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AMENDMENT TO RULES.

SUPREME COURT OF SOUTH CAROLINA.

RULE VI.

Ordered that Rule VI., of the supreme court, be amended by adding immediately thereafter the following:

"If a party to an action or proceeding in the court shall file with the clerk of the court an affidavit that he or she is unable to pay for the printing of any briefs, report or other paper connected with his or her appeal, he or she shall not be required to print the same.

"Typewriting will be permitted only when a good quality of ink is used, with ordinary spacing, upon linen paper of ordinary weight, eight by thirteen inches in size.

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"Papers in typewriting must have a blank margin of an inch and a half on the left. If more than two pages of typewriting be used, they shall be fastened at the top, so as to read continuously.

"Papers in typewriting shall be folded from the bottom in four equal folds and indorsed in the manner hereinbefore provided as to printed papers.

"It shall be the duty of the clerk of the court to see that this rule is complied with before filing any of said papers.

"That this rule shall go into effect on the first of July, 1898."

(v)*

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EGAN v. BISSELL.

(Supreme Court of South Carolina. Jan. 16, 1899.)

TITLE TO REAL ESTATE—QUESTION FOR JURY—FRAMING ISSUES—OBJECTION—CO-DEFENDANTS—SERVICE OF SEPARATE ANSWERS—DEMURRER—PLEADING OVER—REPLY.

1. A question of title to real estate must be determined by a jury.

2. In an action by a purchaser to adjudicate the rights of a third party under a trust deed to the property purchased, the court, in overruling a demurrer to the complaint, and framing issues for the jury, referred to the vendor, who was made a defendant, as being made "a nominal party merely" for the purpose of giving her notice of the controversy between the plaintiff and defendant. *Held* to mean only, as the fact was, that the vendor was identified in interest with plaintiff, and by her answer practically co-operated with him, and joined in the prayer of the complaint, and that it was, therefore, not objectionable.

3. Co-defendants, one of whom practically co-operates with plaintiff, and joins in the prayer of the complaint, need not serve their separate answers on each other.

4. Plaintiff cannot reply where no counterclaim is set up.

On petition for rehearing. Dismissed.

For former opinion, see 31 S. E. 601.

PER CURIAM. The petition for a rehearing which has been filed in this case is based upon several grounds, fully set out in the petition, and we do not deem it necessary to consider or set out such grounds serialim. These grounds may be divided into two general classes: (1) Those which are based upon alleged errors in the judgment of the circuit judge overruling the demurrers filed separately by the defendants; (2) those which impute error in the order of the circuit judge framing issues of fact to be submitted to the jury for trial.

Those of the first class practically invite a reopening of the argument as to the question whether there was error in the judgment overruling the demurrers. Inasmuch as these grounds do not satisfy this court that any material proposition of law was either overlooked or disregarded in the previous consideration of this question, and as such question has already been carefully and maturely

considered, and a majority of this court, after such consideration, were unable to concur in any conclusion, we do not see that any of the grounds of the first class afford a sufficient reason for granting the petition for a rehearing.

As to the second class of grounds taken in the petition, to wit, those imputing error in the order framing issues, it is apparent that this question could not properly be determined, except in one aspect, which will be presently referred to, until the question as to the demurrer was finally adjudicated; for, if there was error in overruling the demurrers, then it would necessarily follow that the order framing issues should be set aside, inasmuch as no issues of fact would be presented by the pleadings after those portions of respondent's answer which presented such issues had been practically stricken out. If, however, this court had been able to render its judgment affirming the judgment of the circuit court as to the demurrer, then the issues of fact presented by the pleadings would have to be determined either by the court or by a referee, or by the jury, according as one or the other of such modes of trial should be deemed proper; and, as the practical effect of the equal division of this court was to affirm the judgment of the circuit court sustaining the demurrer, it became necessary to have the issues of fact raised by the answer determined in some way, and, inasmuch as one of those issues involved a question of title to real estate, it was not only proper, but necessary, that such question should be determined by the jury.

Complaint is made, in one of the exceptions to the order framing issues for the jury, that the circuit judge, in his decree overruling the demurrer, speaks of the defendant Sarah H. Bissell being made "a nominal party merely," for the purpose of giving her notice of the controversy between the plaintiff and the defendant Henry Edward Bissell. But this, as we understand it, only means that Mrs. Bissell was identified in interest with the plaintiff, and by her answer practically co-operates with the plaintiff, and joins in the prayer of the complaint; and this was undoubtedly the fact.

Complaint is also made that no copy of the answer of Henry Edward Bissell was ever served upon Mrs. Bissell. But we do not see why it should have been. In addition to this, it is stated in the "case" that the answer of Mrs. Bissell was never served upon H. E. Bissell, and was not made known to him until the argument on the demurrer before Judge Witherspoon was made. Indeed, the whole record shows that, while Mrs. Bissell appears as a defendant, she was practically a co-plaintiff.

Again, complaint is made that the order framing issues for trial by jury excludes Mrs. Bissell from taking any part in the trial of such issues. We do not so understand the effect of the order. She is a party to the record, and has a right to participate in the trial of such issues, and we do not see that the order undertakes to deprive her of the right so to do, if she desires.

As to the objection that the circuit judge erred in not allowing the plaintiff and the defendant Sarah H. Bissell "to plead over to the defenses set up by Henry Edward Bissell in his answer upon the overruling of demurrer," it is sufficient to say that the record does not show that any such application was made to, or considered by, the circuit judge. Besides, we are unable to perceive any necessity for such pleading over; and certainly the plaintiff has no right to reply, as no counterclaim was set up.

It seems to us, therefore, that the petition for rehearing should be refused, without prejudice to the right of the defendant Sarah H. Bissell to join with the plaintiff in contesting before the jury the issues which are submitted to the jury. It is therefore ordered that the petition for rehearing be dismissed, and that the stay of the remittitur heretofore granted be revoked.

JOHNSON v. CHARLESTON & S. RY. CO. (Supreme Court of South Carolina. Jan. 16, 1899.)

MASTER AND SERVANT—CONTRACTS AVOIDING LIABILITY FOR NEGLIGENCE—RELEASE—RAILROADS—CONSTITUTIONAL LAW—LAW OF CASE.

1. Where the trial court decides that a contract set up as a defense is void, but gives judgment for defendant because plaintiff has accepted benefits under the contract, the decision as to the validity of the contract is not the law of the case, and, on appeal by plaintiff, the supreme court may pass on the question. By a divided court.

2. Const. 1895, art. 9, § 15, provides that railroad employes shall have the same rights and remedies for injuries suffered from the acts or omissions of the corporation or certain employes as are allowed by law to persons not employes, and that their representatives shall have the same right of action for their death; that knowledge of any employe of the defective or unsafe condition of ways, etc., shall be no defense to an action for injury caused thereby, except as to conductors and engineers voluntarily operating unsafe cars or engines; and that any contract, express or implied, made by any employe, to waive the benefit of the section shall

be void. *Held*, that the section has no application to a contract between an employe and the company exempting the latter from liability for its negligence. By a divided court.

3. Where a railroad employe, by becoming a member of the relief department of an organization composed of several railroad companies and their employes, established to raise a fund for the payment of specified amounts to contributing employes when disabled by sickness or accident, the companies guarantying payment of benefits, agrees that the acceptance of benefits after he shall have received injury shall release the companies from all claims for damages therefor, it is not void as a contract exempting the company employing him from liability for negligence of itself or employes, though the employe is required by the company to become a member of the department. By a divided court.

4. Conceding that such agreement be void as exempting the company from liability for negligence of itself and employes, yet if the employe, after sustaining an injury, accept the benefits, and in consideration thereof release the company from liability for the injury, the release is valid. By a divided court.

Appeal from common pleas circuit court of Charleston county; R. C. Watts, Judge.

Action by Willis Johnson against the Charleston & Savannah Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed by a divided court.

W. St. Julien Jervy, for appellant. Mordecai & Gadsden, for respondent.

POPE, J. This action for damages came on for trial before his honor Judge R. C. Watts. The hearing was confined to an oral demurrer to the second affirmative defense set up in the answer, which demurrer was overruled, and from the order of Judge Watts overruling the same an appeal is now presented to this court. It will be proper, therefore, to reproduce the pleadings, to the end that our ruling may be properly understood.

Complaint (caption omitted): "The complaint of Willis Johnson against the Charleston & Savannah Railway Company, defendant herein, respectfully sheweth: (1) That the defendant was, at the time hereinafter mentioned, and now is, a corporation duly created and existing under the laws of the state aforesaid. (2) That the plaintiff was, on or about the 16th day of November, in the year of our Lord one thousand eight hundred and ninety-six, in the employ of the defendant company as a fireman, and was there actively engaged at work on a train of said defendant company, running between Charleston and Savannah. (3) That while so engaged, at Ridgeland, in the county of Beaufort and state aforesaid, as fireman on train proceeding from Savannah to Charleston, under charge and control of Robert Smart, engineer, it became the plaintiff's duty to stand upon a certain platform, on which wood was piled, and from said platform to load the tender with fuel, by throwing sticks of wood therein. That, after supplying the tender with wood, as aforesaid, on a signal that the engine was about to move the plaintiff stepped to the edge of the said platform, and thence endeavored to step

onto the engine. (4) That, by reason of the broken and unsound condition of the said platform which caused the fall of the plaintiff, and the sills on which it rested, the said platform gave way under the weight of the plaintiff, and forcibly precipitated him upon the iron structure of the engine. (5) That the broken and unsound condition of the said platform which caused the fall of the plaintiff, as aforesaid, was the result of the carelessness and negligence of the defendant in not keeping said platform in good, reasonable, and safe repair. (6) That, by reason of the fall aforesaid, the plaintiff sustained serious wounds and bruises in his arm, side, and leg, and also injuries of an internal nature, causing him severe bodily pain and suffering, so that he is not able to perform his accustomed labor. That he has already expended a considerable amount of money for medicines and medical attendance, and is advised by his physicians that his said injuries will probably disable him permanently from performing such labor as he was heretofore capable of performing, and will continue to cause him pain and require medical attention and medicine for the rest of his life. (7) That, by reason of the carelessness and negligence of the defendant, as hereinbefore set forth, the plaintiff has been damaged ten thousand dollars. Wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars, and for the costs and disbursements of this action. Complaint verified. W. St. Julien Jervey, Plaintiff's Attorney."

Answer: "The defendant, the Charleston & Savannah Railway Company, answering the complaint herein, says: (1) This defendant admits the allegations contained in the first paragraph of said complaint. (2) This defendant denies the allegations contained in the second, third, fourth, fifth, sixth, and seventh paragraphs of said complaint. And, by way of affirmative defense to said action, this defendant says: That the injury alleged in said complaint to have been received by the plaintiff, Willis Johnson, was caused by the contributory negligence of the said plaintiff, in not exercising due care and caution in stepping on said engine from said platform, and that but for said want of care said injury would not have happened, such contributory negligence on the part of the plaintiff being the primary cause of said injury. And, by way of affirmative defense to said action, this defendant alleges: That the said plaintiff, at the time he claims to have received the alleged injury, was a member of the Plant System Relief and Hospital Department. The said Relief and Hospital Department is an organization formed by the Charleston and Savannah Railway, Savannah, Florida and Western Railway, Alabama Midland, Brunswick and Western, Florida Southern, and other railway companies (which said railway companies comprise the Plant System), for the purpose of estab-

lishing and managing a fund for the payment of definite amounts to employees contributing to the fund who, under the regulations, are entitled thereto, when they are disabled by accident or sickness, and to their families in the event of death. The said relief fund is formed from contributions from the employees and the Plant System, income derived from investments, and appropriations by the Plant System when necessary to make up a deficit. The regulations governing said Relief and Hospital Department require that those who participate in the benefits of the relief fund must be employees in the service of one of the railroad companies comprising said Plant System. This defendant further says that participation in the benefits of said relief is based upon the application of the beneficiary, and subject to all the rules and regulations of said Relief and Hospital Department. Defendant further says that, on the second day of November, 1896, the plaintiff herein, being in the employ of the defendant company, and said company being a member of the Plant System, applied for membership in the said Plant System Relief and Hospital Department, and in said application agreed to be bound by all the regulations of the Relief and Hospital Department, and in said application further agreed that, in consideration of the contributions of the said companies comprising the Plant System to the Relief and Hospital Department, and of the guaranty by them of the payment of the benefits aforesaid, the acceptance of the benefits from the said Relief and Hospital Department for injury or death should operate as a release of all claims against said companies and each of them for damages by reason of such injury or death. Defendant further says that, when the plaintiff received the alleged injury, he thereupon became entitled to the benefits coming out of his membership in said Relief and Hospital Department, by reason of the injury alleged to have been received by him while in said service. That said plaintiff thereupon immediately applied to said department for such benefits, and received therefrom payments amounting in all to the sum of \$66.50, being the amount due for 133 days at the rate of 50 cents per day, which was the rate to which the plaintiff was entitled as a member of said Relief and Hospital Department. This defendant further says that, in accordance with the regulations of said Relief and Hospital Department, said plaintiff received free medical and surgical attendance from the surgeons of said company, and care and treatment in the said company's hospitals free of charge, and the said relief and hospital department did all on its part to be done for and in behalf of the said plaintiff, by virtue of his membership in said department. The said sum of money the said plaintiff duly accepted and receipted for, under the regulations of said Relief and Hospital Depart-

ment, and in accordance therewith, and the said plaintiff, in consideration of the payment to him of the said sums of money, thereupon duly released and forever discharged said defendant company, and each and every company comprising the Plant System, from all claims and demands for damages, indemnity, or other form of compensation he then had, or might or could thereafter have, against any one of the aforesaid companies, by reason of said injury, which said receipts and releases were severally signed and sealed, and delivered to the said relief and hospital department, by the said plaintiff. Wherefore this defendant alleges that the acceptance of the said benefits from said Relief and Hospital Department for said alleged injury, and the execution of the release aforesaid, operate to release and discharge said defendant company from any and all claims for damages arising in any way out of the injury complained of by said plaintiff in his said complaint."

Oral demurrer (caption omitted): "The plaintiff demurs to the second affirmative defense set up in the answer, and moves that the same be dismissed, for the reason that it does not state facts sufficient to constitute a defense, in this: that in said defense it is alleged that the plaintiff had entered into a contract with the defendant whereby it was agreed, upon certain consideration, that the defendant should be released from all claims of the plaintiff for damages by reason of accidental injury or death; that such contract is contrary to law and against public policy, and a release thereunder cannot, therefore, be pleaded as a defense to an action for damages caused by the defendant's negligence. W. St. Julien Jervey, Plaintiff's Attorney." This demurrer was overruled; and his honor said: "There is no question in my mind that a contract of that kind, whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy; and, where the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company. It seems, in this case, that the plaintiff had entered into that agreement relieving the railroad company before he was injured. After he was injured, he was put to his election as to whether he would sue the railroad company or go ahead and carry out the contract and receive the benefits of that contract. It seems to me that the decision in the case of *Price v. Railroad Co.* [33 S. C. 556, 12 S. E. 413] would control this case, and I think the plaintiff is now estopped from bringing his action against the railroad company, having elected to receive the benefits under that contract, and from suing the railroad company here for damages, and I overrule the demurrer." Counsel for the plaintiff excepted to the ruling, and gave notice of intention to appeal.

Exceptions: "(1) Because his honor erred in holding that the said second affirmative defense set up in the answer contained allegations of fact sufficient to constitute a defense. (2) Because his honor erred in not holding that a contract whereby a railroad corporation seeks immunity from damages caused by the negligence of itself or its servants is null and void, under the constitution of the state. (3) Because his honor erred in not holding that such a contract is null and void, because it is against public policy. (4) Because his honor erred in holding that such a contract may properly be pleaded as a defense in an action brought by an employé against a railroad company for damages caused by said company or its servants. (5) Because his honor erred in holding that, even if such a contract were void, the receiving of money or other consideration thereunder, after the receipt of the injury, was such an act as would bar recovery of damages."

It is apparent from the text of Judge Watts' decision that he held that the contract entered into by and between the plaintiff and the defendant, as a member of the Plant System, was void, as against public policy; and from this decision of Judge Watts there is no appeal, and hence it is the law of this case. However, the circuit judge, as he thought, under the decision of this court in the case of *Price v. Railroad Co.*, 33 S. C. 556, 12 S. E. 413, held that the subsequent receipt of Johnson to the defendant company would estop Johnson from bringing this action. We fear the case of *Price v. Railroad Co.*, supra, has been given a force that it was not intended to possess. In the case cited, *Price*, while an employé of the railroad company, was injured, in February, 1887, by the alleged negligence of the railroad company, and, on the 5th day of August of the same year (1887), executed a release to said company, for a valuable consideration, whereby he discharged such company from any claim, demand, or liability for payment of any other or further sum or sums of money, for or on account of his injury while in their service. *Price* died on the — day of November, 1887. His wife, as the administratrix of his estate, brought an action against the railway company for damages, under what is known as the "Lord Campbell Act." On trial, the defendant railway company offered to prove, under the plea in its answer, that *Price*, the intestate, had in his lifetime released any right of action, for a valuable consideration, for his injury by the railway company. The circuit judge denied the proof, whereupon the railroad company appealed to this court, and it was here decided that the circuit judge was in error, because the right of action under Lord Campbell's act (sections 2183 to 2186 of General Statutes) was first in the party injured, which right of action survived his death to his administrator, and that, as *Price* was competent to deal with his right of action in his lifetime, and had settled with the

railroad company, therefore such settlement would estop his administratrix, unless the receipt was executed under fraud or duress. There was no allegation there that the contract not to sue was against a sound public policy, or that the receipt Price executed was in accordance with and as a part of such illegal contract. So that we do not think the case of *Price v. Railroad Co.* is decisive of this case. We have never had a case in our courts before, where this question was considered. There have been such in other courts of this country, where the decisions have been different,—some upholding the receipt, and indeed the contract, as binding; as, for example, in the state of Pennsylvania, in the cases of *Johnson v. Railroad Co.*, 29 Atl. 854; *Graft v. Railroad Co.*, 8 Atl. 206; also, in the state of Maryland, see *Fuller v. Association*, 10 Atl. 237; *Spitze v. Railroad Co.*, 23 Atl. 307; also, in the state of Iowa, see *Donald v. Railway Co.*, 61 N. W. 971; also, state of Nebraska, see *Railroad Co. v. Bell*, 62 N. W. 314; also, in the state of Ohio, see *Railway Co. v. Cox*, 45 N. E. 641; *Owens v. Railroad Co.*, 35 Fed. 715; also, in Illinois, *Eckman v. Railroad Co.*, 48 N. E. 496; also, the state of West Virginia. The only case where the court has refused to sustain the question is that of *Miller v. Railway Co.*, 65 Fed. 304; *Id.*, 22 C. C. A. 284, 76 Fed. 441. It seems to us that, when analyzed, the proposition of the defendant railway company is, as to either or both of these matters: First, a party can contract to relieve a railway company from the negligence of such railway company; or, second, a party, not being able to contract with a railway company as against its negligence, yet, by the acceptance of a benefit under such contract, may be estopped thereby from suing the railway company for its negligence. As to the first position, we say unhesitatingly that our decisions uniformly hold that we cannot make a valid contract to free a railway company from negligence. *Swindler v. Hilliard*, 2 Rich. Law, 286; *Baker v. Brinson*, 9 Rich. Law, 202; *Wallingford v. Railroad Co.*, 26 S. C. 258, 2 S. E. 19. But, apart from our decisions, the new constitution of this state, adopted in the year 1895, in article 9, § 15, provides: "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars or even engaged about a different piece of work. * * * Any contract or agreement expressed or implied, made by any employee to waive the benefit of this section, shall be

null and void; and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any remedy or right that he now has by the law of the land." (*Italics ours.*) One of the results of this provision of the constitution is that the employees of a railway corporation are placed upon the same plane with all other persons in any case of injury which results from negligence of such railway company. This being so, no contract by which an employee binds himself to forego an action by reason of negligence as against a railway company is valid. It is not only against public policy, but it is forbidden by the constitution. Now, as to the second point: It seems to us that the language in the last part of section 15, art. 9, of our constitution forbids any agreement by an employee to waive the benefits of this section. But, if this were not so, still, as the original contract to release the railway from the liability for its negligence was void, any attempt by this employee to ratify such void contract is a nullity. It is needless to prolong this discussion or to cite the numerous authorities bearing on this matter. 28 Am. & Eng. Enc. Law, 478, puts the doctrine thus: "A void act, as defined in the later cases, and by approved authorities, is one which is entirely null, not binding on either party, and not susceptible of *ratification*." (*Italics ours.*) We will not undertake to comment upon the plans of the Plant System as to the protective association. It has some admissible points, but is fatally defective in others. My opinion is that the judgment of this court should be that the judgment of the circuit court be reversed; but, inasmuch as the justices are evenly divided in opinion, under our constitution the judgment of the circuit court stands affirmed.

JONES, J., dissenting.

GARY, A. J. I concur in the conclusion announced in the opinion of Mr. Justice POPE, as it seems to me the allegations of the second or affirmative defense show a scheme on the part of the defendant to avoid its liability for negligence, and that it is therefore against public policy, null, and void. The unlawful scheme even extended to the acceptance of the benefits thereunder, and such acceptance is also against public policy.

McIVER, C. J. Being unable to concur in the conclusion reached by Mr. Justice POPE, I purpose to state the grounds of my dissent. All the material facts are so fully set forth in the leading opinion that it will be unnecessary to repeat them here in detail. The sole question presented for the decision of the circuit judge was whether the demurrer to the second affirmative defense, based upon the ground that the facts stated therein were not sufficient to constitute a defense, should be sustained; and, he having held that the demurrer could not be sustained, the question

presented for the decision of this court is whether such ruling was erroneous in one or more of the several particulars pointed out by the exceptions. The first exception is manifestly too general to require further notice, under the well-settled practice. The third and fourth exceptions are taken under a misconception of the ruling of the circuit judge; for, so far from not holding that a contract whereby a railroad corporation "seeks immunity from damages caused by the negligence of itself or its servants" is null and void because against public policy, he expressly so held, and, so far from holding that "such a contract could be pleaded as a defense to an action brought by an employé against a railroad company for injuries caused by [the negligence of] the said company or its servants" (the words which I have inserted in brackets being obviously inadvertently omitted), he, in terms, so held. This is manifest from the language used in the first sentence of the remarks made by the circuit judge in overruling the demurrer. These two exceptions may therefore be dismissed from further consideration. So, also, the fifth exception does not exactly represent the ruling of the circuit judge; but, by a liberal construction (which I am disposed to give it), this exception may be regarded as sufficient to raise the question whether there was error in ruling that, after the injury was sustained, the plaintiff was put to his election whether he would sue the company for damages, or accept the benefits of the arrangement set forth in the second affirmative defense, and, these having been accepted by the plaintiff, he was estopped from suing the company, and I am quite willing so to consider that exception. So that, according to a strict practice, the only question necessary for this court to consider is whether the second and fifth exceptions can be sustained.

The second exception presents the question whether there is any provision in the present constitution declaring that "a contract whereby a railroad corporation seeks immunity from damages caused by the negligence of itself or its servants is null and void." Waiving the objection, which might be raised, that there is nothing in the record showing that such question was presented to or considered by the circuit judge, as I prefer to consider the question on its merits, disembarassed by any technical objection or rule of practice, I propose to so consider it. The only provision which is relied upon is that contained in section 15 of article 9 of the present constitution, which reads as follows: "Every employee of any railroad corporation shall have the same rights and remedies for any injuries suffered by him from the acts or omissions of said corporation, or its employees, as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of a party injured, and also when the in-

jury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines, voluntarily operated by them. When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The general assembly may extend the remedies herein provided for, to any other class of employees." It seems to me very obvious that the main purpose of this provision of the constitution was to make material, and, as I think, wise and proper, changes in the long-established rule whereby an employer, when sued for damages for injuries sustained by one of his employés, could exempt himself from liability by showing that the injuries complained of by the employé resulted from the negligence of one of his fellow servants, and to settle finally the doctrine (as to which there had been some conflict of authority) that the fact that an employé (except a conductor or engineer in charge of dangerous or unsafe cars or engines voluntarily operated by him) knew that the machinery or other appliance by which he was injured was defective or unsafe would constitute no defense to an action for damages brought by such employé, and finally to declare that any contract or agreement, either express or implied, by which any employé undertakes to waive the benefits of this section, shall be null and void. Now, what are the benefits secured by this section to the employé of a railroad corporation? (1) Putting the employé on the same footing as other persons, not employés, so far as his rights and remedies for injuries sustained under the circumstances mentioned in the section are concerned. (2) Declaring that the fact that the employé knew of the defective or unsafe condition of the machinery or other appliances which caused the injury should constitute no defense to an action for damages sustained by such injury. (3) Giving to the representatives of any employé killed on the railroad the same rights and remedies as the representatives of any other person, not an employé, who may be killed by the railroad company, would have. (4) Declaring any contract to waive the benefits of this section to be null and void. (5) De-

claring that this section shall not be so construed as to deprive any employé of a corporation of any right that he now has by the law of the land. (6) Authorizing the general assembly to extend the remedies therein provided for to any other class of employés. From this analysis of the provisions of the section, it seems to me very clear that it has no application whatever to this case. The affirmative defense here set up is not based upon any contract or agreement to waive any of the benefits secured by the section of the constitution above analyzed. The constitutional provision now under consideration does not even purport to declare that a railroad corporation cannot, by contract, exempt itself from liabilities for damages sustained by reason of its own negligence or that of its servants or agents, for the very obvious reason that such a declaration would have been wholly unnecessary, as that was the law at the time of the adoption of the constitution, well settled by authority, and fully sustained by sound reason, and undisputed by any one. The sole object of the constitutional provision was to confer upon the employés of railroad corporations certain benefits therein specifically stated, which they either had not previously enjoyed, or their right to which was a matter of question; and, to secure to such employés the full enjoyments of such benefits, it was further provided that any contract to waive any of such benefits "shall be null and void." I am therefore unable to perceive that section 15 of article 9 of the present constitution has any application to this case, and hence I think the second exception should be overruled.

Proceeding, then, to the consideration of the fifth exception: This exception, as it seems to me, is based upon the assumption that the contract or arrangement set out in the second affirmative defense is void because against public policy. Whether this assumption is well founded is an important and interesting inquiry, of novel impression in this state, at least. But, before proceeding to this inquiry, I desire to notice a mistake into which, I submit with deference, Mr. Justice POPE has fallen. He says (and in justice to him I quote his language): "It is apparent from the text of Judge Watts' decision that he held that the contract entered into by and between the plaintiff and the defendant, as a member of the Plant System, was void as against public policy; and from this decision of Judge Watts there is no appeal, and hence it is the law of this case." In the first place, it is at least doubtful whether the circuit judge so construed the contract set up in the affirmative defense. His language, following immediately after the statement of the grounds of the demurrer, should be construed in connection with that statement: "He says there is no question in my mind that a contract of that kind [meaning a contract of the kind mentioned in such statement], whereby a rail-

road company attempts to relieve itself of any liability on account of negligence, is contrary to public policy; and, where the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company." But he nowhere says that he regarded the contract set up in the affirmative defense as void. It is true that he does say, immediately after the language just quoted, that "It seems in this case that the plaintiff had entered into that agreement, relieving the railroad company, before he was injured"; and he then proceeds to hold that after the plaintiff was injured he was put to his election whether he would sue the company, or carry out the contract by receiving the benefits thereof, and that, having elected to receive the benefits of the contract, he was estopped from suing for damages. His idea seems to have been that, even if the contract was void, the plaintiff, by receiving its benefits, had estopped himself from suing. This, judging from the language used in the exception, seems to have been the view taken by appellant's counsel, for the error imputed to the circuit judge by the fifth exception is "in holding that 'even if such a contract were void the receiving of money or other consideration thereunder, after the receipt of the injury, was such an act as would bar the recovery of damages.'"

But, in the second place, even if it be assumed that the circuit judge did consider the contract or arrangements set out in the affirmative defense void as against public policy, and gave as his reason for the judgment which he pronounced, that, notwithstanding such contract was void, yet the plaintiff, by accepting its benefits after the injury was sustained, had estopped himself from bringing this action, I do not think this court would be thereby precluded from considering and determining the two questions: (1) Whether the contract or arrangements set up as a bar to the action was in fact contrary to public policy, and therefore void; (2) if so, whether the acceptance of the benefits of such contract or arrangements after the injury was sustained estopped the plaintiff from bringing this action. As I understand it, the appeal is from the judgment rendered by the circuit court, and not from the reasons given by the circuit judge for such judgment. The question, therefore, is whether any error in the judgment has been pointed out by the exceptions, and not whether the reasons given for such judgment are well founded; for, as has been frequently said, a judgment may be affirmed, though the reasons given for it by the circuit judge may not be sound. If, therefore, the circuit judge can properly be regarded as having considered the contract set up in the affirmative defense as contrary to public policy, and therefore void, the defendant could not appeal from that, as the

judgment was in its favor; and, the defendant company having obtained the judgment of the circuit court, it matters little to the company what may have been the grounds upon which such judgment was based. It seems to me, therefore, that this court not only may, but should, consider the important and interesting question whether such contract is contrary to public policy. This question, new in this state, has been considered and determined in at least eight of our sister states, and by federal courts in at least four of the circuits. In every case which has been brought to my attention, except one, contracts similar to that now under consideration have been upheld, as not contrary to public policy and not void. Even in the case mentioned as an exception (*Miller v. Railway Co.*, 65 Fed. 304), it seems that when the case was carried up by appeal the appellate tribunal, while affirming the judgment, did not do so upon the ground that the contract was contrary to public policy, and therefore void, but upon the ground of defect in the plea setting up the contract as a defense. Indeed, the appellate tribunal seems to have recognized the authority of the numerous cases holding that such contract was not void as against public policy. Many of these cases, having been mentioned in the opinion of Mr. Justice POPE, need not be cited here. While it is quite true that these cases are not binding authority on this court, and are only useful as showing the trend of the judicial mind, and mainly valuable for the strength of the reasoning employed therein, yet, when such unusual and striking unanimity is found in the various courts and various jurisdictions in which this question has been considered, it is well calculated to incite this court, when called upon for the first time to determine this question, to the most careful consideration of the reasoning by which such a practically unanimous result has been reached. I propose, therefore, to consider with care this question, aided largely by the light which has been thrown upon it by the various judges who have been called upon to determine the question.

In the outset, I desire to say (what would seem to be needless, but for the fact that it appears to have been thought necessary to expend much time and labor upon the point) that I do not suppose any one doubts that a contract whereby a railroad corporation, or any other common carrier, undertakes to secure immunity from liability for damages for injuries resulting from the negligence of the carrier, or any of his servants or agents, is contrary to public policy, and therefore void. But the question here is whether the contract or arrangement set up in the affirmative defense is a contract for immunity from damages. I do not think it can be so regarded; for, on the contrary, the very terms of the contract necessarily assume that the defendant is liable, and the whole scope and effect

of the contract are to fix the measure of such liability, and the manner in which such liability shall be satisfied. As is well said in one of the cases cited (*Johnson v. Railroad Co.*, 163 Pa. St. 127, 20 Atl. 854), "He [referring to the plaintiff] is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." How such a contract can be construed to be a contract whereby the carrier seeks to obtain immunity from liability for damages sustained by reason of its own negligence or that of its servants or agents, it is impossible for me to conceive. Let us examine in detail the terms of the contract or arrangements as set out in the affirmative defense, and see whether such terms do not fully justify what I have said as to its scope and effects. It seems that the defendant company is one of several railroad companies constituting what is called the "Plant System," in which there is an organization called the "Relief and Hospital Department," established for the purpose of raising a fund for the payment of specified amounts to any employé contributing to the fund, when he is disabled by accident or sickness, and to his family in the event of his death. This fund is raised by stated contributions from the employés, from the Plant System, from income that may be derived from investments of the fund, and from appropriations made by the Plant System when necessary to make up a deficit in the fund. It is alleged in the affirmative defense that the plaintiff applied for membership in the said Relief and Hospital Department, and in his application agreed to be bound by all of the regulations of said department, and further agreed that, in consideration of the contributions from the companies composing the Plant System to said fund, and of the guaranty by them of the payments of the benefits aforesaid, the acceptance of such benefits should release the said companies, and each of them, from all claims for damages sustained by reason of any injury that such employé might sustain. It is further alleged that, as soon as the plaintiff sustained the injury complained of in this case, he immediately applied for and obtained from the said Relief and Hospital Department all the benefits to which he was entitled under the regulations of such department, as well in money as in surgical and medical services, care, and treatment in the hospital free of any charge therefor, and that the plaintiff, in consideration therefor, duly executed, under his hand and seal, receipts therefor, and release of all claims for damages or other form of compensation which he might have against the defendant company. From this statement of the nature and terms of the contract or arrangement in question, which substantially covers the allegations made in the second affirmative defense, to which alone the demurrer was directed, which allegations must, in considering the demurrer, be accepted as

true, I do not see how it is possible to regard such contract as a contract exempting the defendant company from liability for damages sustained by reason of the negligence of the defendant company, or that of its servants or agents. By entering into this contract evidenced by his becoming a member of the Relief and Hospital Department, the plaintiff did not waive or release any right of action which he might thereafter have against the defendant company, but his contract was that if, after receiving any injury at the hands of the company, he accepted the benefits which he would be entitled to claim by virtue of his membership of such department, such acceptance should operate as a release of any right of action which he might otherwise have against the company. So that by the terms of the arrangement the plaintiff, after he sustained the injury, had his election either to accept the benefits which, as a member of the Relief and Hospital Department, he would be entitled to claim, or to decline to receive such benefits. If he accepted, he was then bound to release the company; but, if he declined, he was not bound to release the company, but retained his right of action, just as if he had never become a member of the Relief and Hospital Department. It may be said that this seems to be a one-sided arrangement, as the plaintiff, if he declined to accept the benefits, would lose the amount which he had contributed to the Relief and Hospital Department fund. But when it is considered that by the terms of the arrangements the plaintiff would be entitled to the benefits of the fund, and to medical or surgical services, and to care and treatment in the hospital, free of any charges therefor, even if his disability arose from sickness from natural causes, or from injuries for which the railroad company could not be held responsible, this seeming one-sidedness disappears. Furthermore, inasmuch as the plaintiff had the right of election, after the injury was sustained, either to sue for damages, or to claim the benefits of the Relief and Hospital Department, he could, if the injury was slight, accept the benefits of the Relief and Hospital Department as satisfactory compensation for the injury, but if the injury was serious, calling for greater compensation than would be afforded by the benefits which he might claim, he could exercise his right to sue for damages; so that it seems to me that the arrangement, properly understood, would be favorable, rather than detrimental, to the interests of the employé. But, however this may be, such an arrangement certainly cannot be regarded as a contract whereby the carrier undertook to secure immunity from liability for injuries sustained by his employé, resulting from his own negligence, or that of his servants or agents. As was well said in the case above cited, and referred to with approval in another subsequent case in Pennsylvania (*Ringle v. Railroad Co.* [Pa. Sup.] 30 Atl. 492): "It is not

the signing of the contract [or becoming a member of the Relief and Hospital Department], but the acceptance of benefits after the accident, that constitutes the release of the injured party. Therefore he is not stipulating for the future, but setting up for the past. He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. * * * The substantial feature of the contract, which distinguished it from those held void as against public policy, is that the party retains whatever right of action he may have until after knowledge of all the facts and an opportunity to make his choice between the sure benefit of the association [department] or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition."

It was claimed by counsel for appellant, in his argument, that under the rules and regulations of the defendant company the plaintiff was required, when he entered the service of such company, to become a member of the said Relief and Hospital Department; but, as that fact does not appear in the "case" as prepared for argument here, it cannot, under the well-settled rule, be considered. But I may say that, under my view of the case, such fact, even if it did appear, would make no difference. As I understand it, every person who enters the employment of another agrees, either expressly or impliedly, to conform to the regulations of the employer for the control and management of his employé; and, if he is not willing to conform to such regulations, he is at perfect liberty to decline entering the service of such employer. So, here, when the plaintiff entered the service of the defendant company he did so voluntarily, as he was under no compulsion to do so, and might have entered the service of some other company which had no such rules and regulations, or might have engaged in some other employment, but, when he entered the service of the defendant company, he, like all other employés, signified his willingness to conform to its regulations; and he, therefore, cannot properly be said to have been compelled to enter into the contract or arrangements in question.

But even if the contract in question could be regarded as contrary to public policy, and therefore void, then, in the eye of the law, the case stands as if no such contract had ever been executed. If the contract was an absolute nullity, then it is as though no such contract was ever made. If so, then the allegation distinctly made in the second affirmative defense, that the plaintiff, after sustaining the injury complained of, for valuable consideration, under his hand and seal, released the defendant company from all liability for such injury, was certainly sufficient to constitute a defense to the action; and for that reason, if no other, the demurrer was properly overruled. For that would be precisely in accordance with the princ-

ple established in the case of *Price v. Railroad Co.*, 33 S. C. 556, 12 S. E. 413. It seems to be supposed that the case just cited has been misunderstood, and that it has no application to this case. Let us see. That was a case in which Price, a conductor of a freight train, was seriously injured on the 18th of February, 1887, while in the performance of his duties as such, from the effects of which he died in the month of November following. On the 8th of August, 1887, after the injury was sustained, but before his death, he executed a release, for valuable consideration, of his right of action against the railroad company. Subsequently, to wit, in August, 1888, an action was commenced against the railroad company by the administratrix of Price to recover damages under the statute (Lord Campbell's act). On the trial the defendant company offered to put the release in evidence, as a bar to the action, which was ruled inadmissible. Upon appeal it was held that the release was competent, and that its effect was to bar the plaintiff's right of action, unless it was made to appear that such release was obtained by fraud or duress. It is very clear that the court in that case considered and determined the very question presented here, for in the opinion of the court we find this language: "We think the leading and controlling question in the case is as to the admissibility and effects of the release above mentioned." (Italics mine.) And, after showing that the capacity of the deceased to maintain the action is made the test of the right of the administratrix to maintain the action provided for by statute, the court proceeds to use this language: "It cannot be doubted that if the deceased had not died, and such release had been pleaded and proved in an action instituted by him to recover damages for the injury alleged to have been done him by the wrongful act of the defendant, it would have been a bar to such action, unless it had been made to appear that such release was obtained by fraud or duress." That case therefore certainly does decide that such a release, in the absence of fraud or duress,—of which there is not, and cannot be, any pretense in this case, as now presented,—would bar the plaintiff's right of action. It may be that, as in *Price's Case*, 38 S. C. 199, 17 S. E. 732, when this case comes to trial upon its merits the plaintiff will be able to show that the release was obtained by fraud or imposition; but that is a matter which we cannot consider now, when the question is simply as to the sufficiency of the pleading.

It is contended, however, that the release relied on as a bar to the action is but a part of the contract claimed to be void because contrary to public policy, and hence must fall with it. In the first place, as I have endeavored to show, I do not think any part of the contract is contrary to public policy; but conceding, for the sake of argument,

that it is, in the second place I do not think the act of giving the release entered into, or formed any part of, the contract. The terms of the contract, as set out in the second affirmative defense, are that the plaintiff "agreed that, in consideration of the contributions of the said companies comprising the Plant System to the Relief and Hospital Department, and of the guaranty by them of the payment of the benefits aforesaid, *the acceptance of the benefits from the said Relief and Hospital Department for injury or death shall operate as a release of all claims against said companies*, and each of them, for damages by reason of such injury or death" (italics mine); and I am unable to discover anything in the contract which contemplates or requires any formal release, such as is alleged to have been executed by the plaintiff. On the contrary, if, as we have seen, by the terms of the contract, the acceptance were to "operate as a release," there would and could be no necessity for the execution of a formal release. Hence, when the plaintiff did, as alleged, execute a formal release, he was not acting in pursuance of the contract, or carrying out any of its terms, but it was his own voluntary act, independent of the alleged void contract, which must operate as a bar to the action, as declared in *Price's Case*. Besides, I am not now prepared to assent to the proposition that because one of the terms of a contract is contrary to public policy, and therefore void, it necessarily follows that all the other terms must likewise be declared void. But as it would extend this opinion to an unreasonable length to enter into any discussion of that proposition, and as I do not deem it necessary to do so in this case, under the views which I have taken, I do not propose to discuss that proposition, or to express any definite opinion with reference to it. It seems to me, therefore, that, under any view that may properly be taken of this case, there was no error in the judgment overruling the demurrer, and hence such judgment should be affirmed.

CUSHWA v. LAMAR.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1898.)

SUPREME COURT—JURISDICTION—CERTIORARI—RETURN—RECORD—MUNICIPAL OFFICE
—CONTEST—NOTICE.

1. This court has appellate jurisdiction in all cases of certiorari awarded by the circuit court in review of matters and proceedings pending before or determined by a municipal council.

2. Before hearing a case, matter, or proceeding removed by certiorari from an inferior tribunal the circuit court should require a formal legal return thereto to be made by the officers to whom the same is directed, unless such return is waived by the parties to such case, matter, or proceeding.

3. Evidence of witnesses heard by such inferior tribunal is not part of the record, unless made so by a proper order or bill of exceptions

showing such evidence duly certified and authenticated. Where such is not the case, the circuit court cannot review the action of the inferior tribunal on its merits.

4. A notice of contest as to a municipal office which shows that the contestant was the opposing candidate for such office is not fatally defective in not showing that the contestant had the requisite statutory qualifications. The statute relating to contests for county and district offices makes this a matter of defense on the part of the contestee.

(Syllabus by the Court.)

Error to circuit court, Berkeley county; B. Boyd Faulkner, Judge.

Contested election between Harry S. Cushwa and Charles M. Lamar. From a judgment for plaintiff, defendant brings error. Reversed.

Flick, Westenhaver & Baker and Faulkner & Walker, for plaintiff in error. U. S. G. Pitzer and H. H. Emmert, for defendant in error.

DENT, J. On a writ of error to the judgment of the circuit court of Berkeley county in favor of Harry S. Cushwa against Charles M. Lamar, in a contested election case removed from the council of the town of Martinsburg by a writ of certiorari, the jurisdiction of this court is objected to by the defendant.

There are two distinct classes of cases in which, according to the statutes of this state, certiorari is the proper remedy: (1) All that class of cases in which the writ was proper at common law; (2) civil cases wherein the writ is made a substitute for the writ of error. In the latter class this court has no jurisdiction unless the amount in controversy exceed \$100, while in the former class jurisdiction is general, without regard to the amount in controversy, by express provision of the constitution, as amended in 1879, after the decision of the case of *Dryden v. Swinburn*, 15 W. Va. 234, was rendered. The law has been so settled by the holdings of this court in the cases of *Cunningham v. Squires*, 2 W. Va. 422; *Dryden v. Swinburn*, 15 W. Va. 234; *Board v. Hopkins*, 19 W. Va. 84; *Farnsworth v. Railroad Co.*, 28 W. Va. 815; *Wilson v. Railway Co.*, 33 W. Va. 212, 18 S. E. 577; *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906. At common law certiorari was the proper remedy for reviewing contested election cases and other proceedings before municipal councils. 4 Enc. Pl. & Prac. 17. The statute is merely declarative of the common law, enlarging the writ, and substituting it generally for the writ of quo warranto in similar cases. 1 Dill. Mun. Corp. § 202. Such being the nature of the writ, this court has jurisdiction by writ of error to review the judgment of the circuit court.

The writ of certiorari awarded in this case on the petition of Charles M. Lamar was "directed to W. T. Henshaw, mayor, Stapleton C. Proctor, C. O. Lemem, Harry S. Cushwa, W. H. Willen, G. D. Roberts, James Larkins, E. V. Little, John Foley, C. Wesley Mann,

and John Stunkle, members of said board of canvassers and common council of the corporation of Martinsburg, commanding them to certify in return to the judge of the circuit court of Berkeley county, West Virginia, at the court house thereof, on the 13th day of July, 1897, at 10 o'clock a. m., under the official seal or signature of the corporation, a complete record of all the orders and proceedings held before them in reference to the count and the declaration of the result of the election for councilman in the Second ward of said corporation, which election was held on the 24th day of May, 1897, together with the sealed ballots which they either counted or refused to count, as set forth in said petition, and also described in the notice and counter notice of contest, together with the sealed packages of ballots cast and voted at said Second ward, and the poll books and returns from said precinct, with all proper and authenticated evidence heard at the trial of said contest." A careful search of the record reveals no return to this writ. On the bottom of page 17 is the following statement, presumably made by the clerk of the circuit court as a heading, but which cannot be considered as part of the record: "The following is a copy of all the papers and documents returned by the common council as the orders and proceedings held before the common council of the corporation of Martinsburg, acting both in the capacity of a canvassing board of the returns of the election for councilman of the Second ward of Martinsburg, held on the 24th day of May, 1897, and as a common council for said town, together with copies of the ballots either counted or refused to be counted by them, and a copy of the evidence heard at trial of the said contest." This is not signed by anybody, and is not an order of the court, and at most it cannot be considered other than a mere certificate of the clerk. After it follow certain ballots; then the written evidence of certain witnesses, not authenticated in any manner, or by any person; then various orders and copies of proceedings of the council, authenticated separately by the mayor and seal of the corporation. There is no connected record of the proceedings of the council, either filed with the petition or returned by the council or its officers, but a number of fragmentary papers thus appear in the record which the clerk of the circuit court certifies as aforesaid to be "papers and documents returned by the common council as the orders and proceedings held before the common council of the corporation of Martinsburg." On the 1st day of July, 1897, the court, in issuing a rule against the contestant, Harry S. Cushwa, made the following recital in its order: "The mayor and common council of the corporation of Martinsburg, in compliance with the order of certiorari entered by the court on the 1st day of July, 1897, made return of all the evidence and other papers and of their proceedings in the above-entitled cause." And on

the 2d day of August, 1897, the court entered the following order: "This day came the parties by their attorneys, and it appearing to the court that the paper alleged to be evidence taken before the common council and placed in the hands of the clerk of this court on July 9th, 1897, by the clerk of the corporation of Martinsburg, has not been filed as a part of the return of the common council of the corporation of Martinsburg, in compliance with the order of the 1st day of July, 1897, it is ordered that the clerk of the court do mark the paper alleged to be evidence so produced, filed as of the 9th day of July, 1897." To these unauthenticated ballots and evidence being thus made and considered as part of the record the contestant objected, but the circuit court overruled his objection, and gave judgment against him. From this it appears that the only return made to the certiorari was that the clerk of the corporation made copies of certain proceedings of the council with the seal of the town and signature of the mayor attached, and then, together with the other papers mentioned, handed them to the clerk of the circuit court as a return to the certiorari, and no written return properly authenticated and of sufficient legal formality was ever made or required by the circuit court. Herein all the confusion has arisen in this case. The circuit court, instead of requiring the record to be made up and returned by the lower tribunal, attempts to do so itself out of fragmentary papers handed to its clerk. The return should have been in writing, signed and sealed by the corporate authorities, containing a complete record of the contest so far as it appeared in the records of the council, and it should have contained a statement to the effect that all of the proceedings relative to the matters referred to in the writ were returned. 4 Enc. Pl. & Prac. 216, 217. In the case of *State v. St. John*, 47 Minn. 315, 50 N. W. 200, it was held: "Fragmentary and disordered sheets containing what may have possibly been evidence on the trial, but which are not certified to as such," will not be considered. The case of *Perryman v. Burgster*, 6 Port. 99, held: "A paper purporting to be a transcript, as a return to a certiorari, should not be received, unless it be certified by the justice and returned with the writ." "The return should not contain papers, proceedings, or affidavits which do not constitute a part of the record." If it does they will be regarded as surplusage, or be stricken out. 4 Enc. Pl. & Prac. 219. No proper return having been made to the writ, the circuit court should not have considered the case until one was made. This it had the right to require.

But could such return be now made which would be sufficient to authorize the circuit court to hear the case on its merits? It appears from the transcript of the council's proceedings that the evidence was not made a part of the record by a proper bill of exceptions. There is presented in the record a

lengthy paper purporting to be the testimony of certain witnesses examined before the council during the contest, but these are not made a part of the council's proceedings, nor signed or certified by any one, nor authenticated in any manner, except that the circuit court directs its clerk by its order of the 2d of August, 1897, to mark them as filed as of the 9th day of July, 1897. In the case of *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173, this court held that the record must be certified as it was at the time the writ was served. "It is then too late to make contemplated or intended certificates of fact and bills of exception part of such record, but it must be sent up as it is, without increase or diminution." If the lower tribunal cannot add to or take from its record after the writ issues, neither can the circuit court, by receiving and considering papers which are no part of such record. From this it clearly follows that the return can never be made or amended so as to give the circuit court jurisdiction to hear the case on its merits, for the reason that proper bills of exception, making the evidence and other papers parts of the record, were not prepared and properly authenticated. While a legal return was not made, it seems to be admitted on the part of the contestant that the notice and counter notice of contest and transcripts of the proceedings of the council are in the record properly. This requires this court to pass on the sufficiency of the notice of contest. The objection thereto is that it does not show that the contestant was legally eligible to the office, if elected, and, as this is a mere question as to the number of votes received by each candidate, that, notwithstanding the contestee received a less number of votes, yet, so far as the notice shows, he would still be entitled to the office. Judge Green, in the case of *Dryden v. Swinburn*, 15 W. Va. 234, and Judge Snyder, in the case of *Halstead v. Rader*, 27 W. Va. 806, both intimate that in a contest of this character the notice should show that the contestant, if successful, is entitled to the office. In what manner, or to what extent, neither of the judges show, but leave it to be inferred that the statutory qualifications necessary to entitle the contestant to hold the office should be explicitly set forth. Turning to *McCrary on Elections* (section 431), we find the law stated to be, as a general rule, "that statutes provided for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections;" and in section 434, "where the statute provides that the election of a public officer may be contested by 'any candidate or elector,' the person instituting such contest must aver that he is an elector, or he was a candidate for the office in question." In *Paine on Elections* (section 829) the law is stated to be: "It is not necessary to aver in a complaint or notice of contest that the relator or contestant possess-

ed the requisite qualifications for the office. That is to be presumed until the contrary is averred and proved by the defendant." *People v. Ryder*, 16 Barb. 370. In 6 Am. & Eng. Enc. Law, 405, the law is said to be, "The statement of contestant's right to make the contest should appear, but it is not necessary to state that he was eligible where the notice shows he was a candidate, although this might be required in an information," referring to *Ledbetter v. Hall*, 62 Mo. 422, and *Rounds v. Smart*, 71 Me. 380. These decisions are to the effect that, unless the statute so requires, it is not necessary for the notice to contain averments of the contestant's eligibility to the office. There is no statutory provision directing how contests for municipal offices shall be carried on, this probably being left for the council of the municipality to provide by ordinance. In the absence of other provision, the law regulating contests for county and district offices was followed, which is section 1, c. 6, Code 1891: "A person intending to contest the election of another to any county or district office shall, within ten days after the result of the election is declared, give him notice in writing of such intention and a list of the votes he will dispute, with the objections to each, and of the votes rejected for which he will contend. If the contestant object to the legality of the election or the qualification of the person returned as elected, the notice shall set forth the facts on which such objection is founded. The person whose election is so contested shall within ten days after receiving such notice deliver to the contestant a like list of the votes he will dispute, with his objections to each, and of the rejected votes for which he will contend, and if he has any objection to the qualification of the contestant, he shall specify in writing the facts on which the objection is founded." This statute undoubtedly recognizes the presumption of law that the contestant, being a candidate, is eligible to the office for which he contests, and throws on the contestee the burden of both alleging and proving his disqualification. This is undoubtedly consonant with reason, for it is not to be presumed that a disqualified person would be a candidate for an office which he could not hold if elected. And therefore the burden is placed on the contestee relying on such disqualification to allege and prove the same, thus simplifying election contests in furtherance of public interest, and narrowing them to the real question of importance or dispute between the parties thereto. Having reached the conclusion that no proper return was ever made to the writ of certiorari, that such return could not now be made so as to allow a review of the contest proceedings on its merits for want of proper bills of exception, and that the notice of contest, with affidavit thereto, is sufficient in form and substance, the judgment of the circuit court must be reversed, and the certiorari dismissed as improvidently awarded.

STEPHENS et al. v. STATE.

(Supreme Court of Georgia. Dec. 13, 1898.)
SHERIFFS—APPROVAL OF BONDS—DEPUTY SHERIFFS
—FAILURE TO TAKE OATHS—RESISTING
OFFICER—WITNESS.

1. By requirements of the Code, the bonds of sheriffs have to be approved, as well as filed and recorded; but the bonds of their deputies, though required to be taken and recorded, do not have to be approved. Hence section 252 of the Political Code and section 272 of the Penal Code apply to sheriffs, but are not applicable to their deputies.

2. Though deputies as well as sheriffs are forbidden by section 241 of the Political Code to enter upon the duties of office without taking and filing the prescribed oaths, and though, under section 270 of the Penal Code, they commit a misdemeanor by so doing, yet by section 242 of the Political Code "the official acts of an officer are not the less valid for his omission to take and file the oath, unless in cases where so specially declared." It follows that, as between the state and the defendant in a given lawful process or order, the execution of the same by a deputy sheriff who has omitted to take and file the required oath of office is not illegal because of such omission, there being no statute specially declaring the act invalid; and, hence, knowingly and willfully to obstruct, resist, or oppose such deputy sheriff in serving or attempting to serve such process or order is a violation of section 306 of the Penal Code.

3. According to the ruling in the case of *Trowbridge v. State*, 74 Ga. 434, there was no error in excluding the testimony of the husband of one of the defendants in this case.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Emma Stephens and another were convicted of resisting an officer, and they bring error. Affirmed.

M. G. Bayne, for plaintiffs in error. Roland Ellis and Robt. Hodges, Sol. Gen., for the State.

SIMMONS, C. J. Johnson was appointed by the sheriff of Bibb county as one of his deputies. He took the oath of office orally, instead of subscribing the oath and filing it as required by the Code. He also gave a bond as required by law, but it was not filed and recorded as the Code requires. An execution against John Stephens was placed in Johnson's hands. He went to the house of Stephens to make a levy, and was resisted by Emma and Katie Stephens, against whom he then preferred an accusation for obstructing or resisting legal process. On the trial they contended that he was not a deputy sheriff, because he had not filed his oath of office in the office of the clerk of the superior court, and had not filed his bond, and had the same approved and recorded. They claimed that, under sections 270 and 272 of the Penal Code, it was made a misdemeanor for him to perform any of the duties of his office without having taken and filed his official oath in the proper office, or without having filed in the proper office his official bond. These sections read as follows:

"Sec. 270. If any officer or deputy who is

required by law to take and file an official oath shall enter upon the duties of his office without first taking and filing the same in the proper office, he is guilty of a misdemeanor."

"Sec. 272. If any public officer, required by law to give bond, performs any official act before his bond is approved and filed as required, he is guilty of a misdemeanor."

It was claimed that under these sections Johnson was not a deputy, either *de jure* or *de facto*, because these sections make it a criminal offense for him to perform any act of office until he has complied with the requirements of law as to filing his oath and bond.

1. Dealing first with section 272, we think that it does not apply to deputy sheriffs. It will be observed that the section refers to those officers only whose bonds have to be approved and filed. While the law requires a deputy sheriff to give bond to his principal, it does not require that such bond be approved. Civ. Code, § 4378; Pol. Code, § 259. The law does require the bond of the sheriff to be approved (Pol. Code, § 257); and, if he performs any official act before his bond is approved by the ordinary and filed, section 272 of the Penal Code applies to him. Since the law does not require the deputy sheriff's bond to be approved, this penal section does not apply to him. So far, then, as this section is concerned, the defense set up was not sound, and the court properly refused to sustain the motion for new trial on that ground.

2. It was also contended that the deputy sheriff, not having taken and filed the official oath as required by law, could not execute the process of the court, and that it was not an obstruction or resistance of legal process, in the hands of a person duly authorized, to resist him. The reply to this contention is section 242 of the Political Code, which declares that "the official acts of an officer are not the less valid for his omission to take and file the oath, unless in cases where so specially declared." Under this section, as between the state and the defendant in a given lawful process or order, the execution of the same by a deputy sheriff who has omitted to take and file the required oath of office is not illegal because of such omission; there being no statute specially declaring the act invalid. *Gunn v. Tackett*, 67 Ga. 725. As Ex-Chief Justice Bleckley said when this question was presented to him: "It would be absurd for the law to bind defendants by official acts, and at the same time justify them in forcibly resisting those very acts. Public policy is involved no less in keeping the peace than in upholding the service of process." We think, therefore, that knowingly and willfully to obstruct, resist, or oppose such deputy in serving or attempting to serve a lawful process or order is a violation of section 306 of the Penal Code.

3. The accusation was against Emma and Katie Stephens, and they were tried together. It is assigned as error that the court refused to allow John Stephens, the husband of Emma Stephens, to testify, as a witness for Katie Stephens, that the property on which Johnson attempted to levy was the property of Emma Stephens. According to the ruling of this court in the case of *Trowbridge v. State*, 74 Ga. 434, there was no error in excluding this testimony. In that case it was held that "there was no error in refusing to allow the wife of one of the defendants to testify in favor of the other defendant then on trial; they having elected to be tried jointly, and made no reservation of the right to testify for each other, as though they had severed and were tried separately." Judgment affirmed. All the justices concurring.

STEWART v. HALL.

(Supreme Court of Georgia. Dec. 14, 1898.)

JUSTICE OF THE PEACE—JUDGMENT NUNC PRO TUNC—AFFIDAVIT OF ILLEGALITY.

1. Where a verdict has been rendered for the plaintiff in the trial of an appeal to a jury in a justice's court, and the justice, in entering up the judgment upon the verdict, omits the name of the security on the appeal bond, there is no error in entering up judgment nunc pro tunc at the succeeding term of the court against both the defendant and his security without giving previous notice to the security.

2. The fact that the security on an appeal bond was also surety on the replevy bond given by the defendant when he filed his counter affidavit is not sufficient ground, upon an affidavit of illegality filed by the surety, to arrest proceedings under a *fi. fa.* issued upon a judgment against him and the defendant, founded on the verdict of the jury in the appeal case.

(Syllabus by the Court.)

Error from superior court, Lee county; Z. A. Littlejohn, Judge.

R. A. Hall sued out a distress warrant against one Gilbert, who filed a counter affidavit, and gave bond, with T. R. Stewart as security. Judgment for plaintiff, and Stewart filed affidavit of illegality. Demurrer to affidavit sustained in part. Verdict for plaintiff, and Stewart brings error. Affirmed.

J. F. Watson and Allen Fort, for plaintiff in error. C. B. Wooten and J. W. Walters, for defendant in error.

LEWIS, J. A distress warrant for rent was issued in favor of Hall against Gilbert by a justice of the peace of Lee county, and was levied upon the property of the defendant, who filed a counter affidavit, and gave a replevy bond with T. R. Stewart as security. On the trial before the magistrate in the district of the defendant's residence, where the warrant was made returnable, he dismissed the "illegality," and rendered judgment for the plaintiff. The defendant appealed to a jury in the justice's court, and gave an appeal bond, with T. R. Stewart as

security. The jury rendered a verdict for the plaintiff, and the magistrate entered judgment against the defendant for the amount of the verdict. At the next term of the justice's court the magistrate rendered judgment *nunc pro tunc* upon the verdict against both the defendant and the security on his appeal bond; reciting in his order that, by omission and oversight of the plaintiff's attorney when judgment was rendered at the preceding term upon the verdict in the appeal case, judgment was not entered up against the surety on the appeal bond as provided by law. To the levy of an execution issued upon this last judgment an affidavit of illegality was interposed by Stewart, the security. The case was appealed to the superior court, and in that court the plaintiff in execution demurred generally to the affidavit of illegality. The demurrer was in part sustained, and in part overruled. The affiant assumed the burden of proof, and introduced in evidence the entire record in the case, and testified that he was the same person who was security on the replevy bond, and whose name appeared on the appeal bond. No further evidence was introduced, and the court directed a verdict for the plaintiff and against the illegality; and to this the affiant excepted. There were several grounds in the affidavit of illegality, but the only ones relied upon by counsel for plaintiff in error in the argument before this court are covered by the headnotes.

1. It is insisted by counsel for plaintiff in error that the magistrate had no authority to enter up a judgment *nunc pro tunc* against the security without having previously given notice to him of the pendency of a motion or proceeding to have such judgment so entered. Section 5342 of the Civil Code provides, "In all cases of appeal, where security has been given, the plaintiff, or his attorney, may enter up judgment against the principal and surety, jointly and severally, and execution shall issue accordingly, and proceed against either or both, at the option of the plaintiff, until his debt is satisfied." When, therefore, one becomes surety upon an appeal bond, he thereby becomes a party to the cause, to the extent, at least, of subjecting himself to any recovery that may be had against a defendant. When a verdict has been rendered in the case against the defendant, the right to enter up a judgment thereon against the security exists just as clearly and unmistakably as it would in a case where principal and security were sued in the original action upon their bond, and a verdict rendered against both. There is no statute or rule of practice requiring any notice whatever to be served upon the security before the right to enter a judgment against him on his appeal bond can be exercised by the plaintiff. There is no reason, therefore, why there should be any different rule of law or practice in regard to entering up judgments *nunc pro tunc* against sureties in such cases than exists in any other case where parties

have been regularly sued, verdicts rendered against them, and by omission there was a failure to enter judgments thereon at the proper time. In the case of *Mayo v. Kersey*, 24 Ga. 167, it was decided that "the plaintiff has, in a proper case, the right to enter up judgment *nunc pro tunc* against the surety on the appeal." It appeared in that case that a judgment had been rendered against the defendant at the March term, 1857, of the court, and at the January term, 1858, the plaintiff moved to amend the judgment and enter up the same *nunc pro tunc* against Kersey, the surety on the appeal, as well as the principal. The court below overruled the motion, and this judgment was reversed. The question, however, as to whether or not the security was entitled to notice, was not decided, and, so far as our investigation has gone, seems to be an open question in this court. In *Wicker v. Woods*, 55 Ga. 648, it appeared that a counter affidavit was filed to proceedings to foreclose a crop lien, and a replevy bond was given. Upon the trial of this issue the jury simply found that the defendant was entitled to a certain credit. The case thus stood until the second term of the court thereafter, when a *nunc pro tunc* judgment was entered against the defendant and his sureties on the replevy bond. This was held to be error, especially as it did not appear that the sureties had ever had their day in court. It will be observed, however, that the verdict of the jury in that case did not clearly cover the issues between the parties. Warner, C. J., delivering the opinion, says, if a motion to set aside the verdict had been made on this ground, "we are inclined to think it should have been allowed." As we understand that decision, however, its effect is to declare that the surety on the replevy bond was not concluded by the fact that he failed to have the verdict set aside. Because of defect in the verdict, it did not clearly appear from the record in that case that the plaintiff was entitled to a judgment against the surety, and the court simply decided it was error to enter up such judgment *nunc pro tunc*. Had the record shown perfect regularity in the proceedings, we apprehend the ruling of the court would have been quite different. To say the least of it, the decision is no authority for the contention that in such a case notice to the defendants was necessary before any judgment could have been entered. As to whether notice should be given in such cases, the authorities are not entirely uniform. In the case of *Berthold v. Fox*, 21 Minn. 51, it was held that an application by the defendant to amend a judgment so as to make it conform to the verdict, same having been made more than two years after the entry of judgment, should be served upon the plaintiff. We think, however, a very decided weight of authority sustains the contrary view. It was decided that a judgment *nunc pro tunc* may be entered without notice to the opposite party in Allen

v. Bradford, 3 Ala. 281, and Glass v. Glass, 24 Ala. 468. To the same effect, see *Fugua v. Carriel*, 12 Am. Dec. 46; *In re Cook*, 77 Cal. 220, 17 Pac. 423, and 19 Pac. 431; *Portis v. Talbot*, 33 Ark. 218; *Nabers v. Meredith*, 67 Ala. 333; *Stokes v. Shannon*, 55 Miss. 584. We think the proper practice is that when a motion of this sort, to amend the record of a court, depends upon other evidence than the records themselves, notice should be given by the moving party to his adversary; but, where the records of the court upon their face show that the movant is entitled to the relief sought, the court may proceed summarily, and upon an ex parte application by any one who may be interested in having the record in the case to speak the truth. Freeman, in his work on Judgments, after discussing this subject of notice, and citing a number of authorities bearing upon the subject, says, "The more usual practice is to proceed ex parte to order entries required to complete the record, especially where the court acts solely upon matters of record." Section 64.

2. It was further insisted by counsel for plaintiff in error that there was no valid appeal from the judgment rendered by the magistrate in the case, to the jury, inasmuch as the only security given by the defendant on his appeal bond was the name of the same party who was surety on the replevy bond. We do not think, however, it lies in the mouth of the surety himself to make this objection. It is true that such security on an appeal gives no additional guaranty to the plaintiff, as that surety was already liable upon the replevy bond; and unquestionably, upon motion of the plaintiff's counsel, the appeal in such a case would be dismissed for want of a valid bond, as decided by this court in *Gordon v. Robertson*, 26 Ga. 410, and *Insurance Co. v. Plant*, 36 Ga. 623. But this is a matter which affects the rights of the plaintiff, and is an objection that relates to the insufficiency of the bond given by the defendant on an appeal. The plaintiff, of course, has a right to waive either the validity of the bond or the sufficiency of the security; and when he does so, and the case proceeds to trial on the appeal, and a verdict is rendered, neither the defendant nor his surety can then be heard to set up the insufficiency of the bond they themselves had given as a reason why no judgment should be entered in accordance with the plain letter of the statute. Judgment affirmed. All the justices concurring.

BRANNON v. G. OBER & SONS CO.

(Supreme Court of Georgia. Dec. 14, 1898.)

ADMINISTRATOR DE BONIS NON—POWER TO CONTRACT—LIABILITY ON NOTE.

1. Where a testator empowers the executors named in his will to sell privately any property belonging to his estate, and to purchase any

property "it may be deemed important for [the] estate to own," and further directs them to keep together during the life or widowhood of his wife all of his property, except such as they may deem it to the interest of the estate to sell, and that his wife and children shall be maintained and supported out of the estate while the same is kept together, an administrator de bonis non with the will annexed has the power to bind the estate by a reasonable contract for supplies necessary to carry on successfully the cultivation of lands of the estate.

2. An action against such administrator, in his representative capacity, upon a promissory note given by him to plaintiff for a debt created for the above purpose, is not demurrable on the ground that the administrator had no authority to bind the estate by such a note.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by G. Ober & Sons Company against M. F. Brannon, administrator. Judgment for plaintiff. Defendant brings error. Affirmed.

Jas. Dodson & Son, for plaintiff in error.
Hixon & Callaway, for defendant in error.

SIMMONS, C. J. The law as to the right, generally, of an executor or administrator to bind by contract the estate he represents, is clearly laid down in the cases of *McFarlin v. Stinson*, 56 Ga. 396, and *Lynch v. Kirby*, 65 Ga. 279, relied upon by counsel for plaintiff in error. It is his duty, generally, to wind up the estate within a certain time, to pay creditors, and make distribution to the heirs at law. It is therefore held generally that he has no power to bind the estate by contract. Where, however, there is a will, it becomes the law to the personal representative, whether he be an executor or administrator de bonis non cum testamento annexo. The testator, if he so chooses, can change the law as to his own estate, and give his representative power to continue his business, to make contracts, and to bind the estate. In the present case the will confers, upon the executors named, powers greater than those given by the general law. It provides and directs that they shall keep together, during the life or widowhood of his wife, all of his property, except such as they may deem it best for the good of the estate to sell, directs that the wife and children shall be maintained and supported and the children educated out of the estate so long as the same is kept together, and authorizes the executors to purchase any property it may be deemed important for the estate to own. It seems that the testator was a farmer, and supported himself and family by means of farming operations. He therefore, to support and maintain his wife and children, deemed it best to change the general law as to the distribution of his estate amongst his heirs, and directed that it should be kept together, and his wife and children supported from the proceeds, authorizing his executors to purchase such property as it was important that the estate should own. This he certainly

had a right to do, and, in pursuance of this power, the administrator *de bonis non cum testamento annexo* (the executors having failed to qualify) purchased guano for the use of the estate, and gave his note therefor as administrator. It was doubtless for the purpose of increasing the yield of the land cultivated by him, as directed by the will, that he made this purchase. Being authorized by the will to make the purchase, we see no reason why he could not give his note for the purchase money. The note was simply the evidence of the contract, and, being in writing, was not barred by the statute of limitations until six years from its execution. This same question was considered by this court in the case of *Palmer v. Moore*, 82 Ga. 177, 8 S. E. 180, under a will containing provisions almost identical with those of the will now under consideration. In that case, as in this, there was an administrator *cum testamento annexo*, and it was held: "Express direction in a will to keep the estate together, and carry on farming operations, implies a limited power in the executrix to incur debts on the credit of the estate for needful supplies, etc., as prudent farmers usually do in the management of their own business of like kind. Unless such power be one manifestly confided to the executrix as a personal trust, it is exercisable by an administrator with the will annexed. Under the will now in question, the power was so exercisable." The reasoning of Bleckley, C. J., in that case, fully covers the points in this case; and we will content ourselves with stating it as an authority which, under the facts of the present case, is controlling. The cases cited by counsel for plaintiff in error, *supra*, as remarked, hold the general doctrine that the representative of an estate cannot make a contract binding the estate. The question here decided was not made, or, if made, was not passed upon by the court in those cases. In the case of *McFarlin v. Stinson*, *supra*, the question was not raised at all by the pleadings, and the court simply held that an executor cannot generally bind the estate of his testator by the execution of a note signed by him as executor. In the case of *Lynch v. Kirby*, the suit was on a promissory note, and was filed December 27, 1869. Subsequently, in March, 1877, and September, 1879, the plaintiff amended the declaration by reciting that the will of the testator directed that the estate be "kept together and managed for the benefit of [his] wife and children, as though [he] still lived with them"; that the note was given for money loaned to the executrix, and by her invested in provisions and stock, in accordance with the authority conferred on her by the will. Warner, C. J., following the case of *McFarlin v. Stinson*, announced the same principle, the only reference to the amendment being that it was barred by the act of 1869. Hence we think that these decisions do not conflict with that made in the case of

Palmer v. Moore, *supra*, or with that now made. Judgment affirmed. All the justices concurring.

PENN et al. v. MUTUAL COTTON-OIL CO.
(Supreme Court of Georgia. Dec. 14, 1898.)

EXECUTORS—SALE OF REALTY—JUDGMENTS
AGAINST LEGATEES—LIEN.

Where the scheme of a will was that the executor should sell all the property of the estate, either at public or private sale, as he might think best for the interest of the estate, and, after paying the debts of the testator and the special legacies, should equally divide the residuum among the testator's widow and his four children, and after all the other property had been sold by the executor, and all the special legacies turned over as directed, and all the debts had been paid, except the taxes assessed against a certain parcel of realty, which alone remained in the possession of the executor, unadministered, and which could not be divided in kind, the executor, in good faith, and for the purpose of paying such taxes, and for distribution, sold this last piece of realty at private sale, it was discharged of a prior judgment lien against two of the residuary legatees; no levy having been made before such sale.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action between Penn & Rison and the Mutual Cotton-Oil Company. From a judgment holding certain land levied on not subject to a lien of the judgment, Penn & Rison bring error. Affirmed.

W. A. Wimblish and E. D. Burts, for plaintiffs in error. McNeill & Levy, for defendant in error.

FISH, J. In this case the sole question argued here was whether, under the facts, the defendants in execution had any interest in the realty levied upon, which was subject to the lien of the judgment against them. In *McDaniel v. Edwards*, 56 Ga. 444, it was held that "after a sale of land for distribution by an executor, under an order of the court of ordinary, it stands discharged of prior judgment liens against one of the legatees, whose interest therein, under the will, was one equal undivided share with several other legatees." In the opinion, Judge Bleckley said: "The executor had administered the land before the levy. For that purpose he was the agent of the law. He administered under a judgment of the court of ordinary,—the court clothed by law with jurisdiction over estates, testate and intestate. The purchaser bought the land as the property of the testator, against whom there was no judgment, not as the property of the legatee, the judgment debtor. The title of the purchaser, therefore, goes back behind the lien of this judgment, and cuts it off." As there was no levy prior to the sale in the case under consideration, the same result would follow, provided the executor had legal authority to make the sale under which the defendant in error purchased the property. If such power was given to the executor

by the will, then he needed no order from the court of ordinary to sell. The will, after it was admitted to probate, was the law for the administration of the testator's estate; and a sale by virtue of a power conferred thereby was as complete an administration of the property, and passed the title to it as effectually, as if made under an order of court. It will be seen, by reference to the terms of the will set out in the reporter's statement, that the executor was directed to sell all the property of every description, belonging to the estate of the testator; that the sale was to be either public or private, as the executor, in his best judgment, might think to the interest of the estate; and that after the debts of the testator had been paid, and the special legacies turned over as indicated, it was directed that the residue of the estate should be divided between the widow, two daughters, and two sons of the testator,—naming them all,—share and share alike. The executor, therefore, was unquestionably authorized by the will to sell this property at private sale for the purpose of paying debts and special legacies, and for distribution. It appeared from his undisputed testimony that the sale was made by him in good faith; that all other property had been administered; that C. H. and T. B. Watt had drawn on their interest in the estate at different times; that there were other legatees; that this property could not be divided in kind; that it was necessary that it be sold for the purpose of distribution, and for the payment of the taxes that had been assessed against it; and that it was sold by the executor for these purposes. The property levied on, therefore, never vested in C. H. and T. B. Watt, defendants in execution, and the lien of the judgment obtained against them prior to the executor's sale never attached to the property. The will put the title to it in the executor, to be disposed of in conformity to its provisions; and it remained in him until it was duly administered, and then it belonged to the purchaser to whom he sold it. There was no error in directing a verdict finding the property not subject. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

OLIVER v. STATE.

(Supreme Court of Georgia. Dec. 14, 1898.)

CARRYING CONCEALED WEAPONS.

On the trial of a defendant for carrying concealed weapons, when the state relies for a conviction upon positive proof that the accused had a pistol concealed at a certain time and place, testimony that his habit on previous occasions was not to carry his pistol concealed upon his person is not admissible.

(Syllabus by the Court.)

Error from city court of Macon.

J. W. Oliver was convicted of carrying concealed weapons, and brings error. Affirmed.

Nottingham & Polhill, for plaintiff in error. John R. Cooper and Robt. Hodges, Sol. Gen., for the State.

LEWIS, J. J. W. Oliver was indicted by the grand jury of Bibb county for carrying about his person, not in an open manner and fully exposed to view, a pistol. The testimony relied upon by the state for a conviction was briefly and substantially as follows: The defendant, while riding in his buggy on a public highway, ran into a buggy occupied by the prosecutor and his wife. A quarrel ensued as the result of this accident. The defendant got out of his buggy, cursed and abused the prosecutor, pulled off his coat, and from a pocket, where it was concealed on his person, drew his pistol, and pointed it at the prosecutor. This happened in Bibb county, on January 22, 1898. This testimony of the prosecutor was corroborated by his wife, and by another witness who saw the difficulty. The defendant was convicted, and to the judgment of the court overruling his motion for a new trial he excepts.

Besides the general grounds in the motion, error is alleged on the refusal of the court to postpone or continue the case on account of the absence of a witness by whom defendant expected to prove that, on many occasions just prior to the time when the crime charged against him is alleged to have been committed, he rode in the buggy with defendant from defendant's home to town in the afternoons, and back from town to defendant's home in the mornings, and that it was the defendant's invariable custom, on said occasions, when witness was with him, to carry his pistol on his buggy seat, by his side, and only in that way. Error is further assigned on the ruling of the court in excluding the testimony of a witness who was present, and by whom the defendant proposed to prove that it was the habitual custom of defendant, for some weeks prior to the time charged in the indictment, to carry his pistol on the seat of his buggy by his side. Neither of these witnesses was present at the time of the difficulty.

We think the court properly excluded this testimony, for the same was entirely immaterial, and could have thrown no light whatever upon the issue involved. It is true that under some circumstances the habit or custom of a person may be given in evidence in his favor whenever such habit might explain a bare circumstance which would otherwise tend to establish a link in the chain of evidence against him. Hence it was ruled in the case of *White v. State*, 100 Ga. 659, 28 S. E. 423, that, where it became a material inquiry as to whether a person slain had fired his pistol in progress of a rencounter which resulted in his death, it was competent to show that the deceased was accustomed to carry the hammer of his pistol on an empty cartridge. In that case it would seem that the defendant relied on the fact

that, the pistol of the deceased being found with the hammer on an empty cartridge, this was a circumstance tending to show the deceased had fired his pistol before he was shot. As an explanation of this bare circumstance, the state was allowed to show the habit of deceased in carrying his pistol with the hammer upon an empty cartridge. Justice Atkinson, in delivering the opinion of the court, on page 669, 100 Ga., and page 427, 28 S. E., says: "It would seem to be slight of itself, and entitled to little weight, but it is nevertheless competent, and may be properly considered by the jury in connection with all the other testimony which bore upon the question as to whether the deceased had in fact discharged his pistol during the progress of the encounter." The question presented by the record in this case, however, is entirely different. The defendant seeks to overcome positive proof of his guilt at a particular time and place, by showing that on other occasions and under other circumstances, he did not carry his pistol concealed. He was not indicted for habitually carrying a concealed weapon, and it is to be presumed that, even when proved guilty of violating the statute on a particular occasion, such conduct would constitute an exception in his life, and would not tend to establish a habit. Besides, the testimony offered would only have gone to the extent of showing how the defendant usually carried his pistol while riding in his buggy with another party. It was not under these circumstances that the state claims to have found him with a concealed weapon, but it was after he had left his buggy, and was upon the ground for the purpose of having a personal difficulty with the prosecutor. It was therefore entirely consistent with his alleged habit for him to have taken the pistol from the seat before leaving the buggy, and placed it in his pocket. The evidence rejected by the court, therefore, not only could have thrown no light upon the guilt or innocence of the defendant, but could not properly have been considered, even had it been admitted, as tending to impeach the state's witnesses, or in the remotest degree impairing their credit. A case more directly in point than that relied upon by plaintiff in error in 100 Ga. and 28 S. E., above referred to, is that of *Washington v. State*, 38 Ga. 242, where it was decided that, "when a defendant is indicted for having or carrying concealed weapons at a particular time and place, it is not competent for him to introduce evidence upon the trial to prove that it was his general habit to carry his weapon about his person, openly exposed to view." Warner, C. J., delivering the opinion in that case, says: "Was the pistol intentionally carried concealed upon his person at the time charged? This question must be answered by the facts proved at that time, by the witnesses who saw them, and not by the general habits of the defendant in carrying his pistol at other times." The brief recital of

facts above given shows that the verdict was not contrary to evidence, and that there is no merit whatever in the general grounds of the motion for a new trial. Judgment affirmed.

OLIVER v. STATE.

(Supreme Court of Georgia. Dec. 14, 1898.)

POINTING WEAPONS.

The questions made in this case are controlled by the decision this day rendered in the case of *Oliver v. State*, 32 S. E. 18, where this defendant is charged with the offense of carrying concealed weapons.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

J. W. Oliver was convicted of pointing weapons, and brings error. Affirmed.

Nottingham & Polhill, for plaintiff in error. John R. Cooper and Robt. Hodges, Sol. Gen., for the State.

LEWIS, J. Upon transactions reported in the case against this same defendant for carrying concealed weapons, he was placed upon trial for pointing a weapon at another. The facts were the same in both cases, as were also the grounds in the motion for a new trial. The decision, therefore, in the case of *Oliver v. State* (this day rendered) 32 S. E. 18, controls the questions made in this case. Judgment affirmed. All the justices concurring.

MINHINNETT v. STATE.

(Supreme Court of Georgia. Dec. 14, 1898.)

CRIMINAL LAW—APPEAL—REVERSAL—MISTAKE IN BRIEF OF EVIDENCE—CORRECTION.

1. When it appears from the brief of evidence in the record transmitted to this court that, if any offense at all was committed by the accused, it was subsequent to the finding of the presentment upon which he was tried, a conviction will be set aside as contrary to law.

2. This court has no power to correct a mistake in a brief of evidence which has been approved by the trial judge, and filed in the office of the clerk of the trial court. And this is true notwithstanding the trial judge may afterwards sign a certificate stating that the brief as approved and filed contains such mistake.

(Syllabus by the Court.)

Error from city court of Floyd; G. A. H. Harris, Judge.

E. R. Minhinnett was convicted of illegal sale of liquors, and brings error. Reversed.

McHenry & Nunnally, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

COBB, J. On July 29, 1897, the grand jury of Floyd county returned a special presentment against E. R. Minhinnett, charging that he did on the 2d day of April, 1897, commit the offense of selling liquor without a license. To this presentment the accused filed a plea of not guilty, and the case came on for

trial on September 23, 1898, in the city court of Floyd county. Upon the trial one witness testified that the offense was committed "some time in August or September of last year, 1897"; and another witness testified that he did not recollect the date of the alleged sale, "but it was last year some time." The accused was convicted, and, his motion for a new trial being overruled, he excepted.

1. The only evidence in the record as to the time that the alleged offense was committed showing a date subsequent to the finding of the presentment upon which the accused was tried, it needs no argument to demonstrate that the conviction was illegal.

2. When the case was called in this court, the solicitor general stated that the brief of evidence, as approved by the trial judge and filed in the office of the clerk of the city court, contained an inaccurate statement as to the time at which the offense was committed, and that there was evidence on the trial showing positively that the offense was committed prior to the finding of the presentment. He presented a certificate of the trial judge to this effect, and made a motion to correct the brief of evidence in the record sent to this court. This motion was denied, and the case was argued upon the record as certified by the clerk. Whenever suggestion is made in this court that there is in the office of the clerk below any portion of the record material to a proper determination of the questions raised by the bill of exceptions, this court has ample power to pass an order requiring that copies of such portions of the record be transmitted to this court. Civ. Code, § 5536, subd. 4. But this court has no power to alter any part of the record in the case, even though it should be made to appear by a certificate of the presiding judge that the record, as made up in the court below, is not correct. When, as in the present case, the judge certifies a bill of exceptions assigning error on a ruling denying a new trial, and a brief of evidence approved by him is embodied in the record transmitted to this court, there is no power vested in this court to change such a brief of evidence, even though the change may be necessary to make it speak the truth. The case must be decided here upon the record which reaches the office of the clerk of this court in the manner prescribed by law. Judgment reversed. All the justices concurring.

**NATIONAL BANK OF BRUNSWICK v.
LEE et al.**

(Supreme Court of Georgia. Dec. 16, 1898.)

CONTRACT—CONSTRUCTION.

1. Under a written contract, the parties to which were a bank, a manufacturer, and one of his customers, whereby it was agreed that the bank should advance funds to the manufacturer to enable him to carry on his business, holding as collateral security the legal title to all goods subsequently manufactured by him, and that,

when goods purchased by such customer were consigned to him, he should acquire possession thereof, as the bailee of the bank, and should sustain that relation to it until its title to the goods should be divested by actual payment to it of the purchase price, the bank could in no event be held accountable to the manufacturer for any greater sum than was actually paid to it by such customer, unless it wrongfully consented that title to the goods should pass into him without payment therefor in full by the latter.

2. The plaintiff's action being predicated upon a contract of the nature above indicated, and the same having been erroneously construed by the trial judge, there should be another hearing, in the light of the construction placed upon the contract by this court.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by W. P. Lee against the National Bank of Brunswick and Wheelwright & Co. Verdict for plaintiff. Defendant bank brings error. Reversed.

The following is the official report:

An action was brought by W. P. Lee against the National Bank of Brunswick and William D. Wheelwright & Co., upon a contract of which the following is a copy: "This agreement, made and entered into on this 15th day of May, A. D. 1894, by and between William P. Lee, of Ware county, Georgia, the party of the first part, and hereinafter styled the 'first party,' William D. Wheelwright & Co. of New York, New York, but with a branch office and doing business at Brunswick, Glynn county, Georgia, and elsewhere in said state of Georgia, the party of the second part, hereinafter styled the 'second party,' and the National Bank of Brunswick, Ga., a corporation carrying on a banking business at Brunswick, Glynn county, Georgia, the party of the third part, and hereinafter styled the 'third party,' witnesseth: That whereas, the said first party is engaged in the manufacture of railroad cross-ties in Wayne county, which ties, when cut and hewn, are under contract to be delivered and sold to the second party, but, in order to successfully carry on said business, advances are required from the third party to the first party, to enable him, by the use of the money of the third party, to successfully cut, manufacture, and deliver the said ties, which advances the said third party is willing to make for a reasonable sum, but without binding itself to continue the same indefinitely, and at its option to discontinue the same without notice; and whereas, it has been agreed between the said three parties that, for any advances made to the first party by the third party, the same shall be secured upon ties already cut and in process of cutting, and, when the same are delivered unto the second party, the title shall not pass as against the third party, but the said third party shall hold title to the said ties cut or in process of cutting, until the same are fully paid for, but such title shall be divest-

ed by the payment unto the third party by the second party of the agreed contract price per tie delivered unto the second party by the said first party, on the cars at the point of shipment on the line of the East Tennessee, Virginia & Georgia Railroad, in Wayne county, Georgia, consigned to the said second party at Brunswick, Georgia: Now, in consideration of the premises, and the sum of five dollars mutually paid by each party to the other, it is hereby contracted and agreed as follows: First. That the said first party does hereby convey the title absolutely unto the said third party to all ties now cut, as well as such as may be hereafter cut and manufactured by the first party in Wayne county, Georgia, for shipment unto the said second party at Brunswick, Georgia. Second. That the said second party shall receive the said ties at the point of delivery, Brunswick, Georgia, after the same have been duly inspected by the said second party or its agents at point of loading, and that the said second party shall hold said ties as the agent of the said third party until it (the second party) shall have turned over to the third party the purchase price of said ties so received and accepted by the said second party, when the title shall vest absolutely in the second party; but the said second party, after the delivery to it of said ties in Wayne county, Georgia, shall hold the same as the property of the third party, and not ship the same out of the port of Brunswick, Georgia, until it has first settled with and to the satisfaction of the third party for the purchase price thereof, and during said interval the said second party shall be a bailee merely of said party. In testimony of all of which, the said parties have executed this contract in triplicate, the said first party signing in person, the said second party signing by and through its duly-authorized agent, L. D. Hill (stationed at Brunswick, Georgia), and the said third party signing by and through its president, H. W. Reed, this day and year first above written. [Signed.]” A verdict was rendered in favor of the plaintiff against the bank. It moved for a new trial, which was overruled, and it excepted. The remaining facts essential to an understanding of the decision rendered in this case appear in the opinion.

Goodyear & Kay and Brantley & Bennet, for plaintiff in error. Toomer & Reynolds and Crovatt & Whitfield, for defendant in error.

LUMPKIN, P. J. At the trial of this case in the court below, the judge in effect instructed the jury that, under the contract a copy of which appears in the official report, the bank was liable to account to W. P. Lee for the full amount of the contract price of all ties shipped by him to Wheelwright & Co.; that it was the right of the bank, under the terms of this contract, to first satisfy its claims for

all advances of money made to Lee; and, if there should be anything left from the price of the ties, then that would be coming to Lee from the bank, and he could maintain his suit for the recovery thereof. The court refused to give in charge to the jury a number of written requests presented by counsel for the bank, to the effect that the purpose of this contract, so far as the bank was concerned, was merely to secure it for money advanced to Lee, to enable him to manufacture cross-ties to be shipped to Wheelwright & Co., and, to this end, to vest in the bank the legal title thereto, simply to secure it in making such advances; and, further, that the bank was not bound to account to Lee for the full amount of the contract price of all the ties shipped to Wheelwright & Co., but only to properly, honestly, and accurately account to Lee, and pay to him all money actually received by the bank from Wheelwright & Co. on account of ties delivered to them, after deducting whatever sum or sums Lee was indebted to the bank for sums advanced to him.

The case turned mainly upon the construction to be given this contract. If that placed upon it by the court was wrong, there should be another hearing. We are of the opinion that the true intent and meaning of the contract was that indicated in the first head-note. To hold otherwise would be to make the bank an absolute purchaser of the ties, and this certainly was never in the contemplation of the parties. On the other hand, this contract shows a manifest intention on the part of Lee to sell the ties to Wheelwright & Co. on credit, trusting to the solvency and honesty of this firm for payment. The only interest the bank had in the matter was to secure to itself the repayment of whatever sums it might advance to Lee in order to enable him to carry on his business. It cannot, we think, be fairly gathered from the terms of the contract that the bank undertook in any manner to guaranty payment for the ties by Wheelwright & Co. On the contrary, it required that the full amount of the price of these ties should be paid to it, and that it should hold title to the same until paid for, simply as a matter of security to itself. From the very nature of the business, it was essential that the bank should do this, for it was contemplated that it would be constantly making advances to Lee, and that all the proceeds of the ties should pass through its hands, in order that it might at all times have under its control a fund for its reimbursement. Clearly, the bank was not the agent of Lee in the sense that it was bound to represent him with reference to disputes arising between him and Wheelwright & Co. as to whether or not the ties came up to specifications, or as to other matters upon which Wheelwright & Co. might base a claim for a reduction of the contract price. Of course, the bank was accountable to Lee for every dollar it actually received over and above the amount of its advances, and it was also bound

to exercise the utmost good faith in collecting from Wheelwright & Co. all sums for which they were confessedly indebted to Lee on account of ties shipped to them. If the bank collusively permitted Wheelwright & Co. to ship ties from the port of Brunswick without paying or accounting for the same at all, it would doubtless be liable to Lee for whatever loss might thus be occasioned to him; but, so long as it in good faith itself observed and endeavored to carry out the terms of the contract as we have herein construed it, the bank would not be liable to account to Lee for more than it actually received.

We will not discuss the case as made by the evidence, nor deal further with the questions presented in the record. It would hardly be profitable to do so, for the reason that, because of the fundamental error of the court in construing the contract above referred to, the case was tried upon an entirely erroneous theory. Let the next trial be had in the light of what is here laid down as the true intent and meaning of the contract which forms the basis of the plaintiff's action. Judgment reversed. All the justices concurring.

MIZE v. AMERICUS MFG. & IMP. CO.
(Supreme Court of Georgia. Dec. 13, 1898.)

NEW TRIAL—DISMISSAL OF MOTION.

This case, upon its facts, is controlled by the decision rendered in *Baker v. Johnson*, 27 S. E. 706, 99 Ga. 374.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action between the Americus Manufacturing & Improvement Company and R. J. Mize. From the judgment, Mize brings error. Affirmed.

Blalock & Cobb, for plaintiff in error. E. A. Hawkins, for defendant in error.

LUMPKIN, P. J. The only ruling complained of in the present case is the dismissal of a motion for a new trial. The record discloses that the movant had not filed a brief of the evidence in due time. On the day set for the hearing of the motion, however, it was amended by adding a ground alleging that one of the jurors who rendered the verdict complained of was disqualified by reason of his relationship to the respondent in the motion, and movant stated that the only ground she would insist upon was that embodied in the amendment. It was urged in the argument here that the court should have passed upon the merits of this ground, and either have granted or refused a new trial; that this could have been properly done, for the reason that a determination of this ground, which was the only one insisted upon by movant, would not have required any consideration whatever of the evidence introduced at the trial. The precise question thus made

was dealt with by this court in *Baker v. Johnson*, 99 Ga. 374, 27 S. E. 706, where, upon a similar state of facts, this court affirmed a judgment dismissing a motion for a new trial, upon the ground that no brief of evidence had been filed in due time. Judgment affirmed. All the justices concurring.

SILVER v. STATE.

(Supreme Court of Georgia. Dec. 13, 1898.)

INTOXICATING LIQUORS—ILLEGAL SALE.

Where, in the trial of one charged with a violation of section 428 of the Penal Code, as amended by the act of December 9, 1897 (Acts 1897, p. 39), the case, under the evidence, turned upon the question whether the accused, in the transaction under consideration, either as seller himself, or as agent of a seller, took an order for a sale of liquor, or whether he merely acted as the agent of the purchaser in sending an order for liquor, evidence offered by the accused that the purchaser paid for a telegram sent by the accused for the liquor was relevant, and it was error to exclude such evidence as immaterial.

(Syllabus by the Court.)

Error from superior court, Hancock county; S. Reese, Judge.

Wolf Silver was convicted of selling intoxicating liquors, and brings error. Reversed.

Hunt & Merritt, F. L. Little, and C. A. Picquet, for plaintiff in error. R. H. Lewis, Sol. Gen., R. W. Moore, and Harrison & Bryan, for the State.

PER CURIAM. Judgment reversed.

ZACHERY v. STATE.

(Supreme Court of Georgia. Dec. 13, 1898.)

CERTIORARI—SERVICE—DISMISSAL.

Where it appears that the writ of certiorari has not been served upon the judge, or other officer, whose decision is sought to be reviewed, "fifteen days previous to the court to which the return is to be made," the proceeding should be dismissed, unless it clearly appears that the failure to serve was in no way attributable to the fault of the party making application for the writ.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Charley Zachery, being convicted of misdemeanor in a city court, brought certiorari. From an order dismissing the writ, plaintiff therein brings error. Affirmed.

Cobb & Bros. and L. D. McPherson, for plaintiff in error. R. D. Jackson and I. A. Atkinson, Sol. Gen., for the State.

COBB, J. Charley Zachery was placed on trial in the city court of Carroll county, charged with a misdemeanor, and upon being convicted he made application to the judge of the superior court for a writ of certiorari, which was sanctioned on March 21, 1898; and the writ was duly and regularly issued on March 24 by the clerk of the superior

court of Carroll county, returnable to a term of that court beginning on the 3d day of October, 1898. The city court of Carroll county was abolished on the 1st day of July, 1898. Acts 1897, p. 522. When the case came on to be heard at the October term of the superior court, no answer to the certiorari had been filed; the former judge of the city court having filed in office simply a refusal to answer the certiorari, which refusal was in the following words: "I decline to answer the certiorari in the above-stated case, because it was not served upon me fifteen days before the court to which the return is to be made. It was delivered to me this day, September 20, 1898. W. F. Brown, Ex-J. C. C. C." The judge of the superior court declined to require the former judge of the city court to answer the certiorari, and dismissed the same, upon the ground that it was not served on the judge who tried the case 15 days before the term of the court to which the writ was returnable. To these rulings the plaintiff in certiorari excepted.

When an application for a writ of certiorari shall have been made in due form, and sanctioned by a judge of the superior court, and the writ duly issued, the law requires that the clerk of the superior court shall place the same on the docket; and the writ, "together with the petition, shall be delivered to the party to whom it is directed by the party applying for the certiorari, his agent or attorney, or the sheriff, deputy-sheriff, or any constable, at least fifteen days previous to the court to which the return is to be made." Civ. Code, § 4643. When the clerk has failed to issue the writ, and the plaintiff in certiorari is not at fault, it has been held that it was error to dismiss the proceeding. *Hopkins v. Suddeth*, 18 Ga. 518. See, also, *Mitchell v. Simmons*, 58 Ga. 166. After the writ has been issued, the duty is placed upon the party applying for the certiorari to see that the same is served upon the judge whose decision is sought to be reviewed; it not being required that any officer shall serve the same, but the party, his agent or attorney, being allowed to do so. The moment the writ is issued, this duty is placed upon the party applying for the same. If he fails to have the writ served upon the judge within the time required by law, before an order allowing further time will be granted it must appear that the party has used a reasonable degree of diligence in attempting to serve the writ, and has failed through no fault of his. In the present case the plaintiff in certiorari gives as an excuse for not serving the writ in time that his attorney "went to Judge Brown's office three or four times to deliver the certiorari, and this was more than sixty days before the present term of this court, and did not sooner deliver it for the reason that said judge of Carroll city court was absent on political matters." From the time that the writ of certiorari was issued until the last day for service was more than 5

months, and it seems that nothing was done towards making service until 60 days before the court. Even if the plaintiff in certiorari is not to be charged with a want of diligence in not making an effort to serve the writ until 60 days before the term of court began, no sufficient reason appears why he could not have had service made within the 45 days then remaining. It does not appear that the presiding judge was absent from the state, nor does it appear distinctly that he was absent from the county; but even if he was absent from the county, and within the state, it seems that by the exercise of a small degree of diligence he could have been found and served either by the party, his agent or attorney, or some officer of the law authorized to make service. We do not think there was any error in refusing to require the former judge of the city court to answer the certiorari, or in dismissing the same for failure to serve it within the time required by law.

It was contended that the written refusal of the former judge of the city court should have been sworn to, as he had retired from office. The law requires that the answer to the certiorari, if made after the party making the same has retired from office, shall be verified by affidavit. Civ. Code, § 4648. A refusal to answer is in no sense an answer, and therefore the law contained in the section quoted is not applicable. Judgment affirmed. All the justices concurring.

COOPER v. STATE.

(Supreme Court of Georgia. Dec. 13, 1898.)
INDICTMENT — DEMURRER — DISQUALIFICATION OF
GRAND JUROR — PROOF OF VENUE.

1. Demurrer is not the proper method of attacking an indictment on the ground of the alleged disqualification of a grand juror.

2. Applying the decision of this court in *Moye v. State*, 65 Ga. 754, to the facts of the present case, it appears that the venue was not proved.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

W. O. Cooper was convicted of assault, and from a judgment overruling certiorari he brings error. Reversed.

John R. Cooper, for plaintiff in error. F. F. Juhan, Sol. City Court, and C. H. Brand, Sol. Gen., for the State.

LUMPKIN, P. J. The bill of exceptions in the present case alleges that the superior court of Gwinnett county erred in overruling a certiorari sued out by W. O. Cooper to review a verdict rendered in the city court of Lawrenceville finding him guilty of an assault, upon an indictment for assault and battery which had been transferred from the superior court.

1. The petition for certiorari complains that the judge of the city court erred in overruling a demurrer to the indictment based upon the

ground that one of the grand jurors was a brother-in-law of the person alleged to have been assaulted. Manifestly, a point of this kind cannot be properly raised by demurrer, but should have been presented by a motion to quash, or by a special plea in abatement, supported by evidence.

2. It was also alleged in the petition for certiorari that the verdict was contrary to law and the evidence, and petitioner specifically averred that the venue was not proved. The only evidence as to venue was that "the difficulty occurred in Lawrenceville, in front of Dan Rutledge's store." Following the decision cited in the second headnote, we are constrained to hold that this was not sufficient proof of the venue. In *Moye's Case*, 65 Ga. 754, it appeared "that the crime was committed in the lumber yard of a Mr. Sloan, in the city of Americus"; and it was decided that this did not show affirmatively that the offense was committed in the county of Sumter, where the accused was tried. We presume this decision was based upon the idea that, as it was not proved the "city of Americus," in question, was within this state, the court could not assume it was a Georgia city. If it had been proved that the offense was committed in Americus, Ga., doubtless judicial cognizance would have been taken of the fact that this city is in the county of Sumter. Be this as it may, that case is directly in point, and is controlling in the case now before us.

It was further alleged in the petition for certiorari that the judge of the city court was, because of relationship, disqualified from presiding in the case, but the answer to the certiorari distinctly states that no question of this kind was made at the trial. There were also a number of assignments of error relating merely to questions of practice, which are not likely to arise at the next hearing in the city court, and with which, therefore, it is not essential now to deal. Judgment reversed. All the justices concurring.

DIXON et al. v. BAXTER et al.

(Supreme Court of Georgia. Dec. 14, 1898.)
VOID JUDGMENT—COLLATERAL ATTACK—SETTING ASIDE.

1. A judgment void upon its face may be treated as a nullity and collaterally attacked in any court; but a judgment of a superior court, apparently regular and legal, can, after the time for excepting thereto has expired, be set aside only by instituting a proper proceeding for that purpose in the court wherein such judgment was rendered.

2. Applying the familiar rules above announced to the present case, there was no error in sustaining the demurrer to the plaintiffs' petition.

(Syllabus by the Court.)

Error from superior court, Echols county; Augustin H. Hansell, Judge.

Suit by Dixon, Mitchell & Co. against Baxter & Co. and others. From a judgment dis-

missing the petition on demurrer, plaintiffs bring error. Affirmed.

S. T. Kingsbery, for plaintiffs in error.
Hitch & Myers, John C. McDonald, and Leon A. Wilson, for defendants in error.

LUMPKIN, P. J. "A judgment that is void may be attacked in any court, and by anybody. In all other cases, judgments cannot be impeached collaterally, but must be set aside by the court rendering them." Civ. Code, § 5373. "The judgment of a court of competent jurisdiction cannot be collaterally attacked in any other court for irregularity, but shall be taken and held as a valid judgment until it is reversed or set aside." Id. § 5368. The law laid down in these two sections of our Code is controlling in the present case.

Dixon, Mitchell & Co. filed in the superior court of Echols county an equitable petition against Baxter & Co. et al., seeking to set aside a certain judgment which had been rendered in the superior court of Clinch county, and praying for an injunction. This petition was dismissed on demurrer. Without setting forth in detail its allegations, it is sufficient to say that the judgment referred to was on its face valid and regular, and that the plaintiffs were not, so long as it remained of force, entitled to the injunction for which they prayed. It is true that the petition contained allegations which, if proved, might afford ground for setting the judgment aside. Upon this, however, it is not now necessary to pass definitely. The plaintiffs' case was clearly without merit, because the attack upon the judgment was made in the wrong jurisdiction. It should have been in the superior court of Clinch county, where in the judgment was rendered. We agree with the learned, experienced, and venerable trial judge that the court over which he presided had no jurisdiction to inquire into the validity of this judgment, with a view to setting it aside, and thus opening the way for granting the extraordinary relief sought. Judgment affirmed. All the justices concurring.

GRIMSLEY v. ALEXANDER.

(Supreme Court of Georgia. Dec. 14, 1898.)
CERTIORARI TO JUSTICE—JURISDICTIONAL AMOUNT
—PROCEDURE—JUDGMENT—PROCEEDS OF
EXECUTION—RULE ON CONSTABLE.

1. Where a case in which there are no contested issues of fact is tried in a justice's court, the judgment of the justice rendered therein is reviewable by certiorari. (a) Though the amount claimed in such a case is less than \$50, the same may be carried by certiorari to the superior court, without appealing to a jury in the justice's court.

2. Upon the hearing of a certiorari in the superior court, in a case in which no issues of fact are involved, and the determination of which depends entirely upon questions of law, it is proper for that court to render a judgment finally disposing of the case.

3. Where, upon the hearing of a certiorari from the judgment of a magistrate, rendered upon a rule in a justice's court against a constable, the judgment of the superior court, making the rule absolute, was that the constable should pay, out of a fund in his hands, to the petitioner in the rule and in the certiorari, a sufficient sum to satisfy the claim of such petitioner, and the cost incurred in taking the case up by certiorari, as well as the cost of the case in the superior court, and it appeared that the plaintiff's claim, together with such cost, amounted to more than the fund in the constable's hands; such judgment was erroneous.

(Syllabus by the Court.)

Error from superior court, Early county; H. C. Sheffield, Judge.

W. H. Alexander obtained rule against H. H. Grimsley, sheriff, for failure to pay over money demanded. Rule discharged before the justice, and on certiorari defendant ordered to pay over said sum, and he brings error. Reversed.

R. H. Sheffield, for plaintiff in error. G. D. Oliver, for defendant in error.

FISH, J. The undisputed facts in this case, as we gather them from the record, are that Grimsley, constable, sold a horse, as the property of the defendant, under an execution in favor of Smith & James, against Wyatt Alexander. The horse brought \$31. After the sale, and while the constable held the proceeds, W. H. Alexander, as guardian, etc., placed in the hands of the constable a distress warrant in favor of W. H. Alexander, guardian, etc., against Wyatt Alexander, for \$28, with notice to hold up such proceeds to be applied to the payment of the distress warrant. At the time of the sale, there was pending an affidavit of illegality, filed by Wyatt Alexander, to the execution against him in favor of Smith & Jones, under which the horse was sold. After the sale, and after the placing of the distress warrant in the constable's hands, upon the trial of the illegality proceedings in the superior court, the execution in favor of Smith & Jones against Wyatt Alexander was declared to be void. Subsequent to this, Smith & Jones, in a suit against Wyatt Alexander, and Grimsley, as garnishee, obtained a judgment against the garnishee for \$24.50, on account of his having in his hands, as the property of Wyatt Alexander, the proceeds of such sale. W. H. Alexander, as guardian, then demanded of Grimsley, the constable, that he pay to him, out of the proceeds of the sale, a sufficiency to satisfy his distress warrant. The constable refused to comply with this demand, and Alexander ruled him in the justice's court for failure and refusal to pay over the money as demanded. Upon the hearing of the rule, the facts above stated appeared. The record shows, further, that a witness for the constable testified that the witness had examined the records of the office of the ordinary of Early county (the county in which the case arose), and that no order had been

granted to W. H. Alexander, as guardian, authorizing him to rent any land for minors. The magistrate discharged the rule against the constable, and Alexander carried the case by certiorari to the superior court. Complaint was made in the petition for certiorari that the magistrate erred in admitting the testimony of the witness that he had examined the records in the ordinary's office, and that no order had been granted to Alexander, guardian, to rent any land of minors, and that the magistrate also erred in admitting the evidence as to the judgment in favor of Smith & James against Grimsley, as garnishee. The petition specified the objections over which all such evidence was admitted, but the answer of the magistrate, which was neither excepted to nor traversed, failed to disclose the grounds upon which such evidence was objected to, or for what reason the same was admitted. Upon the hearing of the certiorari, counsel for Grimsley moved to dismiss it, "because the records showed there were disputed facts involved, and the same had been brought to the superior court on a certiorari, without having first been appealed to a jury in the justice's court, the amount involved being less than fifty dollars." This motion was overruled, and the court rendered the following judgment: "Ordered and adjudged that certiorari be sustained, and that defendant pay to plaintiff out of said fund a sufficient sum to pay off his distress warrant and the cost of — dollars and — cents, paid out by plaintiff in certioraring said case, and the sum of — dollars, cost of this court." Grimsley excepted, and assigned as error "the refusal to sustain said motion as aforesaid, and in rendering said judgment as aforesaid: (1) Because, there being facts involved in the justice's decision complained of, there should first have been an appeal to a jury in the justice's court, before certioraring the case to the superior court, the amount involved being less than fifty dollars; (2) because the court erred in rendering final judgment in said case, instead of remanding the same for a new trial in the justice's court, there being conclusions of fact in said case to be ascertained from testimony; (3) because the court erred in rendering judgment as aforesaid, because the amount is either greater than the amount of money in defendant's hands, or else is not definitely ascertained."

1. The record shows that, upon the trial of the rule in the justice's court, there were no contested issues of fact, and therefore the judgment of the magistrate was reviewable by certiorari, although the amount involved was less than \$50. This court has so ruled several times. See *Toole v. Edmondson* (Ga.) 31 S. E. 25, where Mr. Justice Cobb cited the previous decisions.

2. There were no issues of fact involved upon the hearing of the certiorari in the superior court. The determination of the case

depended entirely upon the question of law whether the rule should be made absolute against the constable upon the undisputed facts as they appeared in the certiorari proceedings, and it was proper for the court to render judgment finally disposing of the case. Civ. Code, § 4652; *Greenwood v. Furniture Factory*, 86 Ga. 582, 13 S. E. 128, and numerous cases cited under the above section of the Code.

3. This being a rule against a constable heard in the superior court upon certiorari, the judgment rendered in that court, ordering the constable to pay, out of the fund in his hands, to the petitioner in the rule and in the certiorari, a sufficient sum to satisfy the claim of such petitioner and the costs incurred in taking the case up by certiorari, as well as the cost of the case in the superior court, made the rule absolute against the constable, not only for the amount of the claim of the plaintiff in the rule, but also for all of the costs required by the judgment to be paid by the constable, and subjected him to all the pains and penalties imposed by statute upon an officer failing to pay the amount required by a rule absolute rendered against him. The amount in the constable's hands was \$31. The amount of the distress warrant of the plaintiff in the rule was \$28. The cost of taking the case to the superior court by certiorari, and the cost of the trial in that court, necessarily amounted to more than \$3, as will appear by reference to the fee bills in the Code, which, added to the sum called for by the distress warrant, made the amount for which the rule was made absolute larger than the sum in the constable's hands. We therefore think the judgment was erroneous. It may have been erroneous for other reasons, but we must decide the case as made by the bill of exceptions, and cannot go outside of that in search of error. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

WHITE et al. v. INTERSTATE BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. Dec. 14, 1898.)

ACTIONS—CONSOLIDATION—EXECUTION—CLAIMS—GOOD FAITH—DEEDS—RECORDATION—USURY—BUILDING AND LOAN ASSOCIATIONS—EVIDENCE—RELEVANCY.

1. Where a plaintiff in *fi. fa.* files an equitable petition against the defendant in *fi. fa.* and a claimant who asserts title to the property levied upon, charges collusion between the defendant and the claimant, and attacks the title relied upon by the claimant, and upon such petition an injunction is granted, restraining the prosecution of the claim case, and a receiver appointed to take charge of the property in dispute, it is not error for the judge, upon the call of the case for trial, to direct that the claim case and the case made by the equitable petition be consolidated and tried together.

2. The failure to record, within one year from its date, a deed executed in 1894, would post-

pone such deed to one subsequently made by the same grantor, and which was filed and recorded in due time, if the grantee in such subsequent deed took the same without notice of the existence of the first deed. If such subsequent deed be void because infected with usury, the first deed, though unrecorded, will prevail.

3. In the trial of a claim case, where the plaintiff in execution is a building and loan association, and the claimant attacks the deed upon which plaintiff's judgment is founded, on the ground that it is infected with usury, the charter and by-laws of such association are admissible in evidence in behalf of the claimant; and testimony of an officer of such association tending to show that the actual operations of the association did not bring it within the scope of a building and loan association, pure and simple, is also admissible in evidence in behalf of the claimant.

4. Where, in such a case, the plaintiff in execution is attempting to enforce a special lien upon a tract of land, which lien is founded upon a deed executed to plaintiff by the defendant in execution, and the claimant, the wife of the defendant in execution, claims under a deed from her husband, evidence showing that she made application for dower in the property is admissible on the question of the good faith of her claim.

5. In such a case, tax *fi. fas.* against the property in dispute, and the return of the appraisers on the estate of the deceased husband, including the property in controversy, had no relevancy to the issue, and should have been excluded from evidence, it not appearing that the claimant had any connection either with the tax *fi. fas.* or the appraisement.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

An execution in favor of the Interstate Building & Loan Association was levied on property of the estate of A. W. White, deceased, and the widow interposed a claim thereto. Plaintiff filed a petition against the widow and the administrator for the appointment of a receiver, and to enjoin the prosecution of the claim. The two proceedings were consolidated, and there was a judgment for plaintiff. Claimant brings error. Reversed.

Brannon, Hatcher & Martin, for plaintiff in error. W. A. Winbush and E. D. Burts, for defendant in error.

COBB, J. On April 12, 1884, A. W. White conveyed by deed to his wife certain land. This deed was not recorded until February 9, 1898. On March 10, 1894, White, who was a member of the Interstate Building & Loan Association, obtained from it an advance of \$2,000, to secure the payment of which he executed to the association on the same day a security deed to the same land which he had previously conveyed to his wife. This deed was taken by the association without notice of the prior deed to White's wife. After the conveyance to his wife, White remained in possession of the premises, and exercised acts of ownership over them until his death, which occurred in January, 1895, after which his administrator went into possession. The building and loan association brought suit against White in November, 1894, for the purpose of obtaining a special lien upon the property described in its security deed.

Pending the suit, White died, and his administrator was made a party. In November, 1896, a general judgment was recovered in this suit, and a judgment setting up a special lien upon the property in dispute. A deed reconveying the property for the purpose of levy and sale was made by the association to the administrator. An execution issued upon this judgment in December, 1896, was levied, and the property duly advertised for sale. When the day of sale arrived, Mrs. White, the widow of A. W. White, filed an affidavit claiming the property as her own. Pending the claim case, the association brought its petition against the claimant and the administrator, alleging that the claim was not interposed in good faith; that the claimant had no title or color of title to the property; that the claim was the result of collusion between the administrator and the claimant for the purpose of retaining possession of the property and enjoying the rents and profits; that the defendants were insolvent, and unable to respond in damages; and praying that a receiver be appointed to take possession of the property, and collect the rents and profits, and hold the same, subject to the order of the court, and that the claimant be enjoined from proceeding with her claim, except to bring the same within the purview of this suit, to be herein adjudicated. The court granted an interlocutory injunction, and appointed a temporary receiver. Mrs. White filed an answer, in which she denied that she was insolvent, and denied that the claim was interposed in bad faith. When the case was called for trial, the plaintiff in execution asked the court to consolidate and try as one case both the claim case and the case made by the equitable petition. The claimant objected, because she was the only party to the claim case, while the petition was against different parties, and because the claim case raised the sole question of title, which question would be confused and clouded before the jury if tried with other issues. The court overruled the objection, and ordered that both cases be tried together as one case. To this the claimant excepted. The jury rendered a verdict finding the property subject, and the court decreed accordingly. Claimant filed a bill of exceptions assigning error upon the exceptions above referred to, as well as to certain rulings on the admissibility of evidence, and to certain portions of the judge's charge, and his refusal to give in charge to the jury certain written requests.

1. There was no error in directing that the claim case and the case made by the equitable petition be consolidated and tried together. *Smith v. Dobbins*, 87 Ga. 303, 13 S. E. 496. It is true that in the case of *Rosser v. Cheney*, 64 Ga. 564, it was held that it was error to require an action of ejectment, and a bill filed by the defendant therein to enjoin the same, to be consolidated and tried together, when objection was made by either party; but that case was decided before the

passage of the uniform procedure act of 1887, which provides for the trial in the superior court under the same form of pleadings of every character of action, whether it be based upon a legal or an equitable cause of action. We see no reason why, since the passage of that act, two cases of the character involved in the present litigation may not, in the discretion of the trial judge, be disposed of together, and submitted to the jury, under the direction of the court. See, in this connection, *Roulett v. Mulherin*, 100 Ga. 591, 28 S. E. 291.

2. The moment that White executed and delivered the deed to his wife, she became possessed of all his interest in the property. It was not necessary, to complete her title to the property, that her conveyance should be recorded. Her failure to record the deed might operate to prevent her from setting up her title against a subsequent purchaser from her husband, if such purchaser obtained a deed without notice of the existence of the first conveyance, and had the same recorded. See *Association v. Gann*, 101 Ga. 678, 29 S. E. 15. The law of force controlling in such matters at the time that the deed from White to his wife was executed is contained in section 2705 of the Code of 1882, and is in the following words: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies within one year from the date of such deed. On failure to record within this time, the record may be made at any time thereafter; but such deed loses its priority over a subsequent deed from the same vendor, recorded in time, and taken without notice of the existence of the first." The law embraced in this section is embodied in section 3618 of the Civil Code, but in language not exactly the same, the section of the present Code being as follows: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first." The section last quoted is, however, to be construed in connection with the registry act of 1889, now embodied in section 2778 of the Civil Code, which declares that "deeds, mortgages and liens of all kinds, which are now required by law to be recorded in the office of the clerk of the superior court of each county within a specified time, shall, as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record in the clerk's office. And the said clerk is required to keep a docket for such filing, showing the day and the hour thereof, which docket shall be open for examination and inspection."

tion as other records of his office." The deed from White to his wife, having been made in 1884, is, of course, to be governed by the law as found in the Code of 1882. The deed made by White to the loan association, having been made in 1894, is to be controlled by sections 2778 and 3618 of the Civil Code. The title acquired by Mrs. White under her deed was superior to the claim of every other person whatsoever, but her failure to record the same in due time would have the effect of preventing her from asserting her title against a subsequent purchaser from her husband, if such purchaser took without notice of the existence of her deed, and had his deed recorded in due time.* Having failed to record her deed within the time allowed by law, she took the risk of her husband's making a deed to a subsequent innocent purchaser, and this risk continued as long as she withheld her deed from record. Therefore, when, in 1894, her husband, for value, made a deed embracing the property to the loan association, and the same was received, filed, and recorded in accordance with the law then of force, and without notice of the existence of her prior unrecorded deed, such second deed, if otherwise valid, would take precedence of the prior unrecorded deed. In order, however, for her deed to be defeated by such subsequent conveyance, it is absolutely essential that the subsequent conveyance should be a valid instrument. If the subsequent deed be void for any reason, the holder of the same acquires no right against the holder of the prior unrecorded deed. Therefore, if Mrs. White can show that the second deed made by her husband was, for any reason, void, the fact that she failed to record her deed is immaterial to an assertion of her rights under it. If the loan made by the association was infected with usury, the deed taken to secure such loan would be void. Mrs. White's rights in the property being complete long before the suit against her husband was filed, she, of course, is not concluded by the judgment in that case, and has the right, on a claim filed to the levy of the execution issued on such judgment, to raise the question as to the validity of the deed which was the foundation of the special lien now asserted on the property by the loan association. On this point the case is controlled by the cases of *Ryan v. Mortgage Co.*, 90 Ga. 322, 23 S. E. 411, and *Marshall v. Charland* (Ga.) 31 S. E. 791, and is to be distinguished from the cases of *Swift v. Dederick*, Id. 788, and *George v. McAllister*, Id. 790.

3. The claimant contended that the deed made by White to the loan association was void on account of usury, and, in support of this contention, tendered in evidence the charter and by-laws of the association, and also offered to prove by its general manager that it acted under this charter, and had made loans to persons who were not members

or stockholders, and had issued stock known as "investment stock," which matured at a different time and in a different way "and a different amount than is charged upon regular loans." The court refused to allow any of this evidence. We think this was error. The claimant had a right to attack the deed for usury, and should have been allowed to offer any competent evidence which would tend to support her contention. If the plaintiff association was a building and loan association pure and simple, and the particular transaction under investigation was one thoroughly in accord with the scope and object of such an association, there would be no usury in the transaction. If, on the other hand, the association was not a building and loan association pure and simple, and the plan of its operations was only a scheme to make money at usurious rates of interest under the form of building and loan contracts, and a sum of money in excess of the amount which would be realized from the legal rate of interest was exacted from the borrower, such transaction would be tainted with usury, and the deed would be void. This was a question for the jury to determine from evidence submitted to them. See *Cook v. Association* (Ga.) 30 S. E. 911; *Hollis v. Association* (Ga.) 31 S. E. 215, and cases cited. The plan of the association as set forth in its charter and by-laws and its actual operations, as proposed to be proved by the testimony of the general manager, were material. The court should therefore have allowed the jury to pass upon the evidence.

4. There was no error in refusing to exclude evidence showing that Mrs. White had applied for dower in the property in controversy. The application for dower being subsequent to the deed made by her husband to the loan association, of course, could in no way operate as an estoppel, so as to prevent her from asserting her title to the property. But the fact that she did, after the date of her deed, file an application of this character, treating the property as the property of her husband's estate, would be a circumstance to be considered by the jury on the bona fides of her claim of title, subject, however, to be explained by her.

5. Error is assigned upon the refusal of the judge to exclude from evidence two tax *fi. fas.*, for 1895 and 1896, against the property in dispute, which *fi. fas.* had been transferred to the plaintiff in execution, and also upon the court's refusal to exclude the return of the appraisers on the estate of A. W. White, which appraisement included the property in dispute. Mrs. White, the claimant, not being connected in any way with the tax *fi. fas.* or the appraisement, so far as the record discloses, we do not think the evidence was relevant, and hence the court erred in refusing to exclude the same.

It is not necessary to rule specifically on all of the numerous questions made in the record. The controlling questions are decid-

ed by what has been said. Upon another trial the presiding judge can conform his charge to the law as laid down in this opinion, and, if other errors were committed, he will have an opportunity to correct them. Judgment reversed. All the justices concurring, except LITTLE, J., disqualified, and LUMPKIN, P. J., absent on account of sickness.

DAWSON v. DAWSON et al.¹

(Supreme Court of Georgia. Nov. 25, 1898.)

TAX SALE—VALIDITY—RIGHTS OF PURCHASER—APPEAL IN FORMA PAUPERIS—LIABILITY FOR COSTS.

1. Where property has been duly sold under a tax *fi. fa.* against one who returned the property for taxes, and who was in possession thereof, such sale is not invalid because the property did not belong to the defendant in *fi. fa.*, but to his minor children, nor because the *fi. fa.* included taxes upon other property that did not belong to the minors. If the property is not redeemed within 12 months from the date of the sale, the purchaser gets a good title as against the real owners.

2. Counsel for plaintiff in error is not relieved from liability for costs in this court when the affidavit in forma pauperis does not indicate where it was executed, and does not show that the officer attesting the same was authorized to administer the oath.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Adolphus Dawson and others against Matilda Dawson. Judgment for plaintiffs. Defendant brings error. Reversed.

Brannon, Hatcher & Martin, for plaintiff in error. C. J. Thornton and A. E. Thornton, for defendants in error.

SIMMONS, C. J. 1. The decision in the case of *State v. Hancock*, 79 Ga. 799, 5 S. E. 248, followed in *Barnes v. Lewis*, 98 Ga. 558, 25 S. E. 589, fully covers the law and facts in this case. The reasoning in the decision in that case also applies to this, and the principle announced therein is the same as that involved in the case under consideration. In the *Hancock* Case a claim was interposed by the true owners. In this case there was no claim, but a sale made under a tax *fi. fa.* by the sheriff, a purchase by a third party, and a suit by the true owners to recover the property. Here the father had given this property to his children, remained in possession for years, and returned the property to the tax receiver as his own. This court held in the *Hancock* Case that: "It is not incumbent upon the state or county to investigate the legal title to property before assessing the same. The only duty of the tax receiver of the state and county in regard to this matter is to see that all the property, not exempted as above set out, is returned by

some one. If it is not returned by the legal owners, as in this case, but is returned by the husband and father, while in possession, the state and county are entitled to the taxes thereon; and, if the taxes are not paid by the person who returns the property for taxation, nor by the legal owner thereof, the tax collector, finding the return of the property on the receiver's digest, has a right—indeed, it is his duty—to issue execution against the person who returned the same, and have it levied thereon." It was also held that, if the person making the return returned this property, of which some belonged to his children and some to himself, it was the duty of the children to pay the taxes on their property so returned by the father, and that, if they did not do so, the property should be sold. The record shows that it was sold, purchased by a third party, and not redeemed by the children within 12 months, as the statute requires. Whether they were minors or adults at the time of the sale does not matter, so far as redemption is concerned. The statute makes no exception in favor of minors for redeeming property sold under a tax execution.

2. The law allows the losing party in the trial court, if he wishes to have alleged errors therein reviewed in this court, and is unable to pay the costs, to file an affidavit in forma pauperis of his inability. That affidavit is filed in the office of the clerk of the trial court, and a certified copy is transmitted to this court as part of the record. The record in the present case contains what purports to be a pauper affidavit, signed by the plaintiff in error. The writing states that she is unable to pay the costs. It purports to be attested by one T. W. Bates, notary public. There is nothing on or in the paper to indicate where the alleged affidavit was made, what county or state. If the venue had been stated as Georgia, Muscogee county, we would have inferred that Mr. Bates was a commercial notary public in that county, but, as it fails to give the venue, we cannot take judicial cognizance that Mr. Bates is an officer authorized to administer an oath. No affidavit having been filed as required by law, the statute requires the plaintiff in error or her counsel to pay the costs. Counsel appealed to us to remit the costs on the ground of the poverty of the plaintiff in error, and the fact, he says, that Bates was a notary public in Muscogee county. While we would be glad to relieve counsel, in every case of this kind, from the payment of the costs, we cannot disregard the law which requires them to pay it. Appeals of this kind have become very frequent of late years in this court. Counsel, through oversight or negligence, fail to prepare these affidavits according to the law, and then appeal to us to remit the costs. All the costs of this court belong to the state. They are appropriated to the payment of the salaries

¹ See note at end of case.

of certain officers, if they amount to the sum paid them. If they are not sufficient to pay these salaries, the deficit is paid out of the state treasury. If they amount to more than sufficient, the excess is turned into the treasury. The state, by its law, remits the costs when the plaintiff in error complies with certain prescribed regulations. These regulations have not been complied with in the present case, and this court has no authority to remit the costs. The remission of these costs to pauper litigants is gratuitous on the part of the state. We regret to say that a great many litigants take advantage of the law when, in our opinion, they are really not entitled to its benefits. Many cases come before us where parties, excused under this law from the payment of costs, appear from the records to own and possess a considerable amount of property. We would respectfully recommend to the legislature that the law be so amended as not to allow parties to be themselves the sole judges of the truth of their affidavits of inability to pay the small amount of costs taxed in this court. We are the more impressed with the importance of this matter since the report of the clerk of the number of these cases on the present docket. This report shows that of the 497 cases so far returned to this term of the court, 177 are brought up by plaintiffs in error who have availed themselves of the benefit of the law. The plaintiffs in error in more than one-third of the cases brought to the present term are, according to this report and the affidavits filed by them, too poor to raise the small amount of \$10 to pay for having their cases passed upon by this court. The sum of \$1,770 is thus given by the state to these litigants at one term of the court. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

NOTE.

Defendant, although not the legal owner of a certain house and lot, returned it for taxes as his own, together with personal property and a poll. Upon default, tax executions issued against the land in question and other property, which belonged to the person returning the same. *Held*, that the claimants of the property erroneously returned by defendant must offer to pay the proper amount of taxes against the property claimed before they can have it declared not subject to the execution. *State v. Hancock*, 79 Ga. 709, 5 S. E. 248.

Where a trustee, having the title to realty, returned it for taxation for a particular year in his own name, making no other tax return for that year, and the property was afterwards sold under a tax execution issued against him individually, and based upon the return indicated, and, though not so appearing on the face of the execution, the property tax on this identical property, the purchaser at the sale, if the same was otherwise free from objections, obtained a good title, as against the cestuis que trustent represented by the trustee; and this is true, although the poll tax of the latter was also included in the tax execution. *Barnes v. Lewis*, 98 Ga. 558, 25 S. E. 580.

DAVIS v. MUSCOGEE MFG. CO.

(Supreme Court of Georgia. Dec. 13, 1898.)

PLEADING—AMENDMENT—COSTS ON APPEAL—PAUPER AFFIDAVIT.

1. The original petition in the present case setting forth no cause of action whatever, there was nothing to amend by.

2. A pauper affidavit filed for the purpose of relieving the plaintiff in error from the payment of costs in this court is sufficient, if it state that the plaintiff in error, because of his poverty, is unable to pay the costs; and it need not be further stated in the affidavit that he is unable to give bond for the eventual condemnation money, or that his counsel has advised him that he has good cause for a writ of error. Aliter, if the purpose of the affidavit is also to obtain a supersedeas of the judgment rendered in the court below.

(Syllabus by the Court.)

Error from superior court, Muscogee county: W. B. Butt, Judge.

Action by Robert Davis against the Muscogee Manufacturing Company. From an order refusing to allow plaintiff to amend his complaint, he brings error. Affirmed.

Blandford & Grimes, for plaintiff in error.
McNeill & Levy, for defendant in error.

COBB, J. Davis sued the Muscogee Manufacturing Company for damages, alleging that he was in the employment of the defendant, to clean and wash window glass in the defendant's factory, and, while he was so engaged, the engineer, or some other employé of the defendant operating the engine of the factory, without warning to the plaintiff, and without his knowledge, turned on the steam from the engine or other appliance of the defendant so carelessly and negligently that the water and steam went outside of the factory, to the window plaintiff was washing, and thereby, without any fault on his part, scalded and burned him, to his damage, etc. When the case came on for trial the plaintiff proposed to amend the declaration as follows: "And plaintiff further alleges that the defendant was negligent, in this: that it kept and maintained a foot valve, which was liable to get out of order at any time, and which was well known to defendant, and which did get out of order, and when out of order a vacuum attached to the engine or attachment of said engine would be broken, and, when so broken, would cause hot water and steam to be forced in a pipe running up the side of the building of said defendant, whereby your petitioner was scalded and burned, to his damage," etc. The defendant objected to the amendment upon the ground that it constituted a new cause of action. The court sustained the objection, and the plaintiff excepted.

1. The petition, as originally filed, set forth no cause of action. The negligence alleged resulted from the acts and conduct of the employés of the defendant, who were the fellow servants of the plaintiff; and such negligence, although resulting in damage to the plaintiff,

did not give him a cause of action. *Kerr v. Cotton Mills* (Ga.) 31 S. E. 166, and cases cited. The amendment offered alleged that the plaintiff was injured by the negligence of the defendant in not providing proper machinery. This was entirely different from the allegation in the original petition, and made a cause of action which was in no way connected with the allegations contained in the original petition. It was contended by the plaintiff in error that the original petition set forth a cause of action, which consisted of the negligent scalding and burning of the plaintiff, and that the amendment did not make a new cause of action, but was permissible for the purpose of making varying allegations as to what constituted the negligence resulting in the scalding and burning. It is true that in the case of *Harris v. Railroad Co.*, 78 Ga. 525, 3 S. E. 355, it was held that, "the cause of action alleged being the homicide of plaintiff's husband by means of the defendant's negligence, the allegations in the declaration touching the specific acts of negligence, and the manner of causing death, may be varied or added to by amendment during the progress of the trial, so as to adapt the pleadings to the evidence in all its aspects," and that Chief Justice Bleckley, in the opinion, says: "The cause of action was the homicide of the plaintiff's husband by the negligence of the defendant. In setting out that negligence, it was described in one way in the original declaration, in another by the first amendment, and in another by the second amendment. But it was all the same cause of action." The distinction between that case and the one now under consideration is that the original petition set forth a cause of action, the substance of it being that the plaintiff's husband was killed by the running of the defendant's trains, locomotives, cars, and other machinery, and that his death was the result of no negligence on his part, but was due to the negligence of the defendant; it then being alleged in what this negligence consisted. So that the original petition contained a complete cause of action. The amendments which were allowed simply made allegations of acts of negligence additional to those contained in the original petition. If the petition in the present case had alleged that the plaintiff was burned and scalded by the negligent conduct of the defendant in the operation of its factory, and had set forth some specific act of negligence, then, under the ruling in the *Harris Case*, an amendment containing additional acts of negligence might have been properly allowed. But the original petition contained no allegation of negligence which was chargeable in law against the defendant, and for this reason the case differs materially from the *Harris Case*. What has been said in reference to the *Harris Case* also applies to the case of *Railroad Co. v. Kitchens*, 83 Ga. 83, 9 S. E. 827. There is nothing in this view to conflict with the ruling made in the case of *Ellison v. Railroad Co.*, 87 Ga. 691, 13 S.

E. 800. While some of the language of Chief Justice Bleckley, taken isolated and alone, might lead to the conclusion that the amendment in the present case should have been allowed, still, if the opinion is construed as a whole in the light of the record in that particular case, it will be seen that the amendments which are allowable under the authority of that decision are those which simply make perfect a cause of action which is imperfectly set forth in the pleading sought to be amended. That this is the true purpose of the decision comes out clearly in the language of the seventh headnote, which is as follows: "Under the Code, a declaration which has all the requisites to make it good and sufficient in substance, save that it omits to allege some fact essential to raise the duty involved in the cause of action which the pleader evidently intended to declare upon, is amendable by supplying the omitted fact at any stage of the case. Thus, where the duty claimed was the duty of forbearing to obstruct a sewer pipe which conveyed waste water from the plaintiff's premises, and discharged the same on the defendant's land, the declaration was amendable by alleging an easement subjecting his land to the burden of receiving the water so discharged. Also, in an action by a mother suing for the homicide of her son, where the fact omitted from the declaration was that she was dependent upon him for a support, the declaration was amendable by alleging that fact." The omission in the original petition in the present case was not due to a failure to allege some essential fact which was necessary to a cause of action imperfectly set forth therein, but was an omission to allege in any way whatever a state of facts which would constitute a cause of action against the defendant. We cannot hold that it was the intention of this court in *Ellison's Case* to carry the law of amendment to such an extent. An imperfect cause of action may be made perfect by a suitable amendment. No cause of action whatever cannot, by amendment, be converted into a cause of action.

2. Upon the call of this case a motion was made to dismiss the writ of error on the ground that the pauper affidavit appearing in the record was not sufficient, in that it did not distinctly appear from the same that counsel had advised plaintiff in error that he had good cause for a writ of error. The constitution declares that plaintiffs in error shall not be required to pay the costs in this court when the usual pauper affidavit is filed in the court below. Civ. Code, § 5881. It is provided by law that, "if a pauper oath be made for the purpose of carrying any case to the supreme court without payment of costs, such oath shall state that the plaintiff in error, because of poverty, is unable to pay the costs in said case, and must not add conjunctively the inability of the plaintiff in error to give bond for the eventual condemnation money." Id. § 5553. See, also, rule 14 of the supreme

court (26 S. E. viii.). It would seem, therefore, that, if the pauper affidavit is filed for the sole purpose of bringing the case to this court without the payment of costs, the only thing material to be stated in the affidavit is that the plaintiff in error, from his poverty, is unable to pay the costs. If, however, the purpose in filing the affidavit is not only to be relieved from the payment of costs, but also to obtain a supersedeas of the judgment of the court below until the case is finally adjudicated here, the affidavit must not only set forth that the plaintiff in error is unable to pay the costs, but also, disjunctively, that he is unable to give security for the eventual condemnation money, and that his counsel has advised him that he has good cause for a writ of error. Civ. Code, § 5552; Flannagan v. Scott (Ga.) 31 S. E. 23; Williams v. George, 104 Ga. 599, 30 S. E. 751.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

GORDON v. STATE.

(Supreme Court of Georgia. Dec. 13, 1898.)

CRIMINAL LAW—DEMAND FOR TRIAL — RIGHTS OF ACCUSED.

1. The benefit of a demand for trial duly made in a superior court is not lost by reason of the subsequent transfer of the indictment to a city court.

2. If, at a term when a demand for trial is operative, a trial be had, which results in a verdict of guilty, and a new trial be granted at that term, the failure of the accused to then move for a discharge will not affect his rights under the demand. It will stand over, to be complied with at the next term.

(Syllabus by the Court.)

Error from city court of Gwinnett.

Ben Gordon was indicted for misdemeanor, and demanded a discharge, and, on refusal, brought error. Reversed.

L. F. McDonald, for plaintiff in error. F. F. Juhan, for the State.

FISH, J. At the September term, 1897, of the superior court of Gwinnett county, Ben Gordon was indicted for misdemeanor. During the March term, 1898, a demand for trial was duly made, and entered upon the minutes, and the case was continued by the state. Subsequently, and during the same term, an order was granted transferring the indictment to the city court of Gwinnett for trial. At the June term, 1898, of the city court,—that being the first term of such court after the transfer of the indictment,—the accused was tried, convicted, and a new trial granted him. At the August term, 1898, of the city court, the accused announced "Ready for trial," but the state continued the case. Thereupon the accused moved for a discharge under the demand. There were juries impaneled and qualified to try him at this term. The motion was passed, to be considered later in the term, but the court adjourned without disposing of it.

At the next term,—October term, 1898,—when the case was called, the accused announced "Ready," and renewed his motion for a discharge, upon the ground that he had not been tried at the preceding August term. The motion was passed to be heard later in the term, and on October the 14th, during the term, after the state had continued the case, and while there were juries impaneled and qualified to try the accused, he presented a written demand for a discharge, which was then refused by the court, whereupon the accused excepted.

1. The act establishing the city court of Gwinnett (Acts 1895, p. 384, § 29) provides that "the judge of the superior court may send down from the superior court of Gwinnett county all presentments and bills of indictment for misdemeanors to said city court for trial," etc. The indictment in this case, charging the accused with a misdemeanor, was pending in the superior court of Gwinnett county at the time he therein made, and had entered upon its minutes, his demand for trial. The order which was subsequently granted, at the same term the demand was made, transferring the indictment to the city court, carried the whole case, including the demand for trial, to the latter court, without affecting the rights of the accused under his demand. To hold that he could not insist upon a discharge in the city court, under a demand for trial duly made in the superior court prior to the order of transfer, would be to say that merely transferring his case from one court to another would deprive the accused of all benefit of the statute guarantying to him a speedy trial. He certainly could not move for a discharge in the superior court after the indictment had been transferred to the city court, because the case would no longer be pending in the former court; and if he could not insist upon such motion in the latter court, where the indictment was then pending, he would lose all rights under his demand. In *Hunley v. State* (Ga.) 31 S. E. 543, Mr. Justice Little said: "To give effect to both sections of the Penal Code to which we have adverted,—that is, that cases charging misdemeanors may be transferred from the superior court to the city court, and the provision securing to a defendant the right of a demand for trial,—it must be held that the terms of the court to which the case has been transferred are to be regarded as the terms of the court covered by the statute, and that a demand for trial. In order to be effective, must be made to the court in which the case is pending at the time of the demand." And he further said that "to render the demands available so as to operate as acquittals, under the provisions of the statute, they would have to have been made in the city court," to which the cases he was then considering had been transferred from the superior court. If a demand for trial can be made in the city court under an indictment transferred from the superior court, there can be no reason why a demand made in the superior court

prior to the transfer may not be insisted upon in the city court to which the indictment is transferred; and, if a trial be not had in compliance with such demand, the accused is discharged.

2. It was contended by counsel for the state that the accused forfeited all benefit under the demand by his failure to move for a discharge at the June term, 1898, of the city court after the new trial was granted. Following the intimations of this court in *Silvey's Case*, 84 Ga. 44, 10 S. E. 591, and *Brown's Case*, 85 Ga. 713, 11 S. E. 831, we are of opinion that the omission of the accused to then make such motion did not result in the loss to him of his rights under the demand, but that the demand stood over, to be complied with at the next term. As will be seen from the statement of facts, the accused, at the next term after the case had been continued by the state, moved for a discharge; but the motion was passed to be heard later during the term, and the court adjourned without rendering a judgment thereon. There is nothing in the record tending to show that the accused consented to the continuance of his motion for the term. At the succeeding October term, 1898, the accused again insisted upon a discharge, upon the grounds that he had not been tried at the preceding August term, and because he was not tried at the then October term. The discharge was refused by the court. We think this refusal was error. The accused was entitled to be "absolutely discharged and acquitted of the offense charged in the indictment." Judgment reversed. All the justices concurring.

CANNON et al. v. COMMONWEALTH.
(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

CRIMINAL RECOGNIZANCES—CONDITIONS.

A criminal recognizance that is silent as to the commission of any offense, and is conditioned on the principal's appearance before the court on a certain day to answer the judgment of the court, is void, under Code, § 4093, requiring such a recognizance to be conditioned on accused's appearance at a prescribed time "to answer for the offense with which such person is charged."

Error to corporation court of Norfolk.

Action by the commonwealth against Joseph P. Cannon and another on a recognizance. Judgment for plaintiff, and defendants bring error. Reversed.

Burroughs & Bro., R. Carter Scott, and H. G. Buchanan, for plaintiffs in error. The Attorney General, for the Commonwealth.

CARDWELL, J. At the November term, 1897, of the corporation court of the city of Norfolk, Joseph P. Cannon was convicted of a misdemeanor, and adjudged to pay a fine of \$1,000, and to confinement of one year in jail, and afterwards until payment of the fine and costs. In order that Cannon might apply to this court for a writ of error, the court

below postponed execution of the judgment to its January term, 1898, and admitted Cannon to bail for his appearance on the first day of the January term; the following order being then entered:

"In the Corporation Court of the City of Norfolk on Saturday, the 13th day of December, 1897.

"On motion of Joseph P. Cannon, it is considered that he be let to bail. Whereupon the said Jos. P. Cannon, and Joseph Cannon, his surety, who justified his sufficiency on oath, acknowledged themselves to be indebted to the commonwealth of Virginia in the sum of five thousand dollars, of their respective goods and chattels, lands and tenements, to be levied, and to the use of the commonwealth rendered; and they respectively waived their homestead exemptions as to this obligation, and also any claim or right to discharge any liability arising hereunder with coupons detached from the bonds of this state. Yet, upon condition that if the said Jos. P. Cannon shall appear before this court on the first day of its January term, 1898, and shall not depart without leave thereof, to answer the judgment of this court, this recognizance to be void; otherwise, to remain in full force and virtue."

At the January term, Joseph P. Cannon not appearing, his default was entered of record; and on the 7th day of February, 1898, an order was entered directing a scire facias to issue on the recognizance. On the return of the scire facias, Joseph P. Cannon and Joseph Cannon, his surety, appeared by counsel, cravedoyer of the recognizance, and demurred to the scire facias. Joseph P. Cannon offered a plea of infancy; and Joseph Cannon, a plea in bar,—claiming that, the recognizance being void as to the infant, the surety was not bound.

On the 6th of May, 1898, the court overruled the demurrer, and rejected each of the pleas, and entered judgment against Joseph P. and Joseph Cannon; and thereupon the writ of error now before us was awarded by this court.

The only question that we need to consider is raised by the demurrer, and that is whether the recognizance is void or not.

Section 4092, Code Va., provides that a court or judge letting a person to bail shall require a recognizance to be given.

Section 4093 provides, "Every recognizance under this chapter or under chapter 191, and chapters following, to 199 inclusive," shall be taken as provided by this section.

Section 4051, after providing for a stay of execution of a sentence of a court where a person is convicted of an offense punishable by death or confinement in the penitentiary, in order that such person may apply to this court for a writ of error, provides that "in any other criminal case, wherein judgment is given by any court, and in any case of

judgment for contempt, to which a writ of error lies, the court giving such judgment may postpone the execution thereof for such time and on such terms as it deems proper."

This is the second section of chapter 198 of the Code, and is the only section in that chapter, and the only statute, under which, by any possible construction, a recognizance can be taken. Therefore a recognizance taken under this section must substantially comply with the conditions of section 4093.

Keith, P., in *Com. v. Fulks*, 94 Va. 587, 27 S. E. 499, says: "Section 4093 of the Code, speaking of the recognizance, provides, among other things, that 'the condition when it is taken of a person charged with a criminal offense shall be that he appear before the court, judge, or justice before whom the proceeding on such charge will be, at such time as may be prescribed by the court or officer taking it, to answer for the offense with which such person is charged.'"

The condition of the recognizance in that case was that Fulks should personally appear in the county court of Wise county on the first day of the next term, and surrender himself into custody, and not depart thence without the leave of court; and this was held to be not a substantial compliance with the requirement of section 4093 of the Code, and the recognizance, therefore, void.

In the case of *Bias v. Floyd*, 7 Leigh, 640, the court was of the opinion that the recognizance, binding Bias to appear at the superior court, "then and there to do and receive what should be enjoined upon him by the said court," was too general, and the recognizance void, as the justice of the peace taking the recognizance had no right to bind the party in the recognizance to do more than to answer the particular charges of which he was accused.

"Then and there to do and receive what should be enjoined upon him by the said court" means no more and no less than "to answer the judgment of this court."

The recognizance in question does not show that the condition it contains is the performance of an act for which an obligation can be properly taken, and is silent as to any charge of a criminal offense. The condition could not have been drawn in more general and indefinite terms, and cannot be construed so as to give it any definite meaning, or to show what the court was attempting to oblige the cognizors to do.

When a recognizance is taken, it should show on its face that the condition it contains is to do some act for the performance of which such an obligation may be properly taken, and that the court or officer before whom it is taken has authority to act in cases of that general character. *Archer v. Com.*, 10 Grat. 688.

Upon the demurrer there is nothing before the court but the *scire facias* and the recognizance. The entry of default cannot be looked to in aid of the recognizance, as its

validity must be considered standing alone upon the demurrer. *Wood v. Com.*, 4 Rand. 329.

We are of opinion that the judgment complained of must be reversed and annulled, and a judgment entered here for the plaintiffs in error on their demurrer.

RIELY, J., absent.

CITY NAT. BANK OF NORFOLK v. PEED et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

PAYMENT BY MISTAKE—RIGHT TO RECOVER BACK—IGNORANCE OF MATERIAL FACTS.

1. A corporation, of which the plaintiff firm was a stockholder, gave its note for money borrowed of defendant, and, under an arrangement with its stockholders, pledged their stock notes as security therefor. Subsequently the stockholders, to release the company from such indebtedness, made their several notes, payable directly to defendant, in lieu of their stock notes, which were payable to the company, and placed them in the hands of an agent to procure the transfer of such indebtedness from the company to the individual stockholders. Without fully disclosing to defendant his instructions, such agent took up the company's note, in exchange for such individual notes, but left in defendant's possession the stock notes for which they were intended to be substituted. Some time after the payment of the note given by plaintiff, defendant demanded payment of the stock note made by such firm to the company, claiming to P., who had attended to such business on behalf of his firm, that it was held as collateral security for certain indebtedness of the company to defendant; and P., thereupon, under the supposition that such was the fact, gave to defendant a new note, for the amount due thereon, in the name of the firm. J., one of the members of such firm, who had no knowledge of the circumstances under which the several notes referred to had been given, afterwards, on demand of defendant, made a payment on such new note; supposing, from the fact that defendant held it and demanded payment thereof, that it was valid. Held, that plaintiff was entitled to recover back, as paid under a material mistake of fact, the money so paid on such new note.

2. The right to recover back money paid by mistake was not precluded by the circumstance that plaintiff might, by the exercise of greater diligence, have learned the material facts involved in the alleged mistake, where his ignorance of such facts was in good faith.

Appeal from law and chancery court of city of Norfolk.

Assumpsit by Peed & Son against the City National Bank of Norfolk. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

G. M. Dillard, for appellant. Whitehurst & Hughes, for appellees.

BUCHANAN, J. This is an action of assumpsit brought by Peed & Son against the City National Bank of Norfolk to recover back money alleged to have been paid under a mistake.

The material facts upon which the plaintiffs based their right to recover are as follows:

On the 19th day of November, 1894, at a called meeting of the directors and stockholders of the Union Milling Company, it was determined that more money was needed to conduct the business of the company advantageously, and that it should borrow an additional sum from the defendant bank, to which it was then indebted by note in the sum of \$2,000. To accomplish this, it was agreed, and a resolution passed to that effect, that each stockholder should take an additional block of stock to the extent of \$1,000, except Hall, the secretary of the company, who should only take \$500, and that each stockholder who took should give his note to the company for an amount equal to one-half of all the stock in his name, and that these notes should be attached, as collateral security, to the note given to the bank for the additional loan. Six of the stockholders took additional stock, and all of them executed their several notes therefor to the milling company for \$1,000 each, except Hall, who executed his note for \$500. The company thereupon borrowed from the defendant bank the sum of \$5,500, gave its sixty-days negotiable note therefor, and deposited with the bank the above-mentioned stock notes, with the stock attached, which were payable on demand, and amounted to the sum of \$5,500, as collateral security for its payment, and the payment of any other engagement which it might enter into with the defendant. The \$5,500 note was renewed from time to time until July 31, 1895, when it and the \$2,000 note were consolidated, and a new note for \$7,500 given. The \$5,500 note was taken up by the milling company, but the \$2,000 note, which was payable on demand, and which was indorsed by Mahoney and others, was deposited with the defendant, along with the \$5,500 stock notes and stock held by the bank as collateral, and upon the same conditions.

On September 25, 1895, at a called meeting of the stockholders of the milling company, Hall, the secretary of the company, made a statement to the effect that all efforts to secure additional stock had been rendered abortive, owing to the then existing indebtedness of the company to the defendant, and on his motion it was then "resolved that, if the bank [the defendant] would release the Union Milling Company of the \$5,500 of its indebtedness, that each stockholder give his personal note to the bank, obligating himself to pay the same"; the notes having been previously given by the stockholders to the Union Milling Company, which company had received the money from the bank on said notes. A committee was thereupon appointed, consisting of Hall and another, to wait upon the defendant, and see if its officers would consent to accept such notes in lieu of the note of the company. Hall took the notes executed under the resolution to the defendant bank, and stated to its cashier that it was the wish of the milling company to retire \$5,500 of its indebtedness to the

defendant, and, in order to accomplish that end, it proposed to withdraw the \$7,500 note, and in lieu thereof the bank should retain the \$2,000 note indorsed by Mahoney and others, and take the individual notes of Peed and others amounting to \$5,500, payable directly to the defendant. After some hesitation the cashier acceded to the arrangement, and it was perfected. The cashier was told that the object of the milling company in retiring its note of \$7,500 was to enable it to get subscribers for its stock, but he was told nothing further of the contents of the resolution of September 25, 1895.

The note which Peed executed under the resolution of September 25, 1895, payable directly to the defendant, after several renewals, was paid by him. Some time afterwards the defendant demanded payment of the \$1,000 note executed by him to the milling company, and which had been deposited with the defendant under the resolution of November 19, 1894. Peed, when the demand was made, claimed that he had paid that note; but the defendant insisted that it held it as collateral security for the payment of the \$2,000 note, and other indebtedness due from the milling company to the defendant. Peed thereupon stated to the president of the defendant bank that he supposed it to be correct, and a note for \$1,113.95 (which was the amount, principal and interest, of the \$1,000 note) was executed by the plaintiffs to the defendant. There was evidence tending to show that, at the time the note for \$1,113.95 was given, the \$1,000 note, and renewals of it, payable directly to the defendant, which Peed had taken up, had been laid aside, and that he did not know where they were, and that at that time the condition of Peed was such that he did not attend to business; that Jordon, one of the members of the firm of Peed & Son, the plaintiffs, paid \$791.95 on the \$1,113.95 note, but at the time he paid it he did not know any of the facts and circumstances connected with the giving of the note by Peed to the milling company, or the giving of his note payable to the defendant, but supposed that the first-named note was due and unpaid, from the fact that the defendant held and demanded payment of it. It is to recover the sum thus paid that this action was instituted.

The evidence shows very clearly that when Peed and the other stockholders of the milling company executed their notes under the resolution of September 25, 1895, it was their intention, and the intention of the milling company, that the notes were to be in lieu of the notes for like amounts executed by them under the resolution of November 19, 1894. The resolution of September 25th shows this upon its face, and, as between the stockholders and their company, there was no consideration for the latter, except the stock for which the former notes were given. It is clear, therefore, unless the defendant had superior rights to the company, that when Peed paid his note executed under the resolution

of September 25, 1895, he was under no further liability to either the company or the defendant on account of the note executed by him under the resolution of November 19, 1894. It is true that the defendant, when it agreed to accept the stockholders' notes made payable directly to it in lieu of a like amount of the company's indebtedness, did not know that these notes were to be in lieu of the notes given under the resolution of November 19, 1894, and which it held as collateral security for the payment of the debt of the company, which it surrendered, and other debts held by it. But does this want of knowledge place it in any better position than it would have been in if it had known all the facts? If it had known the facts, it might have declined to accept the notes; but, if it had, it would have been in no better position than it is now. Under the resolution of November 19, 1894, the milling company had become indebted to it in the sum of \$5,500, for which it had the company's note and the notes of the stockholders for a like amount, with stock attached, as collateral security. The milling company is insolvent, and its stock is worthless. When the stockholders paid their notes held as collateral it would have satisfied \$5,500 of the indebtedness of the company, and left unpaid the \$2,000 note and the other indebtedness due from the company. When they paid their notes executed directly to the defendant, and for which it surrendered \$5,500 of its indebtedness, the company still owed the defendant the same amount; and it had the milling company and the worthless stock to look to for its payment. The indebtedness and the security in either case would have been the same.

But even if this were not so, and it appeared that the defendant had been injured by accepting the stockholders' notes for the company's indebtedness to the extent of \$5,500, it would not affect the question. It was the duty of the defendant, before accepting the notes of the stockholders, under the resolution of September 25, 1895, from Hall, the agent appointed by the company and its stockholders to effect the arrangement provided for in that resolution, to ascertain his authority; and, if it failed to do so, it acted at its peril. It is true, the notes were negotiable and in Hall's possession; but he was no party to them, and the defendant, being the payee, could alone assign or transfer them. Hall, therefore, had no right to deal with the notes, except as the agent of the makers. The defendant, in dealing with him, was put upon its guard by that very fact, and dealt with him at its own risk. It cannot rely for its protection upon Hall's assumption of authority,—upon what he disclosed, or failed to disclose, as to the purpose for which the notes were made,—but it must be regarded as receiving the notes in the light of the resolution under which Hall was acting.

It is clear, as we have seen, that the notes executed under the resolution of September 25,

1895, were to be in lieu of, not in addition to, those executed under the resolution of November 19, 1894; and, when they were paid, neither the milling company nor the defendant had the right to collect the notes executed under the last-mentioned resolution.

The instruction asked for by the defendant was properly refused by the court. By it the jury were told, in effect, that a party cannot recover back money paid under a mistake of fact, if he could (if it was possible) before payment have put himself in possession of all the material facts of the case. At one time it was held by the English courts that, in order to recover back money paid under a mistake of fact, it must be shown that the party seeking to recover it back must be guilty of no laches. But that is no longer the rule in England, nor in many of the states of this country. Mr. Minor states the rule as follows, and it seems to be sustained by reason and authority: That the right to recover money back paid by mistake is not "absolutely repelled by the circumstance that the payor had the means of knowledge in his power, if in truth, and in good faith, he did not possess a knowledge of the fact as to which the mistake is alleged. Even forgetfulness of the fact will not preclude his action, if the jury shall believe that it was a real and honest forgetfulness." 3 Minor, Inst. p. 373; Townsend v. Crowdy, 98 E. C. L. 477; Waite v. Leggett, 8 Cow. 195; Rutherford v. McIvor, 21 Ala. 750.

The instructions given by the court in lieu of those offered by both parties correctly stated the law, and fairly submitted the question to the jury; and, the jury having found that the money sued for was paid under a material mistake of fact, we cannot say that, under all the facts and circumstances of the case, their verdict was contrary to the law and the evidence.

The judgment complained of must therefore be affirmed.

RIELY and CARDWELL, JJ., absent.

HOTCHKISS v. MIDDLEKAUF et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

POWER OF ATTORNEY—CONSTRUCTION—LUNATIC'S LAND—INEFFECTUAL CONVEYANCE—RATIFICATION AND ACQUISITION.

1. A power of attorney "to demand and receive of and from any person or persons all such real and personal estate" as the principal may be entitled to as son and heir, does not authorize the attorney to sell and convey.

2. A deed executed by the committee of a lunatic residing in New York, by order of a New York court, is ineffectual to convey lands in Virginia.

3. Where a deed by committee of a lunatic is voidable, it is not ratified by the heirs of such incompetent where they did not act with knowledge on their part of the existence of the deed and the circumstances attending its execution.

Appeal from circuit court, Rockingham county.

Bill by Samuel Middlekauf and others against one Hotchkiss, trustee. From a decree for complainants, defendant appeals. Reversed.

James Bumgardner, for appellant. John E. Roller and Charles Curry, for appellees.

KEITH, P. Hotchkiss, trustee, brought an action of ejectment in the circuit court of Rockingham county against Samuel Middlekauf and others to recover 5,000 acres of land lying in said county. Before this cause was tried, the defendants filed a bill in chancery, in which they allege that the 5,000 acres which is the subject-matter of the ejectment suit was part of a larger tract of land originally granted by the commonwealth on the 8th of February, 1796, to one Gambill, and that by virtue of certain deeds they have become the owners of the land in controversy, and have thus become "joint owners" with the plaintiff in ejectment in the proportion which the 5,000 acres bears to the whole of the original patent, the title to the residue of which they concede is in Hotchkiss, trustee. In accordance with the prayer of the bill, proceedings in the action of ejectment were enjoined, and, the chancery cause coming on to be heard upon the bill, answer, exhibits, depositions, and the report of the commissioner in chancery, to whom it had been referred, the court decreed "that the complainants * * * be quieted in their possession and ownership of the 5,000 acres of land known as the 'Hill Survey' upon the terms indicated in the report of Commissioner Liggett." The cause is before us upon an appeal from that decree.

Appellant urged upon the court that there was error in the decree, for the reason, among others, that the bill was to be taken as claiming a tenancy in common upon the part of the plaintiffs with the defendants, while the decree was in favor of the plaintiffs for an ascertained tract of 5,000 acres; but, without entering upon any discussion of that and other technical objections taken to the proceedings in the circuit court, we shall content ourselves with an inquiry into the title presented for our consideration by the appellees, and endeavor to ascertain whether they have shown any right whatever to the real estate in controversy.

Their alleged title, like that of the appellant, begins with the grant from the commonwealth of Virginia to Matthew Gambill, dated February 8, 1796, and the chains of title of appellant and appellees are coincident until the deed from States Wilkins and George F. Butler, attorney in fact, and committee of Helen Hawkesworth, to James R. Mount, is reached.

Appellees claim under a deed to James R. Mount from George F. Butler claiming to act as the attorney in fact of States Wilkins and as committee of Helen D. Hawkesworth, a lunatic. Placing the title by this means in James

R. Mount, they deduce it through him to Prosper Knowlton, and as to the land of Prosper Knowlton appellees claim that it was sold for taxes, and conveyed by Little to W. Gambill, clerk of the county court of Rockingham, to one John N. Hill, of said county, by deed dated the 5th of December, 1857. By Hill it was conveyed to J. D. Price by deed of the 7th of April, 1866, and from him, by several deeds shown in the record, and not disputed, it is vested in the appellees. The deed to Mount was, as we have seen, executed by George F. Butler, as attorney in fact for States Wilkins, and committee of a lunatic; and his power and authority, both as attorney in fact and as committee, are denied by the appellant.

The authority to execute a deed must be by deed, "for the law requires that the power of attorney to execute a deed should be in writing, and of the same solemnity as the deed itself; * * * and the authority of the agent should be co-extensive with the act to be done, and the instrument clothing him with the authority as complete as the deed which he is to give." 1 Devl. Deeds (2d Ed.) § 356.

The following power of attorney is exhibited with the record:

"Know all men by these presents that I, States Wilkins, of the city of New York, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, my friend, George F. Butler, of said city, my irrevocable, true, and lawful attorney for me, and in my name, place, and stead to ask, demand, and receive of and from any person or persons all such real and personal estate as I may be entitled to by virtue of my being a son and heir at law of Jacob Wilkins and Ann, his wife, late of the city of New York, deceased; and I do hereby irrevocably authorize and empower the said George F. Butler to commence and prosecute in my name any suit or suits in that behalf, and to compromise or settle or compound the same, or either of them, from time to time, as he may deem proper, with full power of substitution, irrevocably giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal the 29th day of October in the year of our Lord one thousand eight hundred and thirty-four.

"States Wilkins. [L. S.]"

Powers of attorney are strictly construed. "While the general rule governing the interpretation of all contracts or written instruments that the intention of the parties is to be considered in construing their language applies to the construction of powers of at-

torney, yet powers of attorney are construed strictly, and the authority is never considered to be greater than that warranted by the language of the instrument, or indispensable to the effective operation of such authority. Powers of attorney are, ordinarily, subject to a strict construction; or, rather, the authority given is not extended beyond the meaning of the terms in which it is expressed." 1 Devl. Deeds (2d Ed.) § 358.

The power of attorney under consideration nowhere authorizes the agent to sell and convey. He is empowered "to demand and receive of and from any person or persons all such real and personal estate" as States Wilkins may be entitled to as son and heir at law of Jacob Wilkins and Ann, his wife.

Just such an instrument came under consideration before the court of civil appeals of Texas. Said the court: It was "found as a conclusion of law that the power of attorney from Parsons and wife to Duncan, Morgan, and Adams did not authorize them to sell the land in controversy. The court did not err in this conclusion. The power conferred was 'to bring suit for, settle up, compromise, release, obtain, or recover the interest belonging to and owned by Louisa C. Parsons,' etc. The power is not given to sell and convey. Powers of attorney are strictly construed, and the extent of authority must be ascertained from the terms of the instrument itself."

So far, therefore, as George F. Butler undertook to convey, as attorney in fact of States Wilkins, his deed is a nullity, because the authority under which he assumed to act conferred no power to execute such an instrument. George F. Butler and States Wilkins were appointed a committee of Helen D. Hawkesworth, a lunatic, by order of the chancery court of the state of New York, on the 23d of May, 1836, and on the 8th of August of the same year, upon the petition of George F. Butler, stating that Helen D. Hawkesworth was interested in two large tracts of land in the counties of Rockingham, Albemarle, and Orange in the state of Virginia, that the lands were entirely unproductive, that there was no prospect of their improving in value, that it was to the interest of the lunatic that her interest should be sold, and praying for authority to sell the same, it was referred to one of the masters of the court to ascertain whether it would be advantageous or beneficial to the said lunatic that all her right, title, and interest in the land should be sold. The master was required to report with all convenient speed. He obeyed the order by submitting a report of even date with the order itself, in which he states that the land consists of about 20,000 acres; that it is not worth 5 cents per acre, and he does not believe it could be sold for any price in cash; that one-half of it belongs to the lunatic; and that, if it is not disposed of, it will probably be sold for taxes. Upon these facts he is of opinion that it

would be advantageous and beneficial to Helen D. Hawkesworth, the lunatic, that all her right, title, and interest in said land be sold.

The proceedings in the courts of the state of New York by which Helen D. Hawkesworth was adjudged a lunatic, and George F. Butler was appointed her committee, and authorized to sell her land in the state of Virginia, and the deed executed by him in conformity with and obedience to that order constitute the only authority with which Butler was clothed to divest the title of Helen Hawkesworth, and transmit it to his grantee. Nor is it pretended that there is any other deed from her upon which the title of appellees to the land of which she was seized can rest. It is settled law that real estate is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it. Story, Conf. Laws, § 591. And it was said by Chancellor Zabriske in *Davis v. Headley*, 22 N. J. Eq. 115: "I find no case in which a statute, judgment, or proceeding in one country has been held to affect such property when situate in another country, or beyond the jurisdiction of the sovereign or court making the statute or decree." It is true "that in cases of fraud, trust, or contract courts of equity will, whenever jurisdiction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which the controversy had its origin; and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the persons, and the relief asked is of such a nature as the court is capable of administering." *Wimer v. Wimer*, 82 Va. 901, 5 S. E. 536, and authorities there cited.

Between these two propositions there is not the slightest conflict. The decree of the court does not operate *ex proprio vigore* in the foreign state or territory, but, having jurisdiction over the person, it will, in cases of fraud, trust, or contract, compel the party within its jurisdiction to obey its decree. As was said by Chancellor Wythe in *Farley v. Shippen*, Wythe, 135: "If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey land in North Carolina, why may not a court of equity in Virginia decree that party, regularly brought before that tribunal, to perform the act? Some of the defendant's counsel supposed that such a decree would be deemed by our brethren of North Carolina an invasion of their sovereignty. To this shall be allowed the force of a good objection if those who urge it will prove that the sovereignty of that state will be violated by the Virginia court of equity decreeing a party within its jurisdiction to perform an act there, which act, voluntarily performed anywhere, would

not be such a violation." In the last clause above quoted is to be found the very kernel of the matter. A foreign court can compel a party within its jurisdiction to do an act in Virginia, which act, if voluntarily performed by such party, would not violate the sovereignty of this state. If Helen Hawkesworth had been of sound mind, and had voluntarily conveyed the property in question, it would have been a valid act,—valid everywhere. So, if she had as a result of contract, trust, or fraud been under obligation to convey this property, the court of New York, having jurisdiction over her, could have compelled obedience to its decree, and that act which she could voluntarily have performed would have been equally valid, though done under the compulsion of a decree of a foreign court. But here we have no such case. Helen Hawkesworth was a lunatic. She has made no deed, and she was under no obligation, by contract or otherwise, to make a deed. The authority with which Butler, her committee, was clothed, is derived not from her, but from the laws of New York, and the act of her committee derives its whole validity from the judgment of the court which clothed him with power as her committee, and upon his petition decreed the sale of the property of the lunatic lying beyond its jurisdiction and within the limits of this state.

We are of opinion that the deed from George F. Butler to James R. Mount as attorney in fact for States Wilkins and as committee of Helen D. Hawkesworth was ineffectual to convey the land in controversy. Nor do we think that any efficacy is imparted to it by the subsequent conduct of States Wilkins and of Mrs. Furman, the daughter and heir at law of Helen Hawkesworth, even if the deed of Butler as committee is to be considered as a voidable, and not as a void, act. Ratification and acquiescence imply knowledge, and there is no proof in this record that the acts relied upon as a ratification of or acquiescence in the assumption upon the part of George F. Butler of authority to execute the deed to Prosper Knowlton were performed with knowledge on the part of Wilkins and Mrs. Furman of the existence of that deed, and the circumstances attending its execution.

As was said by Judge Harrison in *Wilson v. Carpenter*, 91 Va. 192, 21 S. E. 246: "Confirmation must be a solemn and deliberate act." * * * No man can be bound by a waiver of his rights unless such waiver is distinctly made with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear."

As we have seen, appellees' title flowing from the deed of Butler to James R. Mount passed from him to Prosper Knowlton, and, he being delinquent in the payment of taxes, it was sold by the state, and a deed made by L. W. Gambill, clerk of Rockingham county court, on the 5th of December, 1867.

What has been said with reference to the deed of George F. Butler in his double capacity of attorney in fact and committee renders it unnecessary to say anything with respect to the deed from L. W. Gambill further than to remark that it conveyed only such title as was vested in Prosper Knowlton, who had no title, and could, therefore, transmit none.

Nor need we consider whether this tax deed could be, under the circumstances, regarded as constituting color of title, for there is no evidence of adversary possession by force of which color or claim of title could ripen into a good title.

Nor do we deem it proper to inquire into the title of appellant, nor to express any opinion with respect thereto.

We are of opinion, for the reasons stated, that the decree of the circuit court should be reversed; the injunction awarded dissolved, the bill dismissed, and the appellants left to prosecute their action of ejectment in the circuit court of Rockingham county without prejudice to the rights of the parties, plaintiff and defendant, to that suit, except in so far as we have found it necessary in this opinion to pass upon the validity of the deed to James R. Mount from George F. Butler as attorney in fact for States Wilkins, and as committee of Helen D. Hawkesworth.

RIELY and CARDWELL, JJ., absent.

GARBER v. BRESSEE et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

INSURANCE—PREMIUM NOTE—DEFENSES.

In an action on a premium note, defendant testified that he would not have given it but for a representation by the company's agent "that there would be no trouble in getting the cash surrender value" of an old policy held by him, which he had been unable to obtain. *Held*, that the agent's statement was merely an expression of opinion, and not a defense to the note.

Appeal from law and equity court of city of Richmond.

Action by Bressee & Sons against one Garber on a note. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

B. B. Munford and H. O. Riely, for appellant. Thomason & Minor, for appellees.

BUCHANAN, J. The defense relied on in this case is set out in a special plea, of which the following is a copy:

"And the said defendant, by his attorney, comes and says that, before the making of the said note in the declaration mentioned, to wit, on the 12th day of June, 1895, this defendant, who had previously procured of the Mutual Life Insurance Company of New York a policy, No. 575,495, on what was known as the 'continuous installment plan,' went to the office of said plaintiffs, in the Chamber of Commerce Building, in the city

of Richmond, who were the agents of the said Mutual Life Insurance Company of New York, and in which said office said plaintiffs performed their duties as said agents, with the view of procuring the cash surrender value of said policy; that, while in said office, he was approached by one Frederick Weber, an agent of said Mutual Life Insurance Company of New York, and an agent of said plaintiffs, at their said office, and in the exercise of authority as such agent in said office, which said Weber solicited this defendant to take out another policy of insurance in the said Mutual Life Insurance Company of New York, known as the '5 per cent. debenture policy'; that this defendant informed said Weber that he could not afford to take out said policy, not being able to pay the premiums upon said plan of policy, and would not take it out unless this defendant could first obtain in cash the cash surrender value of the policy above referred to, which cash surrender value this defendant had been informed by an agent of said Mutual Life Insurance Company of New York amounted to several thousand dollars. The said Weber thereupon informed and assured this defendant that said company would pay the cash surrender value of this policy in cash if this defendant would take out the new policy above referred to; and, relying upon this representation and assurance which the said Weber made in the office of said plaintiffs in the city of Richmond, aforesaid, and in the character as agent for both the plaintiffs and the company, as aforesaid, this defendant agreed then and there to take out a policy for \$10,000, on the 5 per cent. debenture plan, in the said Mutual Life Insurance Company of New York, and on the 12th day of June, 1895, executed his negotiable note to the said plaintiffs for the said sum of \$694, the amount of the first premium on said last-mentioned policy, which note was payable six months after date. And said defendant says that, but for the representations and assurances made by said Weber, the agent of said company and of said plaintiffs, he would never have taken out said last-mentioned policy, or executed said note.

"And said defendant avers that, both by letter and in person, he requested and demanded a performance on the part of the said Mutual Life Insurance Company of New York of the contract made by their agents in their behalf, as aforesaid, and the payment of the cash surrender value of the aforesaid policy, but that said Mutual Life Insurance Company of New York has hitherto wholly failed and refused to pay in cash to this defendant the cash surrender value of the policy, or to in any respect comply with the said contract. And said defendant avers that, in consequence of this failure on the part of said Mutual Life Insurance Company of New York to perform its contract and pay the cash surrender value of said policy as

aforesaid, this defendant thereupon informed said company that he would not pay the amount of the aforesaid note given for the first premium on said policy, and that said policy was surrendered and held by him subject to their order.

"And the defendant avers that, by reason of the premiums aforesaid, the said note of \$694, upon which action was brought, is null and void, and defendant is not bound to pay the same.

"All of which the said defendant is ready to verify."

This plea was objected to, but the court held it to be sufficient, and allowed it to be filed. In doing this it must have held that the representations and assurances of Weber that the insurance company would pay the defendant the cash surrender value of policy No. 575,495 if he took out the new policy of insurance amounted to an engagement or undertaking, and were not mere expressions of opinion as to what the insurance company would do; for, if this latter construction be put upon the plea, it did not set up a good defense, and the objection to it ought to have been sustained. *Watkins v. Improvement Co.*, 92 Va. 1, 22 S. E. 554.

Construing the plea as setting up such an engagement or undertaking, is the plea sustained by the evidence?

The defendant is the only witness as to what took place between Weber and himself. In his testimony, he states that he was in need of money, and went to the office of the plaintiffs, who were the agents of the insurance company in the city of Richmond, to see if he could get the cash surrender value of the policy of insurance which he then held in that company. While in the office, he met Weber, who urged him to take out a policy of insurance upon the 5 per cent. debenture plan. He told Weber that he had a policy in the company, and was not able to take out any more insurance; but, if he could get the cash surrender value of his policy, he would feel like taking out a policy on that plan. "He [Weber] assured me there would be no trouble about getting the cash surrender value of it. I thought he knew what he was talking about, and I told him, if there was no trouble about getting that, I would take out the policy; and I did take out that policy with this distinct understanding. * * * He further states that he never would have taken out the new policy but for Weber's assurance that he "could get the cash surrender value for the old one."

On cross-examination he testified: "I told Weber that I did not care to take out additional insurance; and, when he talked to me on that subject, I told him that I had a policy in the company, and, if I could get the cash surrender value of that, I could probably be induced to take out the policy as he requested."

Again, when asked if the representations of Weber were all made at the time he took out

the policy, he says: "I cannot recollect that. I never thought there would be any trouble about it all. All I remember is that I wanted to get the cash surrender value on my policy, and he assured me there would be no trouble about doing it. * * * Weber said there would be no trouble in the world about my getting the cash surrender value. That was the inducement I had for taking it out."

There can be no doubt from the defendant's evidence that he was induced to take out the new policy of insurance by reason of the representations of Weber; but were they anything more than expressions of opinion on the part of Weber as to what the insurance company would do? Weber had no authority to bind the insurance company to pay the cash surrender value of the old policy. His language does not show that he intended to agree that his company would pay it; neither does the defendant seem to have so understood him, for he says that, when Weber assured him that there would be no trouble about getting the cash surrender value of his old policy, he "thought Weber knew what he was talking about." If he had been under the impression that Weber was making a contract or entering into an engagement for his company by what he said, the defendant used very inappropriate language to express his meaning. But if he understood that Weber was expressing an opinion as to what his company would do, upon which he (defendant) could rely, his language was peculiarly appropriate.

After a very careful consideration of all the evidence, and in the most favorable light for the defendant, as we were bound to consider it upon a demurrer to the evidence, and with a strong desire, if possible, under the law (for this is a very hard case), to find in favor of the defendant, we have been unable to do so.

The judgment of the circuit court must be affirmed.

RIELY and CARDWELL, JJ., absent.

HASHER'S ADM'X v. HASHER'S ADM'R et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

LIMITATION OF ACTIONS — COLLECTION AGENTS — CONTINUING TRUSTS.

1. Where an heir appoints an agent to collect his share of the estate and turn it over to him, there is no trust, and limitations commence to run against his claim for the share collected from the date of collection, whether demand is made or not.

2. The fact that the agent collects a part of the share some time after he collects the main portion does not make it a continuing trust.

Appeal from law and equity court of city of Richmond.

Bill by Granville Hasher against the administrator of Samuel F. Hasher and others. Plaintiff having died, his administratrix was

substituted. There was a decree in her favor, and defendants appeal. Reversed.

Willis B. Smith, for appellants. A. A. Gray and Pollard & Sands, for appellee.

KEITH, P. Daniel Hasher died in the county of Louisa, and in 1861 there was pending in the circuit court of that county a chancery suit for the settlement of his estate, and the distribution of the proceeds among his children. The parties interested determined that all questions at issue between them should be settled out of court. Thereupon they selected arbitrators, and dismissed the pending suit, and Granville Hasher, who lived in the state of Mississippi, appointed his brother, Samuel, his agent to collect and transmit to him his share.

The instrument by which Granville Hasher appointed his brother his agent does not appear in the record, but from the papers filed and other evidence we are of opinion that he was the attorney in fact to collect and transmit to his brother, in Mississippi, the proceeds of his interest in the estate of their father, and to that end to sell and dispose of his interest, and to collect and receipt for money due.

By a letter dated November 23, 1861, and postmarked Salem, Miss., November 30th of that year, Granville Hasher acknowledges receipt of a letter from Samuel, informing him that he had effected a division of the property, and that he expected to get the money in a short time; that he did not desire to keep it, as it would not be safe; and that he would write as soon as he received it.

Leaving out of view a letter written by Samuel F. Hasher to his brother, and mailed June 26, 1863, but which is not shown to have been received by Granville Hasher, there appears to have been no further communication between the principal and his agent.

Samuel F. Hasher died in the city of Richmond in February, 1894, and in December, 1895, Granville Hasher filed his bill in the law and equity court, in which he charges that Samuel F. Hasher "was liable to account to him in his fiduciary relations as agent and trustee, * * * and pay such sum as may be ascertained justly and rightly due." The administrator, widow, and children of Samuel F. Hasher are made parties defendant.

The defendants pleaded that the cause of action did not accrue within 20 years before said bill was exhibited and process issued. Answers were also filed by the defendants, and proofs taken, which establish the facts heretofore stated. The court referred the cause to a commissioner, and upon the coming in of the report rendered a decree in favor of the plaintiff for the sum of \$2,226.14, with interest on \$720.37, part thereof, from the 1st day of July, 1897.

We are of opinion that this decree was erroneous. The statute of limitation is a bar to the action. See *Lightning Rod Co. v. Cleghorn*, 59 Ga. 783. In that case the question was whether an attorney at law who has collected money for a client and retains it is a trustee. The court said: "An attorney's possession of the money of his client is more like that of a mere agent or bailee. It would be deviating from the ordinary use of language to call the client's money trust property, and the sole duty of the attorney in respect to it is to pay it over. He has no right to control and manage it as a trustee in possession. In this regard his powers do not extend beyond those of an attorney in fact appointed to collect, and the latter is not a technical trustee."

More can be said in support of a trust relation existing between an attorney at law and his client than as between an attorney in fact and his principal. In 1 Rob. New Prac. p. 458, it is said "that, to exempt a trust from the bar of the statute, it must be—First, a direct trust; secondly, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, thirdly, the question must arise between trustee and cestui que trust." See, also, Bart. Ch. Prac. p. 110.

At page 347 of Wood on Limitation it is said: "The tendency of the courts is to hold that, in the case of an ordinary collecting agent, whose only duty is to receive and pay over the money to his principal, the statute begins to run immediately upon the receipt of the money, regardless of the question whether a demand has been made or not, unless he has fraudulently concealed the fact of its receipt by him, or, in any event, after the lapse of a reasonable time after he has received it in which to notify his principal."

In this case there was no title vested in Samuel Hasher. He had no power to hold or invest the property of his principal. His plain duty was to collect and pay over at once, and this was fully understood to be the contract between them, as is shown by the letter of November 28, 1861, written to the agent by his principal.

It appears that an item of \$7.03 was collected November 7, 1868, and this circumstance is relied upon by appellee to establish a continuing trust. We cannot think that the delay in the collection by the agent of a part of the money at all affects the character of the relations between himself and his principal. The only effect that could be attributed to it would be that the statute of limitations would apply only from the date of its collection, but this is immaterial here, as the whole demand is barred. The limitation relied upon by the appellee is that of 20 years. We think the demand was barred in five years after the statute began to run, which was on the 1st of January, 1869; but that circumstance is likewise immaterial to this case, and is only mentioned in order to

prevent a misapprehension of our views upon the subject.

We are of opinion that the case should be reversed, and, this court entering such decree as the law and equity court should have entered, the bill of complaint must be dismissed.

RIBLY and CARDWELL, JJ., absent.

TYSON v. WILLIAMSON.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

BONDS—DEFENSES—OBLIGEE'S MISREPRESENTATION—RESCISSON—PLEADING—INSTRUCTIONS.

1. Code, § 3299, authorizing the obligor of a bond to plead the obligee's fraud, in inducing him to execute it, as a defense to an action thereon at law, is not available where such defense is based on equitable grounds requiring a rescission of the contract and revestment of the vendor with a consideration therefor, which relief can only be given in equity.

2. A plea to an action on a bond, alleging that land for which it was given "is worthless," is insufficient, since it does not allege that the land was not worth the price agreed on at the time defendant purchased it.

3. Where there is any evidence tending to prove facts on which a requested instruction is based, and such instruction correctly states the law applicable to such facts, the instruction should be given.

4. Where a vendee of land represented to defendant that his vendor was still the owner, and, as the pretended agent of such vendor, induced defendant to execute a bond to such vendor for the land, the bond is subject to the same defenses, in an action by the obligee, as it would have been had it been made payable to the vendee, and then assigned by him to plaintiff.

Appeal from circuit court, Rockbridge county.

Action by one Williamson against one Tyson. Judgment for plaintiff, and defendant appeals. Reversed.

Frank T. Glasgow, for appellant. Winfield Liggett and S. H. Letcher, for appellee.

BUCHANAN, J. The first error assigned is the action of the lower court rejecting pleas numbered 1 and 4, and striking out a portion of plea numbered 2, offered by the defendant, Tyson.

The defense attempted to be set up in plea No. 1 and in that portion of plea No. 2 which the court ordered to be stricken out was substantially the same. It was averred in those pleas that the defendant was induced to enter into the contract for the purchase of the lot, for which the bond sued on was executed, by certain representations as to the solvency of one McBride; that these representations were false and fraudulent; that defendant, soon after he discovered the fraud practiced upon him, refused to pay the bond in suit, and offered to rescind the contract for the purchase of the lot, and to make a deed reconveying it to the plaintiff, but that the plaintiff refused to rescind; wherefore the defendant averred that he was not liable on the writing sued on.

It was not permitted at common law, in an action upon contracts under seal, to prove a failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of the title or soundness of the personal property, but the defendant had to revert to his independent action for relief. Wyche v. Macklin, 2 Rand. 426; Association v. Rocky, 93 Va. 678, 25 S. E. 1009; 4 Minor, Inst. (3d Ed.) 792.

It is only by virtue of section 3299 of the Code that such defenses can be made in an action upon such a contract (Association v. Rocky, supra); and under it the defendant can claim compensation or damages for the injury which he has suffered by reason thereof, and the plea which sets up such defense must "allege the amount to which he is entitled by reason of the matters contained in the plea."

If the defense is based upon equitable grounds, which require a rescission of the contract and a reinvestment of the vendor with the title, the plea provided for by that statute is not available, because the court of law is incompetent to do complete justice between the parties. Mangus v. McClelland, 93 Va. 786, 22 S. E. 364; 4 Minor, Inst. 796.

There can be no rescission in this action; neither can there be a plea in bar based upon the right and offer to rescind. If the fraud or misrepresentations relied on are such as to justify a rescission of the contract,—as to which we express no opinion,—that relief can only be had in a court of equity.

The pleas were bad, both at common law and under the statute, and were properly rejected by the circuit court.

Plea No. 4 was evidently framed with reference to the provisions of section 3299 of the Code; but it does not aver that the lot which the defendant was induced to purchase by the alleged misrepresentations of the plaintiff's agent was not worth, at the date of his contract, what he agreed to give for it, but avers that it was worthless at the time the plea was filed. That averment is not sufficient. His damages, if any, are to be ascertained and fixed as of the date of the contract,—the time the fraud is alleged to have been committed,—and not as of the date his plea was filed.

This plea was also properly rejected.

Instruction No. 4 of the defendant was refused by the court. This action is assigned as error. The only objection made to it by the plaintiff's counsel is that there was no evidence tending to prove the facts upon which it was based. In this we think he is mistaken.

White states, in one part of his testimony, though he makes a different statement in another part, that he was authorized by Brenaman to sell the lot, and the defendant testifies positively, and without objection, that White told him when he purchased the lot that he (White) represented Williamson, the owner of it.

Under our practice, if there be any evidence tending to prove the facts upon which an instruction is based, and it correctly states the law applicable to such a state of facts, the instruction should be given. Railroad Co. v. Lacy, 94 Va. 460, 26 S. E. 834, and cases cited.

The defendant's instruction No. 5, which the court rejected, ought to have been given. If White purchased the lot from the plaintiff, and sold it to the defendant without disclosing the fact that he was the owner of it, but represented that the plaintiff was the owner, and had the bond made payable to him instead of to himself, it would be subject to the same defenses, in a suit between the plaintiff and the defendant, as it would have been if it had been made payable to White, and then assigned by him to the plaintiff.

For these errors the judgment complained of must be reversed, and the cause remanded for a new trial, to be had in accordance with the views expressed in this opinion.

RIELY and CARDWELL, JJ., absent.

BAILEY v. McCANCE.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

ACTION FOR ASSAULT — PROVINCE OF COURT AND JURY—INSTRUCTIONS.

1. An instruction, in an action for assault, that, if defendant assaulted plaintiff willfully, the jury might give vindictive damages, is not objectionable, as assuming that an assault was made.

2. The court will not disturb a verdict as excessive, unless it has been influenced by passion, partiality, or prejudice.

Error to hustings court of Petersburg.

Action by one McCance against David Bailey. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Hamilton & Mann, W. B. McIlwaine, J. A. D. Richards, L. A. Bailey, and J. M. Johnson, for plaintiff in error. W. R. McKenney, for defendant in error.

KEITH, P. McCance brought suit in the hustings court of the city of Petersburg against David Bailey, charging that one William Ellis had made an assault upon him, acting as the agent and at the instigation of the defendant. In this suit the jury found a verdict for \$2,000, upon which the court entered judgment. During the trial the defendant took several bills of exceptions to the rulings of the court, and the case is now before us upon a writ of error.

After the evidence had been concluded, the plaintiff asked the court to give four instructions, all of which it refused, and in lieu thereof gave seven of its own, and this action of the court constitutes the defendant's first bill of exceptions.

Plaintiff in error indulges in much learned and acute criticism upon the form of the instructions given by the court. To illustrate

the general character of the objections urged, we will take what is said with respect to the seventh instruction, which is as follows:

"If the jury believe from the evidence that the defendant assaulted the plaintiff willfully, and upon slight provocation, or no provocation at all, they may, in addition to the damages mentioned above, give, in their discretion, exemplary or vindictive damages, by way of punishment."

Plaintiff in error finds in this language an effort upon the part of the court to usurp the province of the jury, and many cases are cited to show the jealous care with which this court watches over the trial by jury, and protects it from the slightest invasion of its duties and privileges upon the part of the trial court. It is urged that in the instruction quoted the court assumes that an assault was made, and the only question left to the jury is whether the assault was willful and upon slight provocation or no provocation at all. The objection betrays the straits in which the plaintiff in error is placed. It is plain to us that it was under the instruction for the jury to say—First, whether or not the defendant had been guilty of assault; and, secondly, whether that assault had been willful, and upon slight provocation or no provocation at all. Those were the conditions upon which the conclusion of law was predicated. It was left to the jury to say whether or not a "willful assault" had been made, and, if they found such an assault was established by the evidence, then they were told that it followed, as a matter of law, that they could give, in their discretion, exemplary or vindictive damages by way of punishment.

And so with a like objection urged to other instructions given by the court. The criticism upon them is without merit, and we are of opinion that the court correctly and sufficiently propounded the law of the case to the jury.

When we come to the facts, they are to be considered as upon a demurrer to the evidence, and, in the light of that rule, the testimony must be taken to establish that the defendant in error, a man more than 60 years of age, quietly walking along the streets of the city of Petersburg, was willfully, and without provocation, assaulted by William Ellis, at the instigation of David Bailey, who was present, inciting, encouraging, and approving the commission of the offense. The injuries inflicted, while not such as to endanger life, were inflicted in a wanton and unjustifiable manner. The head of defendant in error was cut in several places, his eyes were bruised, his ear was bitten, and his back was strained, and this outrage was perpetrated upon him by the negro man, Ellis, incited and encouraged thereto by the plaintiff in error, David Bailey.

The jury which heard the evidence was of opinion that \$2,000 was a proper sum to allow as damages for this most aggravated as-

sault. The judge who presided at the trial approved the verdict, and the authorities cited by the learned counsel for plaintiff in error admonish us that we shall not trench upon the province of a jury and disturb its verdict, unless it has been influenced by passion, partiality, or prejudice.

Upon the whole case we are of opinion that there is no error, and the judgment of the hustings court is affirmed.

RIELY and CARDWELL, JJ., absent.

MARYE, Auditor, v. BOARD OF AGRICULTURE.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

STATUTES — REPEAL — BUREAU OF AGRICULTURE — SALARIES AND EXPENSES.

1. Acts 1897-98, p. 717, providing for the payment of salaries and expenses of the bureau of agriculture out of the taxes and fees collected on forfeitures, and in no event out of the public treasury, repealed any authority that may have existed for payment of such salaries and expenses out of the treasury.

2. By Acts 1897-98, p. 717, there is appropriated for the fiscal years of 1898 and 1899, for the "commissioner of agriculture, salary of, \$1,200. His clerk, salary of \$500, which, with all other salaries and expenses of the bureau of agriculture, shall be paid from collections on forfeitures, if sufficient, and, if not, pro rata; "but in no event shall such salaries and expenses, or any part thereof, be paid out of the public treasury." Held, that the commissioner's salary is not discriminated from other salaries and expenses of the bureau, and is not payable out of the treasury.

Appeal from circuit court of city of Richmond.

Petition by the board of agriculture for a writ of mandamus against Morton Marye, auditor. From a judgment allowing the writ, respondent appeals. Reversed.

The Attorney General, for appellant. R. Carter Scott, for appellee.

KEITH, P. A. S. Buford and others, constituting the board of agriculture, presented their petition to the circuit court of the city of Richmond asking for a mandamus upon Morton Marye, auditor of the commonwealth, requiring him to pay certain warrants drawn upon him by the treasurer of the board of agriculture, and countersigned by its president, amounting to \$597.65. The petition recites that grave duties are imposed upon the board, of much importance to the agricultural interests of the state, in the preparation of handbooks, the examination and testing of fertilizers, the distribution of seeds, the publication of information, and the making of annual reports; that for the purpose of carrying out the designs for which the board was established an appropriation of \$10,000 was made by an act of the legislature approved March 5, 1888, which was to be placed to its credit, and drawn out by warrants of its treasurer, countersigned by the president

of the board. Relators further aver that this law has never been repealed, unless it be by act approved March 3, 1898, and that it was in full force and effect on the 1st day of October, 1897. They claim that under the provisions of this act on the 1st day of October, 1897, there was, or should have been, on the books of the auditor, to the credit of the board of agriculture, the sum of \$10,000, and that warrants were drawn as required by law on this fund, which were honored by the auditor for the sum of \$7,118.81, of which \$5,161.62 were paid prior to March 3, 1898. Relators claim that the moneys thus paid should have been charged against the \$10,000 appropriated by the act of 1898, and, if that act was not in force, then the payment was without authority of law, and the auditor is without purpose to use money dedicated to other purposes by the legislature to wipe out this overdraft. Relators further allege that, in order to keep the bureau of agriculture a "going concern," and to pay salaries and expenses, they drew upon the auditor sundry drafts amounting to \$597.65, which he has refused to honor because of the provision of the general appropriation bill approved March 3, 1898. Warrants numbered 1, 2, 3, and 4, filed with the petition, were for the expenses of the bureau, and those numbered 5, 6, and 7, were for salaries of officials and employes of the government.

Section 8 of an act of March 5, 1896 (Acts 1895-96, p. 926), is as follows:

"The board of agriculture shall adopt all needful rules and regulations providing for the collection of the money arising from the fees aforesaid or from fines imposed under this act, and shall require the same to be deposited with the treasurer of the state, and only to be drawn therefrom upon warrants issued by the auditor of the state, out of which shall be paid only the expense of carrying out the provisions of this act, including a commission of three per centum to the commissioner of agriculture for collecting and disbursing the said fees and fines, which sum for all purposes shall not exceed the sum of three thousand dollars in one year."

It appears from the petition that there has been collected under that section, and deposited with the treasurer of the state, the sum of \$7,090. Relators claim that this fund is "earmarked" by law, and can only be used in paying expenses incurred in carrying out the "fertilizer laws" of the commonwealth, and a commission of 3 per centum to the commissioner of agriculture. When the auditor read the appropriation bill approved March 3, 1898, and found that he had allowed the sum of \$7,118.81 to be drawn out of the treasury, and, believing that he had no authority of law therefor, [he] laid violent hands on the above money received from fertilizer taxes amounting to \$7,090, and used it, as he claims, to wipe out the aforesaid overdraft." This act on the part of the auditor is claimed to have been without authority of law. Re-

lators further aver that they are officers of the state, that their employes are employes of the government, and come within the exception of clause 6 of the act approved March 3, 1898. They therefore pray for a writ of mandamus to compel the auditor to honor the warrants drawn upon him.

To this petition the auditor of public accounts filed his answer, and denied that the commonwealth of Virginia owes the relators, or any one for its use, the sum of \$597.65, but admits that there is now in the treasury the sum of \$159.12 applicable to the payment of the warrants drawn upon him. He avers that the act of March 3, 1898, repeals the act of March 3, 1898, and all subsequent acts, in so far as said act appropriates any money for the benefit of the board of agriculture. He states that during the fiscal year ending September 30, 1898, there was collected and paid into the treasury taxes and fees on fertilizers amounting to \$7,090, and that he paid warrants drawn upon him by the board during that period amounting to \$6,930.88; that the several unexpended balances of prior annual appropriations made for the benefit of the board of agriculture have heretofore, at the close of the several fiscal years, been duly settled, and are not now available to pay the warrants mentioned in the petition.

It is not to be denied that much confusion exists in the legislation with respect to the board of agriculture, but the legislature, when it passes an appropriation bill, is presumed to know the condition of the treasury, the sums that have been theretofore paid out under existing laws, the balances to the credit of the various divisions of the state government, and the sums paid out for their support.

The appropriation bill (Acts 1895-96, p. 608) is entitled "An act appropriating the public revenue for the two fiscal years ending, respectively, the 30th day of September, 1896, and the 30th day of September, 1897." Indeed, all the appropriation bills, so far as we have examined them, have a similar, if not identical, caption, and appropriate money for the fiscal year beginning on the 30th of September preceding their passage, and cover the period of two years from that date.

No money can be lawfully paid out of the treasury except in pursuance of appropriations made by law. Const. Va. art. 10, § 10. When the legislature came to pass the appropriation bill of March 3, 1898, it is presumed to have done so with full knowledge of the situation. It knew the previous legislation with respect to the board of agriculture, and that by virtue of it the board had paid into the treasury a certain sum derived from fees collected in the performance of its duties. It knew that the auditor had paid out a certain sum of money upon the warrants of the board, and it took the situation just as it existed, and passed the act of March 3, 1898 (Acts 1897-98, p. 717).

There is appropriated by that act for the fiscal years ending September 30, 1898, and September 30, 1899, for the "commissioner of agriculture, salary of, twelve hundred dollars. His clerk, salary of five hundred dollars, which, with all other salaries and expenses of the bureau of agriculture, shall be paid from the fees and taxes collected on forfeitures if sufficient for the purpose; if not they shall be paid pro rata from said funds; but in no event shall such salaries and expenses, or any part thereof, be paid out of the public treasury. Should there be any excess from said taxes and fees on fertilizers the same shall be paid into the treasury."

Language could hardly be more explicit, and by force of it any authority of law which may theretofore have existed for the payment out of the public treasury of any sum for salaries and expenses on the part of the board of agriculture was repealed, if not in express terms, by a necessary implication. If the fees and taxes were sufficient to pay the salaries and expenses, well and good; if insufficient to pay them in full, the funds were to be distributed pro rata; if more than sufficient, the surplus is to be covered into the treasury, but "in no event shall such salaries and expenses, or any part thereof, be paid out of the public treasury."

The circuit court was of opinion that the salary of the commissioner could be discriminated from other expenses and salaries of the bureau of agriculture, and was payable out of the treasury. This view rests mainly upon the punctuation. The law says, "Commissioner of agriculture, salary of, twelve hundred dollars," with a period after the word "dollars." "His clerk, salary of five hundred dollars," and then follows the paragraph as above quoted. While conceding the force of the views presented by the circuit court in its opinion, we are constrained to the conclusion, reading the whole paragraph together, and thus seeking to ascertain its true intent and meaning, that there was no purpose upon the part of the legislature to distinguish or discriminate the salary of the commissioner from other salaries and expenses of the bureau of agriculture. "The commissioner of agriculture a salary of twelve hundred dollars, his clerk salary of five hundred dollars, which, with all other salaries and expenses of the bureau of agriculture, shall be paid from the fees and taxes collected on fertilizers if sufficient for the purpose; but in no event shall such salaries and expenses, or any part thereof, be paid out of the public treasury." The writ of mandamus will not issue in such a case except to compel the performance of a plain duty. There can be no payment of public money except in pursuance of law, and we have been able to discover no such law applicable to this case.

It is not for us to express any opinion upon the merits of the methods pursued in the

management and control of the finances of the state. They are doubtless such as have come down to us from the past, and will prevail until altered by law. Our duty ends when the conclusion is reached that there is no existing law which, in our judgment, requires us to grant the prayer of the petitioners.

Certain formal objections were taken to the petition, but upon them we express no opinion.

The judgment of the circuit court must be reversed, and the petition dismissed.

SPILLER et al. v. WELLS et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

COURTS—CONCURRENT JURISDICTION—PRIORITY—MECHANICS' LIENS.

Where a subcontractor filed a bill to ascertain and enforce his lien, making the owner and the general contractor parties defendant, and alleging that the general contractor had perfected his lien for a certain amount, which was in fact the amount due him, and defendants were served with process, the statute of limitations ceased to run against the general contractor's lien, and all claiming as contractors under him, and he could have complete relief in the suit; and hence the court had priority of jurisdiction, as against a court of concurrent jurisdiction, in which the general contractor afterwards filed a bill to enforce his lien.

Appeal from law and chancery court of city of Norfolk.

Bill by J. W. Wells against one Spiller and others to establish and enforce a mechanic's lien. William H. Barnard and others intervened, claiming as subcontractors. From a decree ascertaining the amounts due complainant and the subcontractors, and directing a sale of the property to satisfy their demands, Spiller and others appeal. Reversed.

George McIntosh, for appellants. Thomas W. Shelton, for appellee. R. H. Baker, for A. G. Anthony.

KEITH, P. The facts with which we have to deal are as follows:

Appellants contracted with Wells to erect a three-story brick building in the city of Norfolk, which was completed on the 4th day of July, 1896. On the 30th day of August of that year, Wells perfected his lien as general contractor by filing in the clerk's office of the corporation court of the city of Norfolk an account showing the amount and character of the work done, the material furnished, the prices charged therefor, the payments made, and balance due, and a description of the property upon which he claimed a lien, all of which was duly recorded by the clerk.

At rules held in the clerk's office of the court of law and chancery of the city of Norfolk on the first Monday in January, 1897, Wells filed his bill to enforce this lien. Ap-

pellants were made parties defendant, and into this suit came a number of persons claiming as subcontractors under the plaintiff, and asking to have their rights protected.

William H. Barnard, doing business as Barnard & Co., also filed a petition, in which he alleged that J. W. Wells, the general contractor, had contracted with him to do the tinning, iron work, and plastering, and to furnish the necessary terra-cotta pipe and work for draining the building to be erected; that petitioner had fully complied with his contract with Wells, and had on the 31st of July, 1896, filed his mechanic's lien upon the building in the clerk's office of the corporation court of the city of Norfolk for \$1,836.88,—that being the balance due to him,—and on the next day gave notice in writing to the owners of the property of the amount and character of the lien. Petitioner further avers that on the 26th of December, 1896, he instituted a suit in chancery in the circuit court of the city of Norfolk against Wells, the general contractor, and the owners of the building, to enforce his said lien; that the circuit court thus acquired jurisdiction of the suit, of the parties thereto, and the subject-matter thereof. On the 28th and 29th of December process in said suit was duly executed on all of the defendants, and from that time the circuit court had "exclusive jurisdiction of all matters growing out of the enforcement of the mechanic's lien against the property, and the settlement of all matters in controversy concerning said liens."

The prayer of the petition is that the suit instituted by Wells in the court of law and chancery of the city of Norfolk to the first January rules, 1897 (which was Monday, the 3d day of the month), may be dismissed, or that he may be restrained from further proceeding therein until the final disposition by the circuit court of the city of Norfolk of the suit instituted by petitioner.

By a decree entered April 10, 1897, the cause was brought on to be heard upon the petition of Barnard & Co. and of the subcontractors, and the petition of Barnard & Co. was dismissed, and the cause referred to a commissioner to state certain accounts. The commissioner having reported in obedience to this decree, a further decree was entered on the 1st of July, 1897, ascertaining the amounts due the general contractor and the subcontractors, and directing a sale of the real estate to satisfy their demand. From that decree appellants appealed, and the chief contention is that the court erred in rejecting the prayer of the petition of Barnard & Co.

In *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317, this court had occasion to examine the law in relation to a conflict of jurisdiction between two courts having concurrent jurisdiction, and it was there held (Judge Riely delivering the opinion) that "that court which first acquired cognizance of the controversy, or obtains possession of the property in dispute, is entitled to retain it until the end of the litigation, and

should decide all questions which legitimately flow out of the controversy. That jurisdiction is acquired by the issue and service of process, and, in case of conflict between courts of concurrent jurisdiction, the date of service of the process determines the priority of the jurisdiction." It is further stated that technical creditors' bills are exceptions to the general rule which pertains to a conflict of jurisdiction between courts of concurrent jurisdiction; but as the bills before us are not creditors' bills, but suits brought to ascertain and enforce liens binding a specific piece of property, we need not confuse or embarrass the discussion by further reference to this exception. The rule established is necessary to the orderly and decent administration of justice. Nothing can be more unseemly than a struggle for jurisdiction between courts; but a rule which rests for its support upon considerations of convenience, however great, and of decency, order, and priority, however exacting, must yield to the higher principle which accords to every citizen the right to have a hearing before some court. An essential condition, therefore, of the application of the rule insisted upon as to priority of jurisdiction, is that the first suit shall afford the plaintiff in the second an adequate and complete opportunity for the adjudication of his rights. When Barnard & Co. instituted their suit in the circuit court, that court acquired jurisdiction over the subject of litigation and the parties to it. Wells, who afterwards brought suit in the law and chancery court, was made a party defendant. His case is fully stated in the bill,—that he was general contractor for the erection of the building, and that he had perfected his mechanic's lien, amounting to \$6,788.20, the precise sum for which the lien is claimed by Wells in the account filed as an exhibit with his own bill. The lien of Wells, of course, inures to the benefit of all subcontractors, so that they can also be amply protected in the circuit court.

While the suit in that court is not a general creditors' bill, and did not affect the statute of limitations as to creditors not named as to parties to it, there can be no doubt that as to liens claimed by parties to it, and directly involved in the suit, the statute ceased to run upon its institution. The work was completed on the 4th of July, 1896, and it was necessary to sue within six months,—that is to say, on or before January 4, 1897; but we are of opinion that it was not incumbent upon Wells to institute a separate suit in order to enforce his lien, but that he, and those claiming under him as subcontractors, could be fully protected in the suit brought by Barnard & Co., and that the statute ceased to run, as to the lien of the general contractor, from its institution. If the stoppage of the statute by the suit in the circuit court had not that effect as to the subcontractors as well as the general contractor, their claims would have been barred when presented in the suit brought by Wells; for their petitions were not filed until

the 9th of April, 1897,—more than three months after the expiration of the six months within which it was necessary to bring suit.

We are of opinion that the general contractor could have had complete relief in the circuit court, which first acquired jurisdiction over the subject of litigation and the parties to it; that from its institution the statute of limitations ceased to run, as against his mechanic's lien and all claiming as contractors under him; and that, as a consequence, this case is controlled by the decision in *Craig v. Hoge*, supra; and the decree of the court of law and chancery is therefore reversed.

RIELY and CARDWELL, JJ., absent.

GRAND FOUNTAIN OF UNITED ORDER OF TRUE REFORMERS v. WILSON.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

WILLS—WHAT CONSTITUTES—EXECUTION—PROBATE—MUTUAL LIFE INSURANCE—RIGHTS OF BENEFICIARY—INFANTS.

1. Indorsements by the holder of a certificate of membership in a beneficial order, giving to her two children all her interest in such certificate at her death, and naming an executrix to receive payment thereof, are testamentary, and must be executed as a will.

2. In an action by the beneficiary on a certificate of membership in a beneficial association, proof of payment by the association to one named as executrix in an instrument inoperative as a will, executed by the insured, with the approbation of the father of the beneficiary, who was a minor, is not relevant, nor proof that the proceeds thereof had been applied to the support of the beneficiary.

3. Nor proof that the proceeds had been applied to expenses incurred in behalf of the insured in payment of doctors' bills and in placing a stone over her grave.

4. In an action on a certificate of membership in a beneficial association, evidence that a testamentary writing thereon, disposing of the proceeds, was executed and acknowledged as a will, is inadmissible, since a will must be proved before a probate court and admitted to record.

Error to corporation court of Lynchburg.

Action by William Wilson, a minor, by his next friend, against the Grand Fountain of the United Order of True Reformers. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Giles B. Jackson, for plaintiff in error. R. P. Armistead and N. T. Goldsberry, for defendant in error.

KEITH, P. Plaintiff in error, an association organized under the laws of this state, insured the life of Cella Wilson for the sum of \$500, upon certain conditions set out in its certificate. Cella assigned this certificate to her two children, William and Alice, and upon the death of Alice it vested in William as survivor. Upon the death of his mother, he, by his next friend, instituted suit in the corporation court of Lynchburg to recover the amount due, which resulted in a verdict

and judgment in his favor. Plaintiff in error during the trial took sundry bills of exceptions, and the cause is now before us upon a writ of error.

The first bill of exceptions is to the admission of the certificate of membership, but as the action of the court in that behalf is not relied upon in the petition for the writ of error nor in the argument, and as no ground is perceived upon which it could be maintained, it will not be further noticed.

The second bill of exceptions, which is the first assignment of error in the petition, is upon the following ground: When the defendant in error read the certificate before the jury, it omitted to read a certain indorsement written thereon in the following words and figures:

"Lynchburg, Va., August 6, 1890.

"This is to certify that I, Cella Wilson, do leave to my two children, William and Alice, all money or moneys mentioned on the face of this policy, Miss Sarah C. Watkins to be executrix, who shall receive all the money or moneys mentioned on the face of this policy for my two children, William and Alice Wilson.

"The said Sarah Watkins shall pay all money drawn on the face of this policy in the True Reformers' Bank for my two children, William and Alice. I now sign my name and fix,

her
Cella X Wilson."
mark.

Thereupon plaintiff in error moved the court to cause it to be read, but the court, being of opinion that the indorsement was testamentary in its character, refused to do so. It is clear that in this ruling there was no error. The writing is testamentary. It makes disposition of property to take effect after death, and names an executrix. It could be operative only as a will, and as a will it is inoperative, because not properly executed.

Plaintiff in error offered to sustain the issues on its part by the deposition of Sarah C. Watkins, which the court excluded, and this action is assigned as error. The court was plainly right. She had been named as executrix in the paper above referred to. As that paper could not be proved as a will, it conferred no authority upon her whatever, but was a mere nullity, and any payment made to her by plaintiff in error upon the faith of it was made in its own wrong. Nor was it relevant to show that the money had been paid to her with the approbation of Samuel Wilson, the father of the beneficiaries, nor that its proceeds had been applied to the support of William Wilson, or for expenses incurred on behalf of Cella Wilson in the payment of doctors' bills and placing a tombstone over her grave.

The ruling of the court presented in bill of exceptions No. 5, excluding certain witnesses

offered by plaintiff in error to show that the testamentary writing on the back of the certificate naming S. C. Watkins as executrix was acknowledged by Celia Wilson in their presence, that it was written at her instance and request, and that she made her mark for the signature thereto, is not well taken.

A will must be proved before a probate court, and admitted to record, and the testimony sought to be adduced was wholly irrelevant and inadmissible.

The court certifies the facts as follows: That Celia Wilson was, at the time of her death, a member of the Grand Fountain of the United Order of True Reformers, in good standing; that all her dues had been paid; that the policies or certificates were presented for payment, with indorsements thereon by Sarah C. Watkins; that her right to collect was questioned, and payment was postponed, that it might be ascertained to whom the money was to be paid; and that at a later day there appeared, at the Lynchburg branch of the plaintiff in error, Samuel Wilson, father of William Wilson, with his counsel, and S. C. Watkins, and it was then stated that the parties had agreed that the money was to be paid to S. C. Watkins, and payment was then and there made and receipted for. It further appears that the money was paid to Sarah C. Watkins because she was named on the back of the policies or certificates as the person to receive it; and it was further proved that Sarah C. Watkins transacted all the business of Celia Wilson in her lifetime, and was her confidential and intimate friend, and that Alice Wilson died before her mother.

There was a motion to set aside the verdict, which was, we think, properly overruled. There can be no doubt that the facts stated were abundantly sufficient to warrant the verdict and the judgment of the corporation court.

It is therefore affirmed.

RIELY and CARDWELL, JJ., absent.

BURRUSS v. NATIONAL LIFE ASS'N OF HARTFORD, CONN.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

LIFE INSURANCE—CONDITIONS—VALIDITY—APPLICATION—MISREPRESENTATIONS—KNOWLEDGE OF AGENT—RIGHTS OF BENEFICIARY.

1. Code, § 3252, providing that no condition or restrictive provision of a policy shall be operative unless in writing or in type of a specified size, applies to the application, where it is expressly made a part of the policy.

2. Where the beneficiary in a life policy told the agent before the application was made that he understood the insured to be in bad health, and to have been rejected by other companies, but the insured showed by his applications to the other companies, by unqualified statements in the application for the policy in suit, and by the certificate of the medical examiner, that he was in good health, and had never been rejected, the

agent was not charged with knowledge that the statements in the application were false.

3. Where insurance is effected on the life of a debtor for the benefit of a creditor, and material misrepresentations inducing the contract are made by the insured, it vitiates the policy, though the beneficiary was ignorant thereof.

Error to law and equity court of city of Norfolk.

Action by one Burruss against the National Life Association of Hartford, Conn., on a life insurance policy. There was a judgment for defendant, and plaintiff brings error. Affirmed.

George McIntosh, for appellant. Ed. Pendleton, for appellee.

HARRISON, J. The court is of opinion that section 3252 of the Code, which provides that no failure to perform any condition or restrictive provision of a policy shall be a valid defense to an action thereon, unless such condition or restrictive provision be printed in type of a specified size, or written with pen and ink in or on the policy, applies alike to the application and the policy issued thereon, where, as in the case under consideration, the application is expressly made a part of the contract of insurance. In such a case the application and the policy issued thereon, taken together, constitute the contract of insurance between the parties, and any other construction would enable the insurer to avoid the statute by putting all such conditions and restrictive provisions in the application alone.

In the case at bar it is conceded that the conditions and restrictive provisions found in the application, the failure to perform which is relied on by the defendant, in part, as its defense to the plaintiff's motion, are in type smaller than that required by the statute. The clause in the application obnoxious to this provision of the statute must therefore be disregarded, and the case considered as if no conditions or restrictive provisions were embodied in the contract sued on.

Not relying on the condition that the answers of the insured to the questions contained in the application should be treated as warranties that the same were complete and true, the defendant company, by its plea, puts in issue the bona fides of the contract, by alleging that the answers made by the insured to certain material questions were absolutely false and untrue, and that they were made for the purpose of misleading, deceiving, and defrauding the defendant, and did deceive and mislead it into issuing the policy sued on.

Recognizing and giving full force to the rule controlling in case of a demurrer to evidence, this plea is abundantly sustained. The questions and answers involved were most material, and the answers are shown to have been absolutely false, and it clearly appears that insured knew they were false when made.

The policy in question was issued for the benefit of a creditor of the insured, who is the plaintiff in error here; and it is contended that the beneficiary is not affected by the false representations of the insured, because the agent of the company who took the application had knowledge of the falsity of such statements at the time they were made, and that the company is therefore estopped to rely on the same as avoiding the policy.

Independent of the question whether such knowledge, if possessed by the agent, would bind the company, and prevent it from relying on the fraud of the insured, the evidence does not sustain the contention that any such knowledge was brought home to the agent. Great stress is laid on the fact that the agent applied to the beneficiary, and suggested his taking out the policy; that the beneficiary then told the agent he did not think a policy could be written on the life of the insured, and that he understood him to be in bad health, and to have been declined by other insurance companies; that, in reply, the agent said that made no difference, that his company took risks declined by other companies. This reply of the agent is fully explained by the fact, perfectly understood by the insured, that the company took first-class risks and second-class risks, and that the premium was regulated by the class to which the insured belonged, the premium for a second being very much higher than that for the first class risk. The insured stood his examination for the policy before the medical examiner, and, in his application, answered the questions propounded without any qualification, in such a way as to entitle him to be received as a first-class risk. The policy was issued upon his life as a first-class risk, received by the beneficiary as such, and the premium paid, known by him to be only the amount required for a first-class risk.

The beneficiary is shown to have been a man of business experience, carrying a large amount of insurance on his own life. He knew the usual course was for the insured to make out and sign an application, and for the company to issue the policy on the faith of the statements therein made; and he does not claim to have understood or supposed that the defendant company pursued any different course in that respect. The statement by the beneficiary to the agent that he understood the insured to be in bad health, and to have been rejected by other companies, did not establish the fact that those things were true; at most, it could only have put the agent on inquiry. The result of that inquiry was to show, by his applications to other companies, by his own unqualified statements in the application to the defendant company, and by the certificate of the medical examiner, that he was in good health, and had not been rejected by other companies.

It would hardly be contended that, if the insured had taken out this policy for his own benefit, his estate could recover it, in the face of the gross fraud shown to have been perpetrated by him in procuring it. There is nothing in the circumstances of the case to place the beneficiary in any better position than the insured would have occupied had the policy been for his benefit. Where insurance is effected upon the life of a third person, for the benefit of a creditor, and misrepresentations of material matters inducing the contract are made by the party whose life is insured, it will vitiate the policy, although the beneficiary was ignorant of such false representations.

For these reasons, the judgment complained of must be affirmed.

RIELY and CARDWELL, JJ., absent.

MOORE v. TRIPLETT.

(Supreme Court of Appeals of Virginia, Jan. 12, 1899.)

DEEDS—CONSIDERATION—PAYMENT OF GRANTOR'S DEBTS—GRANTEE'S LIABILITY—TRUST—JUDICIAL SALE—CONFIRMATION—ADVANCE BID—ACCEPTANCE—DISCRETION OF COURT.

1. One who accepts a deed in consideration of his agreement to pay the grantor's debts becomes primarily liable therefor.

2. Where land is conveyed in consideration of the grantee's promise to pay the grantor's debts, equity will treat the transaction as a trust, and subject the property in the hands of the grantee, his representatives, or one to whom he had voluntarily conveyed it, to the payment of such debts.

3. Whether a judicial sale should not be confirmed because of an advance bid of 10 per cent. of the price bid at the sale is within the legal discretion of the court.

4. In general, a bidder at a judicial sale will not be permitted to put in an upset bid.

5. Where land was fairly sold in parcels at a judicial sale for an adequate price, an upset bid for parts of the land should not be accepted, where it would materially injure the utility of the part left to the original purchasers.

Appeal from circuit court, Shenandoah county.

Action by J. I. Triplett against Kate G. Moore to set aside a deed to certain lands, and subject them to complainant's claims. From a decree in favor of complainant, defendant appeals. Affirmed.

John H. Roller, for appellant. Barton & Boyd, Walton & Walton, and L. Triplett, Jr., for appellee.

RIELY, J. This is the sequel of the case of Moore v. Triplett, reported in 23 S. E. 69.

The main question involved by the appeal is the propriety of the decree of the circuit court subjecting to the payment of the debts of Israel Allen and others the land conveyed by Morgan M. Moore to his mother by the deed of July 11, 1885, and settled by her by a contemporaneous deed on his wife and children.

The debts were due by him, and assumed by his mother. They constituted a large part of the consideration for the conveyance to her of his land, and were successfully relied upon at the hearing of the former appeal to sustain the validity of the said deeds. She died without having paid the debts, and they have not since been otherwise discharged. They have remained unpaid from 1885 down to the present time, upwards of 13 years. The debts of Allen were secured by prior deeds of trust on parts of the land conveyed by Morgan Moore to his mother.

By accepting the conveyance, and promising to pay the debts, she became personally liable for them, and, between her son and herself, she was primarily bound. This doctrine has been so repeatedly recognized by this court as no longer to admit of question. *Willard v. Worsham*, 76 Va. 302; *Osborne v. Cabell*, 77 Va. 462; *Francisco v. Shelton*, 85 Va. 779, 8 S. E. 789; *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871; *Ellett v. McGhee*, 94 Va. 377, 26 S. E. 874.

The assumption by the mother of Morgan Moore of his debts constituting a part of the consideration for the conveyance to her of his land, it would be against equity and good conscience to permit her to make a voluntary settlement of the property so as to protect it from liability for the debts, so assumed, in the hands of her beneficiaries. A man must be just before he is generous. He cannot make a valid gift of his property, and leave his obligations unsatisfied or unprovided for. Indeed, the deed of settlement itself seems to contemplate the payment of the debts assumed from the property conveyed, and makes provision for a sale of a part thereof for that purpose. The grantor was apparently in doubt as to her right to make the settlement, but expresses her desire to do so "as far as legal and proper for her to do." The deed is inartistically drawn, but it is fairly plain that the grantor intended to provide in the deed of settlement for the payment from the property thereby settled of the debts which she had assumed, in the event that they were not otherwise paid. There is therefore no error in the decree for the sale of the land to pay the said debts.

Another assignment of error was the refusal of the court to accept the upset bids put in on certain parcels of the land, and its confirmation of the sale that had been made thereof.

Whether a court should confirm a report of sale depends in a great measure upon the circumstances of the particular case. In acting upon the report, it must exercise not an arbitrary, but a sound, legal discretion in view of all the circumstances. It must be exercised in the interest of fairness, prudence, and with a just regard to the rights of all concerned. This is the result of many cases on the subject. *Hudgins v. Lanier*, 23 Grat. 494; *Brock v. Rice*, 27 Grat. 812; *Rou-*

dabush v. Miller, 32 Grat. 454; *Berlin v. Melhorn*, 75 Va. 639; *Hansucker v. Willson*, 76 Va. 753.

In *Todd v. Manufacturing Co.*, 84 Va. 587, 5 S. E. 676, it was said: "All the cases agree that the court must sell at the best price obtainable; and when a substantial upset bid, well secured and safe, for ten per cent. advance, is put before confirmation, it is as much a valid bid as if made at the auction. This is the settled law of this court, and will doubtless so remain until the legislature shall provide by law as has been done by the English parliament." This same language was quoted with approval in *Ewald v. Crockett*, 85 Va. 290, 7 S. E. 386.

The above statement of the law was construed by the counsel of the appellant to be a departure from the previous cases and the former practice in this state, and to mean that "a substantial upset bid, well secured and safe, for ten per cent. advance, put in before confirmation," was always to be accepted without regard to the circumstances of the case, and that the court had no discretion in the matter. Such a construction is a misapprehension of the import of that decision. The court in that case found no equitable circumstances, which, in the exercise of a sound legal discretion, called for a rejection of the upset bid. It was in amount a large advance on the price obtained at the sale, and in that view substantial. It was well secured and safe. The creditors whom it benefited desired its acceptance, and the purchaser, as the court took pains to show at length, had no just ground of complaint. We understand the decision in that case to mean simply that a substantial and well-secured upset bid should be accepted, unless there are circumstances going to show that injustice would be done to the purchaser or other person. That such was the purport of that decision and the understanding of the judge who delivered the opinion of the court in that case and also in *Ewald v. Crockett*, supra, is clearly manifested in the subsequent case of *Carr v. Carr*, 88 Va. 785, 14 S. E. 368, where he enunciates the long and well established rule in Virginia that "the court, in acting upon the matter, was called upon to act in the exercise of a sound legal discretion in view of all the circumstances. It is to be exercised in the interest of fairness, prudence, and with a just regard to the rights of all concerned." And he refers to the cases decided long before *Todd v. Manufacturing Co.* to sustain his declaration of the practice and the law on the subject in this state.

Considering the circumstances of the case at bar, and applying the rule prevailing in this state, our conclusion is that the circuit court did not err in rejecting the upset bids and confirming the report of sale of the parcels of land in question.

The sale took place under favorable cir-

cumstances, was fairly made, and there is not a suggestion of misconduct or impropriety on the part of any one.

There is no evidence or complaint, even, that the land did not sell for a fair price, and bring its market value. The commissioners state in their report that it brought good prices, and recommend the confirmation of the sale.

The main upset bid was put in by one who had an agent at the sale, who bid for him. It has been generally understood by the profession and enforced by the court that one who was a bidder at the sale by himself, or by an agent, which is the same thing, or was present, and had the opportunity to bid, would not, as a general rule, be permitted to put in an upset bid. He must bid at the sale, in open competition with all others, what he is willing to give for the property. A different rule would have a pernicious effect upon judicial sales of property.

The contention over the rejection of the upset bids is not made by the parties who put in the same, but by the owners of the land. As respects the rights of the latter, it appears that every fair means was resorted to that was likely to realize the best possible price at the sale. It was advertised in two of the county newspapers for upward of 60 days, and the several tracts divided into two or more convenient parcels for the purposes of the sale. The parcels were first offered for sale, and then the tract as a whole, with the understanding that the largest amount realized would be reported to the court as the sale. That by parcels realized the largest amount. The entire farm, embracing all the tracts and parcels, with the exception of the mansion house and 54 acres that had been cried out to the wife of Morgan M. Moore, was then offered as a whole, without, however, any advance bid being made on the sale by parcels. The mansion house and 54 acres was excepted from the offer of the whole farm at the request of Morgan Moore. As stated by the judge of the circuit court: "The sale of the land seems to have been conducted by the commissioners in strict accordance with the wishes of the Moores, the owners of the land. The terms of sale were modified to advance their interest. The land was offered in such parcels as they indicated, and offered as long and as often as they requested. They did not then, nor do they now, make any complaint that the sale was not an open and fair bidding, and the prices obtained were not all that could have been expected and desired." The circumstances of the sale furnish them no ground for any complaint.

The case of the purchaser would be very different if the upset bids were accepted. They were only made on a part of his purchases, and his other purchases would stand, and be confirmed. The farm is composed of lowlands and uplands. The bottom lands

are fertile and productive; the uplands are poor, and in part wild and uncultivated. In dividing the farm for the purposes of sale, it was wisely so laid off into parcels that any one buying a parcel of the productive bottom land could also buy a contiguous or conveniently located parcel of upland, and the two be utilized together. The owner of the one would find it convenient and desirable to own the other, but he would not desire to own any part of the upland, unless he could also own some convenient part of the bottom land. The purchaser, J. I. Triplett, having at the sale first bought a parcel of the lowland, he was thereby induced and willing to buy upland that could be advantageously used along with it. The latter, without the bottom land, he did not want, and would not have given as much for it as he bid, if, indeed, he had bid for it at all. The upset bids were made on only a part of his purchases, and one of them so circumscribed that if accepted he could not bid on the parcels as at the last sale. It was an offer of an advance of seven and a fraction per cent. on a parcel of the bottom land bought by him, and another parcel of like land bought by another person, and made a condition that both parcels be again offered as one tract. The other upset bid is a small advance on one of the parcels of upland bought by Triplett. If the upset bids were accepted, the effect would be to compel him to take in any event all the parcels of upland except one, which he would not have purchased at all if he had not first bought the parcel of bottom land, and force him to buy not only it on the resale, but also the other parcel of bottom land coupled with it as a condition of the upset bid, and incur the risk of having to pay an exorbitant price for them both. This would be eminently unfair and unjust, and a court of equity will never put a judicial purchaser in such a situation. The court, in the interest of fairness and justice, in view of all the circumstances rightly rejected the upset bids, and confirmed the sales of the land as made by the trustee and commissioners under its decree.

Judicial sales are constantly taking place, and it must continue to be so as long as there are debts to be collected, and liens to be enforced. Great care should be observed that the practice of the court in acting upon a report of sale should not be such as to deter or discourage bidders, but such as to induce possible purchasers to attend such sales, to encourage fair, open, and competitive bidding in order that the highest possible price be obtained, and to inspire confidence in the stability of judicial sales. This is due not merely to the purchaser, but also to creditors, debtors, and the owners of property which has to be sold by the court.

There were a number of other errors assigned, which related to minor matters, such as the appointment of the receiver in the

case, and the settlement of his accounts. Due notice was given for his appointment, and no objection made; and, as respects his accounts, it is sufficient to say, without particularizing, that no error appears in the action of the court.

The decree appealed from must be affirmed.

COMMERCIAL BANK v. CABELL et al.
(Supreme Court of Appeals of Virginia. Jan. 12, 1890.)

PARTNERSHIP — SET-OFF AND COUNTERCLAIM — RIGHTS OF PARTNERS — INJUNCTION.

1. A firm executed a note to the wife of one of the partners, with the other partner as surety. The former partner, obtaining possession, deposited the note as security for an individual debt to a bank, which instituted suit thereon. It was shown that a settlement of the partnership accounts would show a balance in favor of such surety, and he alleged the insolvency of his co-partner. *Held*, that he was entitled to enjoin the suit in order to set off against the note the debt of the other partner to him on the partnership account.

2. The surety was entitled to set off such partner's indebtedness to him, since, as the note belonged to the estate of the wife, who had died, and not to the husband, the bank took the note subject to all the equities that attached to it in the hands of the husband.

3. In an action to recover on a note executed by a partnership to the wife of one of the partners, and indorsed by the other, it appeared that the former partner had obtained possession after the wife's death, and transferred it to a bank to secure his own debt. This note had been given to the wife in renewal of a former one, which the husband had previously indorsed to the bank, but had obtained by substituting a forged note in renewal. The bank claimed that, as it rightfully held the original note, those claiming through the wife could not have the benefit of the note in issue without making good to it the forged note; but it was not shown that the bank held the original note with the wife's consent, and it had acquiesced in the forgery for three years. *Held*, that it was not entitled to recover.

Appeal from corporation court of city of Danville.

Suit by the Commercial Bank against J. R. Cabell and others. There was a decree from which plaintiff appeals. *Affirmed*.

Peatross & Harris and Christian & Christian, for appellant. Green & Miller, for appellees.

HARRISON, J. The salient facts out of which this controversy grows appear to be that J. R. Cabell and his son-in-law, John A. Coleman, became partners in the tobacco warehouse business in September, 1885. This partnership, being insolvent, terminated in October, 1888, with the understanding that J. R. Cabell (his partner being utterly insolvent) was alone to wind up its business. On June 18, 1887, the firm of Cabell & Coleman borrowed from Ann E. Coleman, the wife of John A. Coleman, \$949.56, and executed to her its note for that amount, payable on demand, with J. R. Cabell as surety thereon. Subsequently John A. Coleman deposited this note,

belonging to his wife, with the Commercial Bank, as collateral security for his individual debt to the bank. It remained with the bank as such collateral until March 8, 1892, when John A. Coleman deposited with the bank in its stead, and as a renewal thereof, a note of like amount purporting to be executed by the same parties, but which was in fact a forgery as to each of the parties thereto, and received from the bank the original note, which he returned to his wife.

On June 2, 1892, Ann E. Coleman surrendered this note to her father, J. R. Cabell, and took from him in its stead a new note of that date, payable on demand, and executed by Cabell & Coleman, with J. R. Cabell as surety, for \$1,099.98; that being the original debt of the firm to her, with interest added. Ann E. Coleman died in October, 1892, with this last-named note in her possession. On March 31, 1893, John A. Coleman, who had in the meantime obtained possession of this note, indorsed the name of his wife thereon, and deposited it with the Commercial Bank as collateral security for two notes of his own, upon which he had forged the name of his father, Daniel Coleman, as surety. In September, 1893, the estate of Ann E. Coleman was committed to the sergeant of the city of Danville for administration; and in August, 1896, the Commercial Bank instituted an action at law in the name of the sergeant, as administrator, for its benefit, against Cabell & Coleman and J. R. Cabell, to recover both notes, — one for \$949.56, and the other for \$1,099.98.

The note for \$949.56, being a forgery, cannot be recovered; and therefore the controversy is narrowed to the right of John R. Cabell, the only responsible party, to enjoin the proceeding at law in order that he may offset the note for \$1,099.98, with the indebtedness of John A. Coleman to him on partnership account, as a member of the firm of Cabell & Coleman.

The bill filed by John R. Cabell for this purpose is free from the objection of multifariousness, and states a case entitling the complainant to the intervention of a court of equity.

Ordinarily a court of equity will not suspend the course of legal proceedings to enable the defendant in an action at law to set off a balance which he alleges to be due him on partnership account. This rule is founded upon the idea that a settlement of the accounts might show a balance against the complainant, instead of for him, and courts of equity will let the law take its course, rather than suspend it upon doubtful results. Where, however, the facts alleged and shown, as in the case at bar, make it certain that the settlement will show a balance in favor of the complainant, although the precise amount of that balance does not appear, and it is further alleged that the debtor partner is wholly insolvent, thus making it plain that the complainant will be remediless, unless he is allowed to have the benefit of his offsets in the

pending suit, a court of equity will, in order to prevent wrong and injustice, stay the proceeding and afford relief. In such a case there is no adequate remedy at law; for, although it is clear that there will be, on settlement, a balance in favor of the complainant, still the amount is undetermined, and can only be ascertained by a settlement of the partnership accounts, and to settle such accounts is one of the principal heads of equity jurisdiction. *Earl of Oxford's Case*, and notes, 2 White & T. Lead. Cas. Eq. pt. 2, p. 1291; *Hewitt v. Kuhl*, 25 N. J. Eq. 24.

It is contended that John R. Cabell is not entitled to his offsets, as against the Commercial Bank, because John A. Coleman was an intermediate assignee of the note in question from Ann E. Coleman, and an intermediate assignor of the same to the bank. Code, § 2860. This note was in Ann E. Coleman's possession when she died. Her husband subsequently found it, forged his wife's name upon it, and thus transferred it to the bank. It is true that John A. Coleman was sole distributee of his wife, and that, subject to her debts, and costs of administration, he would have been entitled to the proceeds of this note; but he was never at any time, in the sense contended for, the assignee of his wife. In transferring the note to the bank, he acted in violation of the rights of his wife's personal representative, and its transfer amounted to no more than an order in favor of the bank, upon his wife's administrator, when appointed, for whatever interest he might have in its proceeds.

At the time that John A. Coleman, as distributee of his wife, became entitled to an interest in this note, he was heavily in debt to John R. Cabell, the only party responsible for its payment. Under these circumstances, John R. Cabell was clearly entitled to set off against his indebtedness to John A. Coleman the latter's indebtedness to him; and, when the bank took the note from Coleman, it stood in his shoes as distributee of his wife, with no better title or greater interest than he had, and held the note subject to all the equities that attached to it in his hands.

It is earnestly contended in argument that the note for \$1,099.98 is a renewal of, and represents, the original genuine note of Cabell & Coleman to Ann E. Coleman for \$949.56, which was rightfully held by the bank as collateral, and surrendered by it March 8, 1892, for a forged note tendered in renewal thereof by John A. Coleman; that, the bank having been thus fraudulently induced to surrender to Ann E. Coleman the genuine note, neither she nor those claiming under or through her can now have the benefit of that which represents the genuine note, without making good to the bank the forged note taken in lieu thereof.

This view of appellant's rights is not presented by the pleadings, and the evidence does not show that the bank held the original genuine note with Mrs. Coleman's knowledge

and consent. If, however, it be presumed that Mrs. Coleman, for her husband's accommodation, loaned him her note to use as collateral in obtaining money from the bank, it may with equal propriety be presumed that it was her refusal to give him further indulgence or means of credit, and her demand of him to close the transaction and return her note, that precipitated the husband's action.

After the bank had held the note as collateral for nearly two years, John A. Coleman substituted a forged note in its place, and returned the genuine note to its owner, who died in possession of it. There is no evidence that he was in any sense the agent of his wife, nor is it pretended that his representations to the bank were made with her acquiescence or knowledge, or that there was any circumstance to arouse her suspicion. No breach of duty, or failure of duty, or negligence of any sort, is brought home to her. She got back her own property, with the bank's consent, wholly innocent of any act on her part to compromise her position.

On the other hand, the bank held the note as collateral for a debt due and enforceable. Of its own accord it chose to renew the loan, and permitted a forged collateral to be foisted upon it in the place of a genuine note. It was plainly the duty of the bank, under the circumstances disclosed by the record, to inquire as to the genuineness of the note before receiving it. The failure to perform that duty has brought about the loss of which complaint is now made.

It may be added that the bank was informed as early as August, 1893, that the \$949.56 note held by it was a forgery. If the right to reclaim the genuine note was relied on, the necessary proceeding for that purpose should have been promptly instituted. Instead of prompt action, the fraud has been acquiesced in for three years, and finally an action at law brought to recover on the forged note.

There is no error in the decree complained of, and it must be affirmed.

RIELY and CARDWELL, JJ., absent.

DOOLEY v. CHRISTIAN, Clerk.
(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

TAXATION—SALES TO STATE—REDEMPTION BY PREVIOUS OWNER—COSTS.

1. Under Code, § 664, as amended by Acts Assem. 1897-98, pp. 513, 514, authorizing "the previous owner" to redeem his land sold to the state for taxes, one in whose name the land was returned delinquent when the state became the purchaser is entitled to redeem, though the land was sold a second time to the state after it had been entered in the land book in the name of his grantee in violation of Code, § 469, requiring land to be continued in the name of the former owner until the purchaser obtains a deed from the state or the land is redeemed.

2. Where land was sold to the state for taxes a second time after it had been entered in the

land book in the name of the previous owner's grantee, instead of being continued in the name of such owner, as required by Code, § 469, the previous owner may redeem without paying the costs of another's application to purchase from the state for the sum for which the land was sold at the second sale.

Application for mandamus by one Dooley against one Christian, clerk of Richmond hustings court. Granted.

W. F. Brown, for plaintiff. W. H. Werth, for defendant.

BUCHANAN, J. This is an application to this court for a mandamus to compel the clerk of the hustings court of the city of Richmond to accept the sum tendered by the petitioner under section 664 of the Code, as amended by Acts 1897-98, p. 513, in redemption of a certain parcel of land sold for the nonpayment of taxes.

There is no controversy between the petitioner and the clerk as to the material facts of the case, which are substantially as follows:

The land, which was located in the city of Richmond, was returned delinquent for the nonpayment of taxes for the year 1883, and sold therefor, in the year 1888, and purchased by the treasurer of the city for the state. The sale was reported by him to the hustings court of the city, confirmed, and entered of record as required by law.

The land was for the next year reported by the treasurer as having been theretofore sold, and his report confirmed and recorded. It was assessed for taxes in petitioner's name for both of these years (1886 and 1887).

In the year 1894 it was returned delinquent for the nonpayment of taxes for that year, in the name of one Vaughan, who had acquired through sundry conveyances such title as remained in the petitioner after it had been sold in his name to the commonwealth as above set forth. At that sale the treasurer bought it in the name of the auditor for the benefit of the state and city. His report of the sale to the court was also confirmed and entered of record.

After the expiration of two years after the last-mentioned sale, one Glenn filed his application to purchase the land from the commonwealth under section 666 of the Code as amended, and proposed to pay therefor the amount for which the land was sold in the year 1896, when standing in the name of Vaughan, together with such additional sums as may or would have accrued for taxes and levies, with all interest provided by law, had not the land been sold and purchased by the commonwealth. He gave notice of his application to purchase to Vaughan and a creditor, or creditors, who appeared by the record to have a deed of trust upon the land. Within four months from the time notice was served under Glenn's application to purchase, the petitioner, for the purpose of redeeming the land, applied to the clerk for a statement of "the amount for which said sale in petitioner's

name was made, together with such additional sums as would have accrued from taxes and levies if the said land had not been purchased by the commonwealth, with interest on the amount for which the sale was made at the rate of 6 per cent. per annum from the day of sale, and on the additional sums from the 15th day of December in the year in which the same would have accrued, and also his (said clerk's) fee for making such statement, for calculating interest, and so forth." The clerk, in response to that application, furnished the petitioner a statement showing that the unpaid taxes upon the land, together with interest and costs, independent of Glenn's application to purchase, were \$2.77, and that the penalty and costs which had accrued by reason of Glenn's application amounted to the sum of \$9.08. The petitioner tendered the \$2.77, but the clerk refused to accept anything unless he paid the whole amount shown to be due by the statement furnished. This the petitioner declined to do, and instituted this proceeding.

The clerk bases his refusal to receive the sum tendered in redemption of the land upon two grounds:

(1) That the amount tendered did not include the penalty and costs which had accrued thereon by reason of the application of Glenn to purchase the land from the commonwealth under section 666 of the Code, as amended by Acts of 1897-98.

(2) That the petitioner was neither "the owner [of the land], nor his heir, assign, or creditor," and was, therefore, not entitled to redeem.

We will first consider the right of the petitioner to redeem the land, for, if he is not one of the persons authorized to redeem, it will be unnecessary to consider the other question.

Section 664 of the Code, as amended by act of March 24, 1896 (Acts Assem. 1897-98, pp. 513, 514), provides by whom real estate purchased by the state for the nonpayment of taxes may be redeemed. Those who are given this right are "the previous owner, his heirs or assigns, or any other person having the right to charge the same with a debt."

The person described as the previous owner of the land clearly means the person in whose name the land was returned delinquent when the state became the purchaser. This is evident from the provisions of sections 469 and 662 of the Code.

By section 469 the commissioner of revenue was required to note on his land book all real estate which is sold for taxes either to a private individual or to the state, the number of acres therein, and to whom sold, and to continue the whole tract upon his land book in the name of the former owner until the purchaser obtains a deed therefor, or until the owner shall redeem the same from the commonwealth.

By section 662 it was provided that when any real estate is offered for sale, as provided for in section 638, and no person bids the

amount charged thereon, the treasurer shall purchase the same in the name of the auditor for the benefit of the state, county, city, or town, respectively, unless such real estate has been previously purchased in the name of the auditor, in which case it shall be sold for such price as it will bring.

If the commissioner of the revenue and the treasurer had done their duty under these sections, such a condition of things as exists in this case could not have arisen. But for the commissioner's misconduct in transferring the land on his land book from the name of the petitioner to that of Vaughan, the treasurer would not have been engaged in the folly of buying for the state lands which it had purchased six years before, and which had neither been redeemed nor purchased from it. The land would still be on the land books, as it ought to be, in the name of the petitioner; and, if it were, would any one doubt that he was the previous owner referred to in section 664, and had the right to redeem? How, then, can he be deprived of that character and that right by a violation of law on the part of the officers of the state?

This construction is strengthened by the provisions of section 666 of the Code as amended. That section provides, among other things, that nothing in it shall be construed as in any way affecting the duties of the commissioner of the revenue as prescribed by section 469, and that the party who desires to purchase such land from the commonwealth shall state in his application the person in whose name it stood at the date of the sale thereof to the commonwealth, and also the person in whose name it stands at the date of the application, in the event that it has been transferred contrary to the provisions of section 469. It would seem from this that the legislature intended that the original owner in whose name it was first sold to the commonwealth should have notice of the application, because at the time it was sold in his name he was the owner, and the only owner, of the land known to the commonwealth, and because without a violation of law it could not be transferred to another upon the land books until it had been redeemed or purchased from the commonwealth in the manner prescribed by law. The legislature also intended that the person in whose name it was standing at the time the application was filed should have notice of it, although transferred to his name in violation of section 469, because, being in his name at that time, he was very probably in possession of the land, and deeply interested also in its redemption. But by providing for such notice it was not intended to recognize the validity, either of the transfer of the land, or of any sale of it made in his name after the illegal transfer, and while the commonwealth was the owner of the land under its purchase in the name of the person from whom it had been illegally transferred. To hold that the person described as "the previous owner" in sections 664 and 666 of the Code as amended

was any other than the person in whose name the land stood when the commonwealth purchased it for the nonpayment of taxes, the amount of which has never been paid, would defeat the chief object for which the latter section was enacted. It would enable the applicant who proposes to purchase the land to get the commonwealth's title to it by paying, not what was due the commonwealth and city at the time the land was sold to the commonwealth, and all additional sums which would have accrued thereon since that time, with its interest, but by paying only the amount for which the land was illegally sold in the name of some one holding under the original owner, and the additional sums which would have accrued since that time, leaving unpaid all sums due thereon prior to, and not included in, the amount for which the last sale was made. Such a construction would offer a premium to purchasers to defeat the commonwealth in the collection of her revenue, and enable them to get title to her lands for less than the taxes and levies and additional sums due thereon, and for less, even, than she requires the owner, in whose name they were originally forfeited, to pay in order to redeem them.

We are of opinion, therefore, that the petitioner had the right to redeem the land, and that he had the right to redeem it upon the terms and conditions prescribed in section 664 of the Code as amended, and that the clerk had no right to demand of him the payment of the costs, fees, and penalty which section 666 of the Code as amended provides shall be collected for the benefit of the party who has filed an application to purchase under that section. Such costs, fees, and penalty can only be collected from the party redeeming where the application to purchase is filed in accordance with that section.

The prayer of the petitioner must be granted.

BRADSHAW v. BRATTON.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

JUDGMENT — FRAUDULENT SATISFACTION — AGREEMENT OF ANOTHER TO PAY — CONSIDERATION.

1. A judgment debtor, after having made several payments on a judgment, confessed a new judgment for the balance due on the agreement that the creditor should satisfy the former judgment. The debtor secured a letter from the creditor to the clerk, directing him to satisfy the "latter judgment," and, by pretending that it authorized satisfaction of the one confessed, secured an entry satisfying that, instead of the oldest judgment as intended. *Held*, that such satisfaction was obtained by fraud, and should be canceled.

2. A purchaser of land subject to the lien of a judgment wrote the judgment creditor, who had no other claim against him, "I will pay you before you can make it by law." *Held* a sufficient promise in writing to pay the judgment.

3. A creditor's forbearance to enforce a judgment against land on which it was a lien is a sufficient consideration for a promise by a subsequent purchaser of the land to pay it.

Appeal from circuit court, Highland county. Bill by George W. Bratton against J. B. Bradshaw to cancel the satisfaction of a judgment. From a decree for complainant, defendant appeals. Affirmed.

Geo. M. Cochran and C. P. Jones, for appellant. R. L. Parrish and J. W. Stevenson, for appellee.

KEITH, P. The controlling facts in this controversy are as follows: Bradshaw, as the administrator of David Lockridge, deceased, recovered a judgment on the 23d day of December, 1884, in the circuit court of Highland county, against Warren L. Gladwell, for the sum of \$1,573.80, with interest from date. Upon this judgment an execution was issued on the 24th of December, 1884, which was retained in the clerk's office, and was subject to numerous credits. By deed dated January 28, 1888, Gladwell conveyed certain real estate bound by this judgment to Bradshaw, who, in his representative capacity, had obtained the judgment before mentioned. This judgment was assigned to the appellee, Bratton, to whom payments were from time to time made by Bradshaw. In 1893, Bratton, being in need of money, demanded payment of this judgment from Bradshaw, and in response to the letter making the demand Bradshaw replied as follows:

"McDowell, Va., July 11th, 1893. Mr. Geo. W. Bratton—Dear Sir: Yours has been received. I assure you it would afford me no little pleasure to send you all the money that is coming to you. But, as you know, times are very tight. I expected to have paid you before this, but the truth is I can't make collections of money that is coming to me. But I will pay you before you can make it by law, and it will put costs on the matter; and if you have to sell the land to make the money out of it the land will likely be sold on 1, 2, and 3 years' time. So you see it will not help the matter, for I think I can pay you before you could make it, if you were to sue me to-day; and I will, if possible, pay you \$100.00 before long, if that will do you any good. Hoping this will find you all well, I am, respectfully, J. B. Bradshaw."

In December, 1895, Bratton renewed his demand for money, and received a letter dated December 14th, as follows:

"McDowell, Va., December 14, '95. Mr. Geo. W. Bratton—Dear Sir: I have been putting off writing you for several days, expecting something to turn up by which I would have some money for you. Had a road contract just about done, when this storm came, and stopped me. If the weather opens up a little, I hope to get some money out of that. I assure you it would afford me great pleasure to pay you some money right now, but it does seem that collection is awful hard to make, and almost all the people owe me. Please don't make any disposition of my paper till I can raise you some money. If any

one wants to sue you, I will pay the cost and the debt as soon as I can raise you some money, rather than have you put to cost. With thanks for your kindness in the past, and kind wishes for you and yours, I am, respectfully yours, J. B. Bradshaw."

In January, 1896, Bratton's necessities having become more urgent, he consulted his attorney, John W. Stevenson, about the collection of the Gladwell judgment, or the feasibility of using it as a security upon which to borrow money; was advised that, as the judgment stood in the name of Bradshaw, administrator of Lockridge, had been several times assigned, and a number of payments made upon it, and was, moreover, barred by the statute of limitations, that it could not be made available for that purpose; and, at Bratton's instance, Stevenson had an interview with Bradshaw, explained to him Bratton's necessities, and was told that it was impossible for him to pay one dollar upon the debt. Stevenson reminded Bradshaw that Bratton had been kind and indulgent to him; that the judgment was in a condition that it could not be negotiated so as to get money upon it; and in response to Bradshaw's question as to how it could be arranged Stevenson suggested a confession of judgment by Bradshaw to Bratton for the balance due on the Gladwell judgment. As a result of this interview, Bradshaw, after some hesitation, executed his bond to Bratton for \$1,835.15, and on the 28th of January, 1896, confessed a judgment for that amount. It had been agreed as a part of the arrangement entered into between Bratton and Bradshaw that the Gladwell judgment should be marked "satisfied," but by some oversight this was not immediately done, and upon discovering that fact Bradshaw called upon Bratton, and obtained from him the following paper, dated February 22, 1896:

"Capt. J. C. Matheny: J. B. Bradshaw having acknowledged judgment for eighteen hundred and odd dollars, and there being a judgment recorded in your office vs. W. L. Gladwell for the same debt, the former and latter judgments make two judgments for the same debt. Therefore, not wishing to hold two judgments against said Bradshaw, you will please mark said latter judgment 'satisfied,' and oblige, Geo. W. Bratton.

"February 22nd, 1896.

"A copy. Teste: J. C. Matheny, Clerk."

Bradshaw took this paper to Matheny, the clerk, and induced him to mark as "satisfied" the judgment which he had confessed on the 28th day of January. Thereupon Bratton filed his bill alleging that Bradshaw, in procuring the paper from him in February 22, 1896, had practiced a fraud, and prayed to have the entry of satisfaction of his judgment made by the clerk of the county of Highland on the lien docket, and other records of his office, erased and annulled.

Bradshaw answered this bill, denied the fraud, and charged that the confession of

judgment made by him on the 28th of January was procured by the fraudulent representation made by Bratton through his attorney, John W. Stevenson, the statement relied upon as constituting the fraud being that Stevenson, at the interview which led up to the confession of judgment, represented the Gladwell judgment as still in force, when in fact it was at the time barred by the statute of limitations, of which Bradshaw was ignorant.

The circuit court held that the judgment confessed by Bradshaw was not obtained by misrepresentation, and that its release was obtained by a fraud upon Bratton.

The paper signed by Bratton in which is to be found the only semblance of authority to mark any judgment in his favor "satisfied," when properly construed, is plainly a direction to the clerk to enter satisfaction of the "Gladwell judgment," for that judgment, though prior in point of time, was the "latter" of the two judgments in the order in which they were mentioned by Bratton in his letter; and when Bradshaw induced the clerk to enter satisfaction of the judgment confessed by him on the 28th of January he was guilty of a fraud.

We are of opinion that the letters, especially that of July 11, 1893, are a promise to pay the judgment in controversy. There was no other transaction to which that letter could refer. There was no ground upon which Bratton could have made a demand of Bradshaw except that he had purchased land bound by the Gladwell judgment. It is true that Bradshaw had never assumed its payment, but he had, from time to time, made payments upon it, and at the date of this letter it was a valid and subsisting charge upon real estate in his possession, to the enforcement of which in due course of law he could have interposed no defense. We have, then, a written promise on Bradshaw's part to pay the Gladwell judgment, and it only remains to consider whether that promise rests upon a sufficient consideration.

Bratton's letter to Bradshaw is not in the record, but its contents may be safely inferred from Bradshaw's reply. Bratton was in need of money. He looked to this judgment as the means by which it might be procured. He demanded its payment, and he threatened suit. In reply, Bradshaw tells him: "I will pay you before you can make it by law, and it will put costs on the matter; and if you sell the land to make the money out of it the land will be likely sold on 1, 2, and 3 years' time, so you see it will not help the matter, for I think I could pay you before you could make it if you were to sue me to-day." There is no express acceptance of this promise, but the threatened suit was not instituted. Bradshaw's possession was not disturbed, and he was permitted to remain in the uninterrupted enjoyment of the land bound by this judgment. This was not a promise for the benefit of

Gladwell, but one that inured to the benefit of the promisor.

In Smith, Lead. Cas. (8th Ed.) p. 546, it is said: "Even when the stay or withdrawal of a distress or execution, the dissolution of an attachment, or the extinguishment of an incumbrance on the faith of a promise that the debt shall be paid results in the loss of the only effectual means of obtaining payment from the debtor, the statute of frauds will operate as a bar, unless it appears that the property so released was the defendant's, or that he derived some benefit from the transaction of which the law can take cognizance."

It is true that the incumbrance was not extinguished as a condition or consideration for the promise, nor can the fact that it subsequently became barred be looked to as a part of the consideration, for it was not Bradshaw's debt; but that Bratton refrained from its enforcement on the faith of the promise was of great benefit to Bradshaw, and is as good, though not as great, a consideration as the extinguishment of the incumbrance would have been. The evidence establishes that there was a promise to pay the Gladwell debt, that the promise was in writing, that it rested upon a sufficient consideration, and that it was accepted and acted upon by Bratton.

Having reached the conclusion that Bradshaw, in January, 1896, was under legal obligation to pay the debt represented by the Gladwell judgment, it of course follows that in confessing the judgment which he now assails he only did what Bratton could have compelled him to do by suit, and has suffered no injury.

For these reasons, without passing upon any other question, we are of opinion that there is no error in the decree of the circuit court, and it is affirmed.

RIELY and CARDWELL, JJ., absent.

BUILDING, LIGHT & WATER CO. v.
FRAY et al.

(Supreme Court of Appeals of Virginia. Jan. 12; 1899.)

DEEDS—COVENANTS—SEISIN—BREACH—FURTHER ASSURANCE—DOWER—DAMAGES—JUDGMENTS.

1. A covenant of seisin is not broken by an outstanding right of dower, since such right does not affect the grantee's possession or legal title.
2. The wife of a grantee acquires no right of dower in land mortgaged to secure a part of the price, where the balance was not paid, and the land was reconveyed to release the grantee from the incumbrances and the balance due.
3. Nominal damages only may be recovered for breach of a covenant of seisin, where, before injury sustained, the paramount title is perfected in the covenantor, and vests by inurement in the grantee.
4. Where, under a covenant of further assurance, the covenantor perfects the seisin before injury sustained, by supplying the missing link in his chain of title, the grantee cannot rescind

the conveyance, and recover the price, as for breach of covenant of seisin.

5. A decree constituting a link in a chain of title is competent evidence thereof against all the world.

6. A decree establishing a title through a lost deed which was not recorded is not binding on the grantor's wife, since, under Code, § 2502, her right of dower cannot be barred by an unrecorded deed.

Error to corporation court of Buena Vista.

Action by J. D. & J. L. Fray against the Building, Light & Water Company. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Winborne & Batchelor, for plaintiff in error. H. A. White and E. M. Pendleton, for defendants in error.

CARDWELL, J. This is a writ of error to a judgment of the corporation court of the city of Buena Vista in an action by the defendants in error against the plaintiff in error to recover damages for the alleged breach of covenants in a deed conveying to defendants in error a certain vacant lot in the city of Buena Vista.

The language of the covenants in the deed alleged to have been broken are "that it [the Building, Light & Water Company, grantor] has the right to convey the said land to the grantee; that it has done no act to incumber the said land; that the grantee shall have quiet possession of the land, free from all incumbrances; and that the said party of the first part will execute such further assurances of the said land as may be requisite."

The uncontroverted facts are that by deed dated October 23, 1890, recorded November 17, 1890, the Building, Light & Water Company, in consideration of \$1,000 cash, and of two bonds for \$1,000 each, payable at 6 and 12 months, conveyed to R. H. Aylor a certain lot (No. 4, block 48, section 2, fronting on Forest avenue) in the city of Buena Vista. The deed acknowledged the receipt of the cash payment, but in fact it was never paid. By deed dated the same day, recorded November 23, 1890, Aylor conveyed the lot to J. W. Childs in trust to secure his two bonds for the deferred payments. Shortly after this, and before January 28, 1891, Aylor being unable to make the cash payment, the Building, Light & Water Company agreed to take the lot back and release Aylor from the payment of the purchase money, and did release him from the cash payment, and surrendered to him his bonds for the deferred payments, in consideration that he would reconvey the lot to the Building, Light & Water Company.

Aylor was in the employ of the Building, Light & Water Company, and, as its agent, was engaged in the sale of lots in Buena Vista. As such agent, on January 28, 1891, he sold to the defendants in error the lot mentioned; and the Building, Light & Water Company conveyed it to them, the deed being in Aylor's handwriting. The terms of

this sale were the same as that to Aylor of October 23, 1890. The defendants in error paid the cash payment of \$1,000, and executed their bonds for \$1,000 each to the Building, Light & Water Company, and secured the bonds by trust deed on the lot, which bonds they afterwards settled with the Building, Light & Water Company by compromise. In the latter part of 1895, or early in 1896, the defendants in error learned of the prior deed to Aylor, who in the meantime had died; and thereupon J. L. Fray, one of the defendants in error, called on J. W. Childs, in Lynchburg, the representative of the Building, Light & Water Company, to know "what he was going to do about it," to which Childs replied, "We will have [Aylor's] minor children make the deed," or that, "if anything is wrong, we will have it corrected." To this Childs claims that Fray said, "All right," but Fray says, "I neither consented or objected to what Childs proposed to do."

It was claimed by the Building, Light & Water Company that, at the time Aylor was released from the payment of the purchase money for the lot, he and his wife executed and delivered to the company a deed reconveying the lot to it, which deed was lost before it was admitted to record; and very soon after the interview between J. L. Fray and J. W. Childs the Building, Light & Water Company instituted in the corporation court of the city of Buena Vista a chancery suit against Aylor's widow and heirs for the purpose of setting up the alleged lost deed, and a decree was entered in that suit establishing the deed, and directing a commissioner of the court, appointed for the purpose, to make a deed for the lot to the Building, Light & Water Company, or to any one the company might direct. Accordingly this commissioner made a deed, in which the Building, Light & Water Company united, conveying the lot to the defendants in error, and the deed was sent to them about May 15, 1896; and they retained it, without objection to its sufficiency or otherwise, until April 1, 1897, when they returned it to the Building, Light & Water Company for the alleged reason that the Company had broken its "covenants of warranty."

This suit was thereupon brought, and matured to the second April rules in 1897.

The declaration alleges the breach of other covenants, but the defendants in error (plaintiffs below) rely only upon the covenants of "right to convey," and "that it [grantor] has done no act to incumber said land," etc.

The plaintiff in error (defendant below) pleaded covenants performed and covenants not broken, and filed a statement of the grounds of its defense, in which it claimed that, prior to the date of the conveyance to the plaintiffs, Aylor and wife, in consideration of the release of Aylor from the payment of the purchase money for the lot, and the surrender of his bonds, reconveyed the lot

to the defendant company by a proper deed, which was lost, and that this deed had been established and set up by the decree of a court of competent jurisdiction, etc. Issue was joined on the pleas, and the verdict and judgment were for the plaintiffs for \$1,000, with interest thereon from January 28, 1891.

The plaintiff in error waives its demurrer to the declaration, and its first and second bills of exceptions to the rulings of the court below at the trial; relying here upon its third, fourth, and fifth exceptions. The third is to the giving, over the objection of the defendant, eight of the nine instructions asked for by the plaintiffs; the fourth to the refusal to give certain instructions, and the modification of others, asked for by the defendant; and the fifth is to the action of the court in overruling the motion of the defendant to set aside the verdict and grant it a new trial upon the ground that the verdict is contrary to the law and the evidence.

It is the contention of the defendants in error that the covenant of the right to convey—which in most cases, as in this, is the equivalent of a covenant of seisin (Devl. Deeds, 893; Sedg. Meas. Dam. 906)—in the deed to defendants in error of January 28, 1891, was broken as soon as made, by reason of the inchoate right of dower in the lot conveyed, outstanding in Mrs. Aylor, and because no deed had ever been gotten from Aylor reconveying the lot back to the plaintiff in error prior to the deed of January 28, 1891, and therefore the plaintiffs were entitled to recover in this action the purchase money paid by them, with interest from date of its payment; in other words, that, if a defective title is shown to exist in the grantor at the time of the conveyance, the covenantees may, as a matter of right, rescind the purchase, and recover their purchase money, with interest.

This position is wholly untenable. In the first place, the covenant for seisin, or of the right to convey, is not broken by an outstanding inchoate right of dower. It does not affect the technical seisin of the grantee. He has the title by virtue of his deed, and although the right of dower in the land may be an incumbrance from which he may be protected by his covenant against incumbrances, yet it does not affect his possession of the land, or his legal title thereto. Devl. Deeds, § 890, and cases cited in notes.

It is true, as the jury were instructed by plaintiffs' instruction No. 4, that although a deed of conveyance of the lot back to the Building, Light & Water Company had been executed by Aylor and wife, and delivered to the Building, Light & Water Company, yet, if the deed was not recorded, it did not operate to pass Mrs. Aylor's contingent right of dower in the lot, if such she had; the recordation of the deed being necessary to operate as a conveyance of whatever "right, title, and interest" Mrs. Aylor had in the lot conveyed. Code, § 2502. But in no view that

may be taken of this case can it be said that Mrs. Aylor had a contingent right of dower, or other interest, in the lot conveyed to defendants in error by the deed of January 28, 1891.

By the uncontradicted evidence, Aylor never paid any part of the purchase money for the lot, and a deed of trust was given by him to secure two thirds of it, and certainly the incumbrance held by the Building, Light & Water Company upon the lot was paramount to any interest Mrs. Aylor had therein; and there is no suggestion, even, that the sale back to the company to satisfy the incumbrance upon the lot for the purchase money was not bona fide, for its full value.

Even though the cash payment of \$1,000 for the lot, from which Aylor was released, was not a lien "paramount to the wife," her dower right in this was subject to the payment first of the \$2,000 secured by trust deed; and when the lot was sold to pay the \$2,000, and it had brought more than this sum, the \$1,000 could only have been considered a surplus arising from the sale, in which the wife might have had an interest. But this would give her no claim on the land in the hands of the Building, Light & Water Company, or its grantee. Code, § 2269; Coffman v. Coffman, 79 Va. 504; Cowarden v. Anderson, 78 Va. 88; Hurst v. Dulaney, 87 Va. 444, 12 S. E. 800.

We need not enter into a discussion of the authorities cited by counsel for defendants in error to sustain their contention that the measure of damages for a breach of a covenant for seisin, or of right to convey, is the purchase money paid, with interest, etc., and that title acquired subsequent to the breach is no defense. Among them is the case of Conrad v. Effinger, 87 Va. 59, 12 S. E. 2, where there had been an eviction; and in this case, as in the other authorities cited, the questions discussed were whether or not the covenantee was restricted in his recovery to the purchase money paid, and interest, and not allowed to recover for improvements, and other kindred questions. These authorities have no application to the case before us. There are numerous authorities agreeing that the measure of damages for a breach of the covenant for seisin, where the conveyance passes nothing, is the consideration paid by the covenantee, and interest thereon; but, where he acquires anything by his deed, this must be considered in measuring damages. Devl. Deeds, §§ 894, 899.

In authorities cited in note to last-named section, it is held that the weight of American authority has determined that the covenant of seisin is broken, if broken at all, so soon as it is made, and thereby the immediate right of action accrues to him who has received it. But in such case the grantee is not entitled as a matter of course to recover back the consideration money. The damages to be recovered are measured by the actual loss at the time sustained. If the pur-

chaser has bought in the adverse right, the measure of his damage is the sum paid. If he has been deprived of the whole subject of his bargain, or of a part of it, they are measured by the whole consideration in the one case, and a corresponding part in the other. Among the authorities here cited is the case of *Tanner v. Livingston*, 12 Wend. 83, where the deed of conveyance purported to convey a fee-simple estate, when it turned out that grantor had but a life estate in the property; and it was held that the grantee must hold the life estate, and recover only, for the breach of his covenant for seisin, the difference between the value of the life estate acquired by his deed and the fee simple bargained for. See, also, *Devl. Deeds*, § 900, where it is said that if the covenant is for a fee simple, and the estate is subject to a life estate, recovery may be had for the value of the less estate. If, after the covenants are broken, and before the covenantee commences action, the paramount title is acquired by the covenantor, which by the operation of other covenants is transferred to the covenantee, the damages may be mitigated or reduced to a nominal amount by this fact; that is to say, that, for the breach of the covenant of good right to convey, nominal damages are only recoverable where, before actual injury sustained, the title is perfected by inurement. See, also, note to *Mecklem v. Blake*, 99 Am. Dec. 76; 3 *Sedg. Meas. Dam.* § 978.

Plaintiffs' instruction No. 3 is as follows: "The court further instructs the jury that if they believe from the evidence that the defendant in January, 1891, conveyed lot No. 4, block No. 48, section No. 2, in Buena Vista, to the plaintiffs, and covenanted that it had a right to convey said lot to the plaintiffs, and that at the time the defendant did not have a good title to said lot, or did not have good right, full power, and absolute authority to convey said lot to the plaintiffs in the manner in which it was conveyed, then the jury must find for the plaintiffs, even though the jury further believe that the defendant has since acquired good title to said lot, and offered to convey it to the plaintiffs, which offer plaintiffs have refused; and in such cases the measure of damages of the plaintiffs is the purchase price paid by them to the defendant for said lot, with interest thereon from the date of payment."

There was no evidence tending to show an after-acquired title; and, if there had been, still, the instruction, in the absence of all proof of injury sustained by the plaintiffs, or of an adverse possession of the lot before the title was perfected, is erroneous, in that it told the jury that the measure of plaintiffs' damages was the purchase price paid, with interest. *Maupin*, Real Est. pp. 271, 508, 509; 1 *Sedg. Meas. Dam.* p. 351; *Baxter v. Bradbury*, 20 Me. 280.

The decree of the corporation court establishing and setting up the evidence of the original title in the Building, Light & Water

Company when it conveyed to the plaintiffs was competent evidence on this point, for which it and the deed made by the commissioner of the court to the plaintiffs pursuant to the decree were offered in evidence; and, as contended by counsel for plaintiff in error, the natural effect of this instruction was to mislead the jury by confounding in their minds after-acquired title and a subsequent decree and conveyance which sets up the evidence of original title, and cause them to mistake the latter for the former.

The question in this case is not whether a grantor can force upon his grantee an after-acquired title to land to which he had no title when he conveyed it to the grantee, but it is whether or not a grantor, before his grantee has been disturbed in his possession or suffered damage because of his defective title, and before action brought, can set up and supply a missing link in the chain of title, whereby the grantee is assured of his title and possession. We fully agree with the court in its decision in the case of *Baxter v. Bradbury*, supra, where it is said: "The covenant of seisin was intended to secure to the plaintiff a legal seisin in the land conveyed. If it is broken, and he fails of that seisin, he has the right to reclaim the purchase money. But if, by virtue of another covenant in the same deed (for further assurances of title), which was also taken to assure to him the subject-matter of the conveyance, he has obtained that seisin, it would be altogether inequitable that he should have the seisin, and be allowed, besides, to recover back the consideration paid for it."

This brings us to the question that is raised by instruction No. 9 given for the plaintiffs, and the refusal to give defendant's instructions Nos. 7 and 9. Plaintiffs' instruction No. 9 is as follows:

"The court further instructs the jury that the deed from O. D. Batchelor, commissioner, etc., to the plaintiffs, and the decree in the cause of the Building, Light & Water Company v. Aylor's Heirs, are not evidence of the existence of any title in the defendant at the time of the deed of January 28, 1891, to plaintiffs."

Defendant's instructions Nos. 7 and 9, refused, are: "No. 7. The court instructs the jury that the decree of May 14, 1896, in the chancery cause of Building, Light & Water Company against R. H. Aylor's Widow and Heirs, is conclusive evidence in this action against any claim of dower interest in or title to the lot in question by the widow and heirs at law of R. H. Aylor, and that the deed of O. D. Batchelor, special commissioner, dated May 15, 1896, made in pursuance of said decree, is a complete estoppel against the widow and heirs of said Aylor, and is sufficient to vest in the plaintiffs the title which it purports to convey."

"No. 9. The court instructs the jury that the decree of May 14, 1896, in the chancery cause of Building, Light & Water Company

v. R. H. Aylor's Widow and Heirs, is competent and admissible evidence in this action to show a passing of title to the lot in question from R. H. Aylor to defendant; and the deed of O. D. Batchelor, special commissioner, dated May 15, 1896, made in conformity to said decree, operates to set up the lost deed established by said decree, and must so stand and be accepted as long as the said decree remains in force."

It is true, as the court instructs the jury by plaintiffs' instruction No. 8, that in order to prove the existence of a lost deed, the loss of it, due execution and delivery, and all the facts necessary to constitute a good and lawful deed, must be proven by clear and direct testimony, etc.; but that is not the question presented by instruction No. 9 given by the court for the plaintiffs over the objection of the defendant, and the refusal of instructions 7 and 9 asked for by the defendant.

That courts of equity have jurisdiction to set up lost deeds and wills, and establish titles under them, can certainly not be denied. *Thomas v. Ribble* (Va.) 24 S. E. 241.

The effect of plaintiffs' instruction No. 9 is to annul and wholly avoid, in a collateral action, the decree of a court of record, entered in a cause of which it had jurisdiction both as to the parties and subject-matter. The decree upon its face recites "that between the dates of October 23, 1890, and January 28, 1891, by deed duly executed and delivered by R. H. Aylor and wife to the plaintiff, the Building, Light & Water Company, Aylor and wife conveyed the same lot that was conveyed to Aylor by the deed of the first-named date, which deed had been lost or destroyed, as fully appears from the record and depositions in that suit." This decree means nothing, and serves no purpose whatever, if it is not evidence of the passing of title by the deed which it declares was lost. The defendant was required, as set out in plaintiffs' instruction No. 2, to prove that at the time it made the covenant in the deed of January 28, 1891, to plaintiffs, of good right to convey, it had an indefeasible title to the property conveyed; and the defendant, to establish a missing link in the chain of its title, offered the decree of a court of competent jurisdiction, and the deed made in pursuance thereto, which establish and set up the lost deed constituting this missing link; and yet the jury are told, in effect, by plaintiffs' instruction No. 9, and the refusal to give defendant's instructions Nos. 7 and 9, to disregard this decree and deed as evidence of plaintiffs' title on January 28, 1891, when it conveyed the lot in question to the plaintiffs.

"A judgment at law or decree in equity, when it constitutes a link in a chain of title, is competent and admissible evidence in that character and for that purpose, not only against the parties to the record, but against all the world." *Black, Judgm. § 607*, and

cases cited, among which is the case of *Baylor's Lessee v. Dejarnette*, 13 Grat. 152. In that case, which was an action of ejectment, a decree in a chancery suit was offered in evidence in support of title, and objections were urged against it; but the court said: "All these are matters purely of equitable cognizance, with which the court of law has no concern. To undertake to reverse the proceedings would be to usurp the province of the court of chancery, and to do what even that court would not do in this collateral way; for that court would not, without proper proceedings to present the subject directly, disregard this decree, or reject it as evidence. So long as it remains unreversed, it must have the force and effect of an adjudication upon the entire estate, and must be considered to divest the title out of the defendant and those claiming in remainder after him. Although it is a decree in chancery, and not a judgment at law, yet, our courts of chancery being courts of record, their decrees may be the basis of title in a court of law, the same as a judgment of recovery in a real action. And the deed of the marshal made in conformity to its decree operates to transfer the entire title in fee simple to the purchaser, and must so stand and be accepted as long as the decree on which it rests remains in force. If there be errors to the prejudice of the remainderman, for which the decree is liable to be reversed, he may, it would seem, make himself a party to original suit by filing a supplemental bill to have the benefit of the proceedings for the purpose of appealing."

The decree alone is sufficient, without the introduction of other parts of the record. *White v. Clay's Ex'rs*, 7 Leigh, 68; *Wynn v. Harman's devisees*, 5 Grat. 157; *Masters v. Varner's Ex'rs*, Id. 171; *Pugh v. McCue*, 86 Va. 477, 10 S. E. 715. It was said in the last-named case, with reference to a deed of a commissioner in a chancery suit, introduced as evidence of a link in a chain of title, without any part of the record: "If those recitals are inconsistent with the record, the plaintiff could have shown it by the introduction of the record. It is clear, therefore, that the deed was not only admissible in evidence, but that in this collateral action it must be regarded as an unassailable conveyance of the legal title."

We are of opinion that the court below should not have given plaintiffs' instruction No. 9, but should have given instruction No. 9 asked for by the defendant.

While the decree referred to in defendant's instruction No. 7 is competent evidence in this cause to prove that R. H. Aylor, by deed in which his wife united, had reconveyed the lot in question to the Building, Light & Water Company prior to the latter's conveyance of the lot to defendants in error of January 28, 1891, and conclusive evidence of any claim of title to the lot in the heirs at law of Aylor, and the deed made by O. D.

Batchelor, special commissioner, to defendants in error, pursuant to the decree, is a complete estoppel against these heirs, and sufficient to divest them of any right to or interest in the lot, it is not, under the circumstances of this case, evidence against the widow. The object of the suit was to set up a deed that had not been recorded, and therefore did not bar the right of dower. That suit could only restore what had been lost. It created no new rights, and was not intended to do so, and left the widow where it found her. If her husband during coverture had been so seised of this land as to entitle her to dower in it, that right was not defeated by the unrecorded deed which was lost, nor by the deed of Commissioner Batchelor, the only office and effect of which was to set up the lost deed, and furnish evidence of the rights of parties as established by it. Therefore this instruction was properly refused.

Defendant's instruction No. 11, asked for, told the jury that the decree of the court setting up the lost deed from Aylor and wife, conveying the lot to the Building, Light & Water Company, was competent and admissible evidence in this action on the question of the passing of title to the lot in question from Aylor to the defendant; but the court struck out the words "the passing of title," and inserted in lieu thereof the words "the effort then made to pass title." This, for the reasons already stated, was error.

As the case has to go back because of the errors already pointed out, other questions presented in the record, and elaborately argued, need not be considered.

The judgment of the court below will be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial, to be had in accordance with the views expressed in this opinion.

LITTELL v. JULIUS LANSBURG CO. (JACKSON et al., Interveners).

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

ATTACHMENT — VALIDITY — MOTION TO QUASH — CLAIM BY THIRD PERSON.

Where an attachment was dissolved on motion because issued on false suggestions, as provided by Code, § 2981, the attaching creditor, or his trustees under a trust deed conveying the attached property as security for the debt sued on, cannot intervene, and claim the property thereunder, on the motion to quash, under Code, § 2984, authorizing a third person to intervene in attachment, and dispute the plaintiff's right to the property.

Appeal from circuit court, Alexandria county.

Attachment by the Julius Lansburg Company against O. I. Littell. A motion to quash being made, plaintiff and Jackson and Kibler, trustees, intervened, and claimed the attached property under the deed of trust as

security for the debt sued on. From a judgment of the county court quashing the attachment and ordering the attached property returned to defendant, plaintiff and interveners brought error to the circuit court, where the judgment was reversed, and defendant appeals. Reversed, and judgment by county court affirmed.

J. K. M. Norton, for appellant. Geo. A. Mushbach, for appellee.

HARRISON, J. By deed dated May 6, 1896, O. I. Littell conveyed to L. J. Jackson and H. R. Kibler, trustees, certain personal property to secure the Julius Lansburg Furniture & Carpet Company the sum of \$1,232, evidenced by the note of the grantor, bearing even date with the deed. In this deed the right was reserved to the grantor to retain the possession and use of the property conveyed until the same should be thereafter required of her as provided in the deed.

On April 15, 1897, the Julius Lansburg Company caused to be issued by a justice of the peace of Alexandria county an attachment for the debt secured in the deed of trust, requiring the sheriff to attach the property conveyed in said deed, and to have the same forthcoming and liable to further proceedings to be had thereupon before the county court of Alexandria county on the first day of the next term thereof.

On July 7, 1897, O. I. Littell moved the court to quash the attachment, and have the property restored to her. When this motion was made, Jackson and Kibler, trustees, and the Julius Lansburg Company, united in filing a petition in which they set forth that, the debt in question being due, the trustees were, under the terms of the deed of trust, entitled to the possession of the property held by the sheriff under the attachment, and asking that the same be turned over to them.

Upon the hearing the court quashed the attachment, and ordered the property to be returned to the debtor, upon two grounds: First, that the affidavit upon which the attachment issued was fatally defective; and, second, because it was issued without sufficient cause, and upon false suggestions. The court further held that, the attachment being quashed, it was without jurisdiction to pass upon the petition filed by the trustees and the attaching creditor.

To this judgment a writ of error was awarded by the circuit court of Alexandria, and on September 30, 1897, that court, being of opinion that the county court had jurisdiction to consider the petition filed by the trustees and the attaching creditor, entered an order reversing the judgment of the county court, and remanding the cause for further proceedings to be had in accordance with the views expressed.

From this judgment of the circuit court the case has been brought to this court.

Upon the case presented the action of the

county court was clearly right under the express terms of section 2981 of the Code, which provides that the attachment shall be quashed if it be invalid on its face, or appears to have been issued on false suggestions, or without sufficient cause; and that, when quashed, there shall be an order for the restoration of the attached effects to the defendant.

It is, however, contended that the petition of Jackson and Kibler, trustees, and the Lansburg Company, was filed under section 2984 of the Code, and that by virtue of that section they had the right to file the petition in this proceeding, and have the same considered and acted upon.

Section 2984 was intended to give any third person, before the attached property is sold, or before the proceeds of sale has been paid to the plaintiff, the opportunity to come in by petition, and dispute the plaintiff's right to the property or its proceeds. In the case at bar, though united with the trustees, the real petitioner is the plaintiff in the attachment. The trustees represent no other creditor, and set up in their petition the same debt sued on in the attachment proceeding. The Lansburg Company, as petitioner, cannot dispute with itself, as plaintiff in the attachment, over the attached effects. Section 2984 was not intended to enable a creditor to bring his debtor's property into a court under an attachment issued on false suggestions, and avail himself of this invalid proceeding to accomplish as petitioner therein what he could not accomplish as plaintiff in the attachment.

For these reasons the judgment of the circuit court must be reversed and annulled, and the judgment of the county court affirmed.

RIELY and CARDWELL, JJ., absent.

FLOOD'S ADM'R v. HUTTER.

(Supreme Court of Appeals of Virginia. Dec. 1, 1898.)

SUBROGATION—RIGHTS OF SURETY.

Where a surety is compelled to pay a judgment against her principal, she is entitled to be subrogated to the judgment.

Appeal from corporation court of city of Lynchburg.

Bill by Flood's administrator against E. S. Hutter. Decree for defendant, and plaintiff appeals. Reversed.

J. H. Christian and H. D. Flood, for appellant. Kirkpatrick & Blackford and W. H. H. Harris, for appellee.

HARRISON, J. The bill in this case was filed, in her lifetime, by appellant's intestate, alleging the payment by her of a judgment in favor of Miller & Franklin against E. S. Hutter and Woodroof & Co., and further alleging that said payment was made under

circumstances which entitled her to be subrogated to the lien of said judgment, as against the debtor E. S. Hutter, to the extent that she had paid the same.

The court is of opinion that, under the circumstances disclosed by the record, appellant was only entitled to be subrogated to the lien of this judgment, as against E. S. Hutter, to the extent that said Hutter appeared to be indebted to Woodroof & Co. This seems to have been the view of the lower court, and the cause was referred to a commissioner to ascertain that indebtedness. This report was filed, showing a settlement of accounts between these parties, and ascertaining that the appellee was indebted to Woodroof & Co. in the sum of \$771.17 as of April 15, 1890.

Appellee filed two exceptions to this report, —one that certain credits had been disallowed in the settlement to which he claimed the right; and the other, that too high a value had been placed on a certain farm in question. The latter exception is disposed of by the view already taken, that appellant was entitled to subrogation. Without acting upon this report, the court directed the commissioner to make, from the record as then made up, and without notice to the parties, certain statements of account outlined by the court. Upon the basis of these statements, made at the hearing, the decree appealed from was entered, dismissing appellant's bill.

It satisfactorily appears from the report of the commissioner, and the evidence upon which it was based, that the controverted items of credit were properly disallowed, and that the correct balance due from appellee had been ascertained by the commissioner.

For these reasons the decree appealed from must be reversed and set aside, and a decree entered here overruling the exceptions, and confirming the report of the commissioner dated April 4, 1890, and subrogating appellant to the lien of the judgment in question to the extent of \$771.17 thereof, with interest thereon at 6 per cent. from April 15, 1890.

CARDWELL and RIELY, JJ., absent.

MERCANTILE CO-OPERATIVE BANK v. BROWN et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

MORTGAGES—ADMISSION TO RECORD—PRIORITY—CONDITION OF RECORD—NOTICE—ESTOPPEL.

1. A deed of trust delivered to the clerk of the county court for record, with the tax, and recording fee, and by him admitted to record, and so indorsed, is prior to a deed of trust subsequently recorded, notwithstanding the clerk retained the former without recordation until after the subsequent deed was recorded, and then erased his former indorsement thereon, and recorded it, and indorsed it as received and admitted to record as of the date of recordation.

2. Actual notice of the truth of facts rep-

resented or concealed is not indispensable to an equitable estoppel, and a mortgagee in possession of a recorded mortgage, on which is indorsed a certificate of the clerk showing a mistake as to the time of recordation, will be charged with notice of the mistake, where he is sought to be estopped from setting up the true date.

3. Where, 18 months after notice to a first mortgagee of a mistake appearing in the records as to the date of recordation of his mortgage, a bona fide assignment was made of a subsequent mortgage recorded prior to the date of the recordation of the first mortgage, as shown by the records, the first mortgagee was estopped to set up the true date of recordation, as against the assignee.

Keith, P., dissenting.

Appeal from circuit court, Page county.

Bill by the Mercantile Co-operative Bank against J. P. Brown and others. There was a decree for defendants, and plaintiff appeals. Affirmed.

Sipe & Harris, for appellant. J. S. Harnsberger, for appellees.

RIELY, J. The appellee J. P. Brown applied to the Mercantile Co-operative Bank of the City of New York for the loan of \$1,000, which he offered to secure by deed of trust on a certain lot in the town of Shenandoah, Page county, Va. This the bank agreed to do, if the security offered was sufficient and the title to it good. It employed Mr. R. S. Parks, an attorney, to examine the title and furnish an abstract thereof. The security and the title to it proving satisfactory, the bank sent a check for the loan to its attorney, payable to J. P. Brown, but to be held by the attorney until the deed of trust should be executed and acknowledged for record and receive the approval of the bank.

The deed having been approved by the bank, and returned to the attorney, the latter, on March 13, 1891, turned over the check to Brown, taking his note for the loan, and delivered the deed to the clerk of the county court of Page county, in his office, to be recorded.

The deed having been duly executed and acknowledged for record, and the tax and recording fee being paid by the attorney, the clerk then and there admitted it to record, noting the time of its admission by an indorsement on the back of the deed in the following words and figures: "A. B., March 13, 1891." The attorney, on the same day, wrote to the bank that its check had been delivered to Brown, the deed of trust admitted to record, and that as soon as the deed was transcribed upon the record he would forward it.

Some few days thereafter the attorney went to the clerk's office, and instructed the clerk not to record the deed until he should direct him to do so. This he did at the instance of Brown, who complained of delay in the payment of the check, although the evidence shows that it was paid in New York without delay, four days after it was turned

over to him. The deed remained in the clerk's office until the 23d of June following, when the attorney went to the clerk's office and ordered that it be recorded. The deputy clerk thereupon ran his pen through the words and figures, "March 13, 1891," which had been indorsed on the deed at the time it was delivered to the clerk to be recorded, and wrote above them, "June 23, 1891," and the deed was then transcribed in the proper deed book.

Brown, in the meantime, had applied to Lucretia J. Harnsberger for a loan of \$1,500 upon the same lot of land. The title to it was examined by her attorney, and, no incumbrance being disclosed, she made the loan, taking a deed of trust on the said property to secure it, which deed was admitted to record on June 10, 1891.

Which of the said deeds has priority, is the first question to be decided, the property being insufficient to pay both of them.

The deed securing the bank being duly executed and properly acknowledged for record, it was the duty of the clerk, upon its delivery to him, on March 13, 1891, with the amount of tax and recording fee, forthwith to admit it to record. This he did, as already shown.

Its admission to record was an official act performed by him, and, having been performed, it was not within his power to undo it. He could no more recall his official act admitting it to record, when he was ordered by the attorney to withhold its recordation, than he could have expunged its recordation from the deed book if it had been actually transcribed. When the bank, through its attorney, delivered the deed to the clerk to be recorded, and paid the tax and recording fee, its duty, in order to secure the lien under the deed of trust, was ended. The actual recordation in the deed book was a consequential act from its admission to record, to be performed by the clerk in the order of the admission by him of deeds to record and as the condition of the business in his office permitted. The bank was entitled to its lien against purchasers and creditors from the time of the admission of the deed to record, and the subsequent act of the clerk, in attempting to change the time of its admission to record at the request of the attorney, was ineffectual, and could not affect the lien then and there acquired by the bank. The lien of its deed of trust, therefore, took effect from March 13, 1891, while that of Lucretia J. Harnsberger only commenced on the 10th day of June, 1891, that being the date of the admission of her deed of trust to record.

But whether the bank, as against the appellees, who are assignees of the Harnsberger debt, can claim the benefit of its lien as of March 13, 1891, is another question, and is to be solved by the application of other principles. It appears from the evidence that \$1,000 of the Harnsberger loan was transferred for value on the 28th day of July, 1893, to

George W. Harnsberger, and the residue thereof, on the same day, to R. A. Bickers; and the assignees contend that the appellant bank, having allowed the public record, showing that its deed was not recorded until the 23d of June, 1891, to remain so without taking any steps to have it corrected, is estopped to claim otherwise as against them, they having relied upon the recorded title.

The evidence also shows that the deed of trust securing the bank was withdrawn by its attorney from the clerk's office on the 11th day of February, 1892, and sent by him to the bank. The bank, therefore, had its deed of trust in its possession nearly 18 months prior to the assignment of the Harnsberger lien to the appellees. The deed, when received by the bank, had upon it the following official indorsement by the clerk of the county court of Page county: "Page County, to wit: The foregoing deed of trust was received in the clerk's office of Page county court, June 23, 1891, and admitted to record. Test: A. Broadus, C. C." It thus appears that the bank, from the time of the receipt of its deed of trust, had in its possession the plain means of knowing when its deed of trust purported to have been admitted to record. It showed that it did not purport to have been admitted to record on the 13th of March, 1891, as the bank had been informed by its attorney was the case, but that the record in the clerk's office showed that it was not received in that office and admitted to record until the 23d of June, 1891. It is true that the president of the bank denies actual notice of this fact until about the time of the institution of this suit, in 1896; but having in his possession the deed itself, with the official certificate of the clerk indorsed thereon as to the time it was admitted to record, knowledge thereof will be imputed to the bank.

Actual knowledge of the truth as to the material facts, represented or concealed, is generally indispensable to the application of the doctrine of equitable estoppel, but, like other general rules, it has its exceptions. Actual knowledge is not indispensable where the circumstances are such that a knowledge of the truth is necessarily imputed to the party sought to be estopped; nor where he has been negligent in failing to perform some duty, whereby another has been misled, to his injury or prejudice. 2 Pom. Eq. Jur. §§ 808, 809; Bigelow, Estop. (5th Ed.) c. 19; Hughes v. Harvey, 75 Va. 200, 212; Henshaw v. Bissell, 18 Wall. 255.

The bank, instead of taking steps to have the date of the admission of its deed to record and the recordation thereof corrected in accordance with the facts and its right, permitted the record to stand until the assignees of the Harnsberger loan had, for value, acquired her debt, and for years afterwards. It is the policy of the registry laws that the evidence of titles should be recorded, and persons dealing with the subject of the recorded title have the right to rely upon the state of

the title as it appears upon the public records, and upon the recordation thereof as having been truly made. It was the duty of the bank, if it would claim the benefit of the true date of the admission of its deed to record, within a reasonable time after the receipt of its deed showing the state of the record to take the proper steps to have it corrected in accordance with the actual fact. The failure to do so was gross negligence. By its negligent conduct, the bank thereby represented to the world that the admission of its deed to record, as it appeared upon the public record of titles, was true. It is now estopped from asserting the contrary.

The doctrine of equitable estoppel has its foundation in natural justice and good conscience. Where one man, by the neglect of some duty, leads another to believe in the existence of a certain state of facts, and under this belief the latter does an act whereby he is prejudiced, the former will not be permitted to show, as against the latter, that the state of facts did not exist. He shall not, by such course, cause loss or injury to another. Such a change of position would be unconscientious and inequitable, and is sternly forbidden by honesty and fair dealing. Where one of two innocent persons must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible. The neglect of the bank to perform its duty to the public, and have the record of the admission of its deed to record corrected, could but have the effect to mislead purchasers and creditors, and did mislead the assignees of the Harnsberger debt, who innocently relied upon the recorded title. It would be a fraud on them to permit the bank now to deny what, by its omission of duty and acquiescence in the state of the public record, it represented to be true. It is therefore estopped to claim, as against them, that the lien of its deed of trust took effect prior to June 23, 1891.

There is no error in the decree appealed from, and it is therefore affirmed.

CARDWELL, J., absent.

KEITH, P. (dissenting). The opinion of the court concedes that the lien of appellant was complete by the recordation of the deed. It concedes that there is no evidence that appellant had actual knowledge of the unauthorized act of the clerk. I am unable to see that there was any duty upon appellant to read or examine the deed of trust when returned to it by the clerk. It had, it is true, the "means of knowing," in the sense that it had the possession of the deed; but, as there was no duty which it owed to appellee to inspect that deed, no wrong can be imputed to it for its failure to do so, and it can, I think, in no proper sense, be said that the bank "permitted" the record to remain uncorrected.

I feel constrained to dissent from the opinion of the court.

PUTNEY et al. v. McDOW et al.

(Supreme Court of South Carolina. Jan. 30, 1899.)

CREDITOR'S SUIT—COSTS AND DISBURSEMENTS.

1. A decree in a creditors' suit, providing for payment of the expenses of the action, does not include traveling expenses incurred in attending court.

2. In a creditors' suit, traveling expenses incurred by plaintiffs in attending court cannot be taxed as costs.

3. Nor can they be taxed as "necessary disbursements."

Appeal from common pleas circuit court of York county; W. C. Benet, Judge.

Creditors' bill by Stephen Putney & Co. and others against Thomas F. McDow, as assignee for the benefit of creditors of A. Y. Cartwright & Co. From a decree directing the receiver to make certain payments, A. W. Cartwright & Co., assignors, and certain creditors appeal. Reversed.

This action was commenced by personal service of the summons within the state on the 25th day of April, 1894, by sundry judgment creditors of A. Y. Cartwright & Co., to set aside the latter's assignment for the benefit of their creditors, and for payment of the former's judgments; and it resulted in a decree, rendered at the spring term, 1895, by his honor, Judge Benet, adjudging the same null and void, but holding that the complaint "can be maintained only to set the assignment aside, and not for the payment of the plaintiffs' claims to the exclusion of all other creditors who may be willing to come in and bear their share of the expenses of this proceeding." The said decree also directed the calling in of "all creditors of the assignors who are willing to contribute their share of the expenses of this action," at the same time making provision for a report upon claims, and for exceptions thereto, and for the appointment of a receiver. Each of the creditor appellants duly presented their claims under said call. At the fall term, 1895, his honor, Judge Townsend, heard certain motions in this cause, and, after the adjournment of said term, to wit, on the 14th of January, 1896, made and filed a further decree, wherein the following directions were given over appellants' objections: "The complaint filed in this action was for the judgment creditors therein named, for their benefit and behoof alone, but Judge Benet, in his above-mentioned decree, adjudged the complaint to be a creditors' bill for the benefit of all the creditors of the assignors who are willing to contribute their share of the expense of the action. It is only equitable and just that all necessary disbursements made and incurred by the original plaintiffs in the complaint in this action, including their traveling expenses in prosecuting the action to judgment, or, more properly speaking, until the rendition of the decree of Judge Benet, on August 23, 1895, should be refunded to them before the fund

coming into the hands of the receiver shall be applied ratably to the claims complying with all the provisions of Judge Benet's decree. It is therefore ordered, decreed, and adjudged that the original plaintiffs in this action, within 30 days from receipt of written notice of the filing of this decree, do file with the receiver a verified statement of their several disbursements from the commencement of the action until the filing of Judge Benet's decree, and that the receiver, out of the first moneys coming into his hands, be, and he is hereby, required to pay said disbursements in full before applying and distributing any portion of the funds to the claims of creditors."

C. E. Spencer, for appellants. W. B. McCaw and Hart & Hart, for respondents.

GARY, A. J. The appeal herein raises the question whether the words "expenses of the action," which were used by his honor, Judge Benet, in his decree, include the traveling expenses of the plaintiffs incurred in attending the court. The presiding judge, by the use of the words "expenses of the action," meant such items of costs and such disbursements as were allowed by the statute. The traveling expenses could not be taxed as costs in the action, as there is no statutory provision for such items as costs.

The next question is whether they could be considered as "necessary disbursements." The respondents' attorney was not able to refer the court to any authority authorizing such expenditures to be taxed as disbursements. As the statute does not allow to a plaintiff or a defendant the fees of a witness, even when they testify, it would seem to follow that they should not be allowed to tax their traveling expenses as necessary disbursements. The law contemplates the attendance of both the plaintiff and the defendant upon the trial of the case, and, in the absence of a statute allowing them to tax such items as disbursements, they should not have been allowed. It is the judgment of this court that the order of the circuit court be reversed.

Ex parte GRAHAM.

PLYLER v. ROBERTSON et al.

(Supreme Court of South Carolina. Jan. 23, 1899.)

JUDGMENT BY CONFESSION—STATEMENT—SUFFICIENCY—BOOKS OF ENTRY—REVIVAL.

1. A statement in the confession of a judgment on a note that it was given "for goods sold and delivered" is sufficient, under Code, § 384, providing that the confession must state concisely the facts out of which the indebtedness arose.

2. A confession of judgment is not void because not entered in the book called "Confessions of Judgment before Clerk," as required by Rev. St. § 783, subd. 9, enacted in 1839, in view of subdivision 6, requiring all judgments to be entered in the book therein mentioned, and Code, § 385, providing that the statement and affidavit

for judgments by confession shall become the judgment roll, on which executions may issue as on judgments in other cases.

3. An order that a levy should continue in force pending an injunction restraining a sale thereunder renders a revival of the judgment unnecessary on the dissolution of the injunction, where the levy was made within the period of limitations, though the period had expired when the dissolution was ordered.

4. An order giving permission to issue execution on a judgment revives it.

Appeal from common pleas circuit court of Lancaster county; J. C. Klugh, Judge.

Action by Pleasant M. Plyler against Barbara Robertson, Benjamin Graham, and others to enforce a judgment lien on land. Judgment for plaintiff, and defendant Graham appeals. Affirmed.

The following is the report of the referee:

"The undersigned was directed by order of Judge Aldrich, dated June 10, 1897, to take the testimony and report my findings of facts and conclusions of law upon the issues between the above-stated parties, 'in the original cause and the cause as above stated,' for the final determination of the court. Having taken the testimony submitted before me, and heard the argument of counsel, I now beg leave to submit the following as my report:

"Findings of Fact.

"On the 7th day of March, 1887, one Samuel Robertson, being then the owner in fee simple of the 500 acres of land, more or less, described in the second paragraph of the complaint in this action, and being indebted to plaintiff by his sealed note in the sum of \$222.15, dated February 4, 1885, and due the 1st day of January, 1886, with interest from date at 10 per cent., due and payable annually, confessed judgment before the clerk of the court for the sum of \$271, being the amount then due upon said note, with interest from 7th of March, 1887 (the date of the judgment), at the rate of 10 per cent. per annum, payable annually, and for \$5 attorney's costs, and for all other proper costs of the officers of court. The confession was made under oath, before the then clerk of the court, and contains a statement that the note was given for goods 'sold and delivered by the said Pleasant M. Plyler to the said Samuel Robertson, and the whole sum aforesaid is justly due and owing to the said Pleasant M. Plyler.' The original note is attached to the statement. On the said 7th day of March, 1887, the clerk of the court, under hand and seal of office, gave and entered up, on said confession, judgment for said amount, with interest as above stated. The said confession of judgment was filed by the clerk in his office on the said 7th of March, 1887, and numbered by him '6,729.' The judgment was recorded in 'Pleadings and Judgments, Book B,' at pages 37 and 38; and was also entered in the book of 'Abstract of Judgments' by its number, '6,729'; also, by same number, in both the direct and cross indexes to said book of 'Abstract of Judgments.' I find that at the time of the rendition of said

judgment, and afterwards, there was an index to said book of pleadings and judgments, kept by the clerk between the covers of the book of pleadings and judgments, and that it was the habit of the then clerk to index in said book all judgments recorded in the book of pleadings and judgments. The said index to book of pleadings and judgments is not now in the clerk's office, and has not been for several years. Its disappearance was not accounted for before me. I find that no separate book known as 'Confessions of Judgments' has ever been kept in the clerk's office, and that confessions of judgments and all other judgments have been recorded in the book of pleadings and judgments, and entered in the book of abstract of judgments. I find that the original confession of judgment, or roll 6,729, was taken out of the clerk's office by Ira B. Jones, Esq., the then attorney for the plaintiff, Pleasant M. Plyler (he having prepared the original judgment), 'in the fall of 1892, or in the first part of the year 1893,' for the purpose of preparing an execution thereon. The paper was mislaid or misplaced in some way by Mr. Jones, and was not found until October, 1896, when Mr. Jones delivered the record to T. Y. Williams, Esq., one of plaintiff's attorneys herein. No execution was ever issued in said judgment prior to October 10, 1896. I find that on the 11th day of November, 1887, the said Samuel Robertson conveyed said 500-acre tract of land to one S. A. Robertson, who had no actual notice of the above-mentioned judgment. That on the — day of —, 1888, the said Samuel Robertson died, leaving as his heirs at law the defendants named in the fourth paragraph of the complaint. That on the 26th day of June, 1889, the said S. A. Robertson, to secure ten promissory notes in favor of the American Freehold Land Mortgage Company, Limited, given on said date, and aggregating twenty-six hundred dollars, money borrowed by him from said company at said date, executed to said company his mortgage on a tract of 800 acres of land described in said mortgage, to be found with the testimony herein, which 800 acres included the 500-acre tract above mentioned. That neither S. A. Robertson nor said mortgage company had actual notice of the said confession of judgment until the commencement of the suit herein. That on the first Monday in December, 1891, under a decree of foreclosure of said mortgage, in which said mortgage company was plaintiff and the said S. A. Robertson and others were defendants, the said tract of 800 acres, which included the 500-acre tract conveyed by Samuel Robertson to S. A. Robertson, was sold and purchased by the defendant Benjamin Graham, to whom a deed was executed for said land, dated — day of December, 1891. The said tract of land (800 acres) was bid off and purchased by said defendant Benjamin Graham at and for the price of sixteen hundred and twenty-five (\$1,625) dollars. At the time of commencement of said foreclosure

suit, a notice of pendency of action was filed in the clerk's office for said county. I find that the defendant Benjamin Graham had no actual notice of said judgment until about the time of the commencement of this action by plaintiff. That the defendant Benjamin Graham, shortly after the delivery of his deed, entered into possession of said land, and has remained in possession ever since. On the 5th day of August, 1896, the plaintiff, Pleasant M. Plyler, instituted this suit against the heirs at law of Samuel Robertson, deceased, mentioned in the fourth paragraph of the complaint as defendants; also against Benjamin Graham, defendant. The complaint alleges the recovery and entry of the said confession of judgment; that the same is a lien on the said 500-acre tract; alleges the conveyance of said land by Samuel Robertson to S. A. Robertson; the death of Samuel Robertson; the giving of the mortgage, as above stated, by S. A. Robertson to the mortgage company; the foreclosure of same, and the purchase and entry into possession of same, by the defendant Benjamin Graham, subject to the lien of said judgment. The complaint further alleges the loss or destruction of said original confession of judgment; also that plaintiff is without remedy for the enforcement of said judgment without the aid of the court. The complaint prays as follows, viz.: First, that the roll of said judgment be restored, and the same declared a lien on the land in question in possession of the defendant Benjamin Graham; second, that the 500-acre tract of land be sold under order of court, and proceeds applied to the payment of the judgment, costs, etc.; third, for leave to issue execution on said judgment; fourth, for any other relief the court may deem proper.

"The defendant Benjamin Graham, in due time, answered the complaint, alleging, among other things, that said alleged judgment was absolutely null and void, because the statement attached to the confession was not sufficient, and because said judgment had not been entered up as required by law. Alleged, further, that both S. A. Robertson and defendant Benjamin Graham were purchasers of said land for value and without notice of said judgment. Further alleges that said judgment has been paid, and that said alleged judgment never has been a lien on said land. The defendant Benjamin Graham, by amendment to his answer, further alleges that, if said judgment is a judgment and a binding lien on said land, it can only bear interest at 7 per cent. per annum. That after the delivery of said original confession of judgment by Ira B. Jones, Esq., to T. Y. Williams, to wit, on the 17th day of August, 1896, an independent proceeding was instituted by Pleasant M. Plyler, by summons, with notice and affidavit attached, for leave to issue execution on said judgment. This proceeding is entitled 'Pleasant M. Plyler, Plaintiff, vs. Samuel Robertson, Defendant.' The summons, notice, and affidavit were served on the said

heirs at law of Samuel Robertson, deceased, and upon the defendant Benjamin Graham, requiring them to show cause why execution should not issue on said judgment. The defendant Benjamin Graham answered, making substantially about the same defense as set up in his answer to the first action. He further pleaded the former action in bar, and alleged that no execution could issue, there never having been administration on the estate of Samuel Robertson, deceased. On the 10th day of October, 1896, Judge Watts granted an order for leave to issue execution on said judgment, but concluded same in the following language: 'I hold that, under section 310 (Code), execution may issue upon final judgment or decrees in any time within ten years. Such being the case, I give permission to plaintiff to issue execution on said judgment, as it is not ten years since it was obtained. But I do not pass upon the validity or sufficiency of said judgment. Neither do I pass upon or adjudge the right of any of the parties above named. Their right to assail the judgment in any manner they may be advised is expressly reserved to them.' On the 29th day of October, 1896, execution was issued on said judgment, and the sheriff of said county, on the 9th day of October, 1896, levied upon the said 500-acre tract of land, and thereafter advertised said land for sale. Upon the petition of the defendant Benjamin Graham, showing the levy upon said land and the advertisement for sale by the sheriff, and the pendency of the action to test the validity of the judgment, Judge R. C. Watts granted a temporary injunction restraining the plaintiff and the sheriff from proceeding further with the sale of the land, and required each of them to show cause before Judge Witherspoon, at his chambers, on the 10th day of December, 1896, why a permanent injunction should not be granted. The plaintiff appeared, and answered the rule to show cause. Judge Witherspoon, on the 12th day of December, 1896, granted an order continuing the restraining order of Judge Watts 'until the cause between the same parties as to the validity and lien of the judgment upon which plaintiff's execution was issued, now pending in the court of common pleas for Lancaster county, shall have been determined.' I find that the plaintiff resided about two miles from S. A. Robertson until some time after the foreclosure sale, and that he had no actual notice of the said judgment. After the levy, as above stated, the successor to Sheriff Hood (who made the levy), on 22d December, 1896, continued the levy by indorsement on the execution. I should have stated before that Judge Buchanan, on 14th day of March, 1897, made an order in this case, reciting that 'a levy has been made upon certain lands in the possession of the defendant Benjamin Graham, under an execution issued upon the judgment in favor of Pleasant M. Plyler vs. Samuel Robertson, and that a sale of said lands under said levy has been temporarily enjoined'; and ordering 'that, pending the hearing of this

cause, the said levy, heretofore made under the judgment in favor of Pleasant M. Plyler *vs.* Samuel Robertson, be continued in force,' and 'that the status of the rights of the parties under the levy remain as it was at the time said levy was made, until the final decree of this court.' See Circuit Court Minutes, p. 340.

"Conclusions of Law.

"It is insisted by the defendant Benjamin Graham that the judgment in question is null and void, and was never a lien upon the land, because the confession of judgment was not entered in the book of 'Confessions of Judgment before Clerk,' required by subdivision 9 of section 783 of Revised Statutes of South Carolina to be kept by the clerk; and, further, because the 'statement' (by the plaintiff, Pleasant M. Plyler) of the indebtedness upon which the confession of judgment was based is not sufficient.

"First. Is the first ground well taken? That is, does the failure of the clerk to 'enter' the proceedings in a separate book, called 'Confessions of Judgment before Clerk,' render the judgment void? My conclusion is that it does not. The record of the 'proceedings' is not the judgment. Section 385 of the Code provides that 'the statement may be filed with the clerk of the court of common pleas, * * * who shall enter a judgment indorsed upon the statement for the amount confessed. * * * The statement and affidavit, with the judgment indorsed, shall thereupon become the judgment roll.' As soon as the clerk 'enters a judgment indorsed upon the statement,' the judgment becomes a lien. Section 309 of the Code provides that a judgment shall constitute a lien upon real estate of the judgment debtor for a period of ten years from the date of entry thereof. But it may be said, in this connection, that it is the duty of the clerk to so publish the judgment as that innocent third parties may be protected. Under the law, it appears that confessions of judgments may be in three separate places in the clerk's office, *viz.*: (1) In the book of the confessions of judgment and index to same; (2) the statement under oath, and indorsement of the clerk thereon, which is the judgment roll; (3) the abstract of the judgment, which, by section 782, Rev. St., and subdivision 6, § 783, Rev. St., and sections 300, 301, Code,—is required to be entered in the book of abstract of judgments and the indexes to said book. Now, in the book of abstract of judgments, this judgment was fully abstracted. The name of plaintiff, Pleasant M. Plyler, and the defendant Samuel Robertson; number of roll, 6,729; amount of judgment; date; date of interest; names of plaintiff's attorneys; and amount of costs,—all appear. Under the entry 'Cause of Action,' the word 'Confession' is written; and under the entry 'How Obtained,' the words 'Before Clerk' are written. The title of the case opposite its number, 6,729, appears in both the direct and cross index to said book of abstract of judgments. It seems to me that

this book, with its indexes, would be a starting point, at least, sufficient to put third persons on their guard. One examining the book of abstract of judgments would see the title of the cause, with the number of the roll, and would then go to the judgment roll for the original proceedings. In case he inquired for the book entitled 'Confessions of Judgment before the Clerk,' he would find that no such book had ever been kept in the office of the clerk of the court for Lancaster county, but that all judgments, confessions as well as others, were entered in the book of pleadings and judgments; and, by reference to the index to said book, he would find the record of the confession proceedings.

"Now, if a separate book for confession of judgments had been kept in the clerk's office, and the clerk, through inadvertence, had entered the proceedings of the confession in another book, a person overlooking the judgment would have better reason to claim he was misled. So, while the mortgage company, S. A. Robertson, and the defendant Benjamin Graham had no actual notice of the judgment, yet I conclude that they each and all had constructive notice of same. Mr. Black on Judgments, in volume 1, § 406, says: 'The purport of the decisions appears to be that the sufficiency of accuracy is attained if an intending purchaser (for example), exercising a reasonable degree of care and a reasonable amount of intelligence in making a search, could not fail to be apprised of the existence and character of the judgment. At the same time, a subsequent purchaser is affected with such notice as the index entries afford; and, if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril.' I take it that the very strict requirements of the law as to what is necessary to give constructive notice to innocent third persons of deeds and real-estate mortgages does not apply to judgments. For instance, our courts have held that before a deed or mortgage can be recorded it must be probated, and, if improperly probated, although recorded and indexed, it is not constructive notice to third persons. So, my conclusion is that the confession of judgment in this case became a lien on the 500-acre tract above mentioned from the time of its entry by the clerk, and that its lien has continued ever since, and that S. A. Robertson, the mortgage company, and the defendant Benjamin Graham all had constructive notice of said judgment, and were all bound by such notice, and took title to said land subject to the lien of said judgment.

"Second. The defendant Benjamin Graham insists that the statement made by Samuel Robertson, when he confessed judgment, to the plaintiff, Pleasant M. Plyler, was not sufficient in law to make the judgment valid and binding as to him; and his counsel, as their main authority, cite the case of Weinges

v. Cash, 15 S. C. 44, in support of their positions. I have carefully read this case, and have arrived at the opposite conclusion. In my opinion, the statement attached to the confession in this case is as concise as that referred to in the case of Weinges v. Cash. The statement in that case is: 'The said judgment arises from the fact that I am indebted to her [Mrs. Cash] on account of the purchase and rentals by me of lands to which she was entitled to an interest, as one of the heirs of her father's estate, and also to the interest of her mother therein, which she has transferred to the plaintiff, and directed me to pay to her, the same not exceeding the amount aforesaid (\$1,500), and the said amount is now justly due to the plaintiff.' The court, in passing on the statement, among other things, said: 'It fixed definitely the amount of the debt, and showed clearly the origin and consideration of the indebtedness;' and, in his judgment, nothing more was necessary. The court further states that 'all a creditor would want to know would be what was claimed to be the origin and consideration of the debt, and he would inquire himself into the details.' The statement in the confession in this case, after describing the note in detail, further uses this language: " * * * The said note being given for goods sold and delivered by the said Pleasant M. Plyler to the said Samuel Robertson, and the whole sum aforesaid is justly due and owing to the said Pleasant M. Plyler.' The statement, I hold, complies with the law. But, even if it did not, I do not think the defendant Benjamin Graham, not being a creditor of Samuel Robertson, could assail the judgment on this account. The judgment would be good between the original parties, even if the statement was insufficient, as against creditors of Samuel Robertson; but the defendant Benjamin Graham claims the land under Samuel Robertson, and therefore would be bound by the judgment just as much as Samuel Robertson.

"Third. As to the rate of interest the judgment should bear: My conclusion is that the judgment can only bear 7 per cent. simple interest from its date, and not 10 per cent. annual interest, as stipulated for in the judgment. See section 1392, Rev. St. 1893; also case of Moore v. Holland, 16 S. C. 16. I therefore find the amount due on the judgment, up to the date of this report, to be the sum of \$492.69, as follows, viz.:

Judgment debt	\$271 00
Interest on same at 7 per cent. for 10 years, 11 months, and 8 days.....	208 03
Costs entered up with judgment and interest	13 66
Total	\$492 69

"Having reached these conclusions, I recommend that the injunction heretofore granted by Judges Watts and Witherapoon be dissolved, and that plaintiff be permitted, under order of court, to proceed with the advertisement and sale of said 500-acre tract of land.

I report the testimony taken herewith. All of which is respectfully submitted, the 25th day of February, 1898.

"R. E. Wylie, Referee."

R. E. & R. B. Allison, for appellant. T. Y. Williams and Ernest Moore, for respondent.

GARY, A. A. J. The facts of this case are fully set out in the report of the referee, which was adopted by the presiding judge as "satisfactorily and ably determining all the questions involved." The exceptions need not be considered in detail, as some of them raise the same questions in different form.

The first question that will be considered is whether the statement in the confession of judgment out of which the indebtedness arose was a compliance with the requirements of the statute. Section 384 of the Code requires that the confession of judgment must state concisely the facts out of which the indebtedness arose. It was not the intention of this section that there should be a detailed statement of the facts out of which the indebtedness arose, nor that it should furnish all the information necessary to determine its validity. The evident intention was simply to provide a clue from which creditors could investigate for themselves. This subject is so fully discussed in Weinges v. Cash, 15 S. C. 44, that we do not deem it necessary to even refer to other authorities for the purpose of showing the intention of the section just mentioned. The confession of judgment by Samuel Robertson to Pleasant M. Plyler contains the statement that the note therein mentioned was given "for goods sold and delivered" to the said Samuel Robertson by the said Pleasant M. Plyler. This, we think, was a specific statement of the consideration of the note, and a sufficient clue to enable creditors to investigate the facts. The exceptions raising this question must be overruled.

The next question raised by the exceptions is whether the confession of judgment was null and void on account of the failure to enter the proceedings in the book called "Confessions of Judgment before Clerk." Section 788 of the Revised Statutes, in making provision for the books to be kept by the clerks of court, contains the following, as the ninth subdivision of said section: "Confessions of Judgment before Clerk: In which shall be entered such proceedings kept with reference to the number of enrollment in book of abstracts instead of page together with an index to this particular volume, in the names of defendants." The sixth subdivision of said section is as follows: "(6) Abstract of Judgment: In which shall be entered each case wherein judgment may be signed (including each case in dower, partition and escheat, after judgment or final order), with separate columns, showing number of enrollment, names of parties, cause of action, attorney, date of judgment, amount of judgment, time of bearing interest, how judgment obtained, costs (separating attorney, clerk, sheriff, wit-

nesses and total), kind of execution, date of issuing, sheriff's return, when renewed and satisfaction, together with an index by the names of defendants, and a cross index by the names of plaintiffs, each alphabetically arranged, and kept in separate volumes, with the number of enrollment of judgment." The act of the general assembly containing the above provisions was passed in 1839, long prior to the Code of Civil Procedure. Section 385 of the Code provides as follows: "Sec. 385. The statement may be filed with the clerk of the court of common pleas, or with a trial justice if the amount for which judgment is confessed shall not exceed one hundred dollars, who shall enter a judgment endorsed upon the statement for the amount confessed, with five dollars, the plaintiff's attorney's costs, when the confession is entered by an attorney, and the usual fees provided by law to the clerk of the court of common pleas or trial justice, as the case may be, for entering up judgment and issuing executions in any case, together with any necessary disbursements of the plaintiff. The statement and affidavit, with the judgment indorsed, shall thereupon become the judgment roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such courts." It will be observed that subdivision 9 simply requires the clerk to enter the proceedings in the book therein mentioned, and does not declare what will be the effect or consequence of a failure to enter the proceedings in said book. In order, therefore, to determine the effect of the failure to enter the proceedings in the book, contemplated by the act of 1839, it will be necessary to take into consideration the purpose for which that law was enacted. The evident intention, when this statute was enacted, in 1839, was to afford protection to subsequent creditors and purchasers for valuable consideration, who otherwise might not have had notice of the judgment; but, while this was necessary under the old act of 1839, this necessity was superseded by the provisions of the Code, which devotes an entire chapter to this subject. Under section 385 of the Code, neither the enrollment of the judgment, nor the right to issue execution thereon, is dependent upon the fact of the proceedings being entered in the book mentioned in subdivision 9, aforesaid. On the contrary, the confession of judgment is complete in all its component parts, without the compliance with the act of 1839. And subdivision 6 of section 783 gives ample notice of the judgment, as all judgments are required by law to be entered in the book therein mentioned. While it might be well to give notice of the confession of judgment in more than one mode, still, if a party has notice from one source, he cannot complain that he did not have notice from another source, when the judgment was duly entered in the book called "Abstract of Judgment," as required by the Code. By this entry a lien was

created upon the real estate of the judgment debtor, and was constructive notice to all persons dealing with reference to the property affected by such lien. We do not think it was the intention of the general assembly that this constructive notice should be given in two different modes, but rather that the provisions of the Code, adopted subsequent to the act of 1839, are ample within themselves to afford the necessary requirements appertaining to confessions of judgments. *Ellis v. Woods*, 9 Rich. Eq. 19. The exceptions raising this question must therefore be overruled.

The seventh exception is as follows: "Because ten years had elapsed since the date of the alleged judgment, without revival of the same, affecting the right of this defendant, and no execution had been raised or could issue until renewed, and the circuit judge erred in dissolving the pending injunction, continuing the levy made under the defective execution, and permitting the sheriff to sell the said tract of land thereunder, and confessing the referee's report." The case contains the following statement of facts: "That after the delivery of said original confession of judgment by Ira B. Jones, Esq., to T. Y. Williams, to wit, on the 17th day of August, 1896, an independent proceeding was instituted by Pleasant M. Plyler, by summons, with notice and affidavit attached, for leave to issue execution on said judgment. This proceeding is entitled 'Pleasant M. Plyler, Plaintiff, vs. Samuel Robertson, Defendant.' The summons, notice, and affidavit were served on the said heirs at law of Samuel Robertson, deceased, and upon the defendant Benjamin Graham, requiring them to show cause why execution should not issue on said judgment. The defendant Benjamin Graham answered, making substantially about the same defense as set up in his answer to the first action. He further pleaded the former action in bar, and alleged that no execution could issue; there never having been administration on the estate of Samuel Robertson, deceased. On the 10th day of October, 1896, Judge Watts granted an order for leave to issue execution on said judgment, but concluded the same in the following language: 'I hold that, under section 310 (Code), execution may issue upon final judgment or decrees in any time within ten years. Such being the case, I give permission to plaintiff to issue execution on said judgment, as it is not ten years since it was obtained. But I do not pass upon the validity or sufficiency of said judgment. Neither do I pass upon or adjudge the right of any of the parties above named. Their right to assail the judgment in any manner they may be advised is expressly reserved to them.' On the 9th day of November, 1896, execution was issued on said judgment, and the sheriff of said county, on the 9th day of November, 1896, levied upon the said 500-acre tract of land, and thereafter advertised said land for

sale. Upon the petition of the defendant Benjamin Graham, showing the levy upon said land and the advertisement for sale by the sheriff, and the pendency of the action to test the validity of the judgment, Judge R. C. Watts granted a temporary injunction restraining the plaintiff and the sheriff from proceeding further with the sale of the land, and required each of them to show cause before Judge Witherspoon, at his chambers, on the 10th day of December, 1896, why a permanent injunction should not be granted. The plaintiff appeared, and answered the rule to show cause. Judge Witherspoon, on the 12th day of December, 1896, granted an order continuing the restraining order of Judge Watts 'until the cause between the same parties as to the validity of the lien of the judgment upon which plaintiff's execution was issued, now pending in the court of common pleas for Lancaster county, shall have been determined.' * * * After the levy, as above stated, the successor to Sheriff Hood (who made the levy), on 22d December, 1896, continued the levy by indorsement on the execution. I should have stated that Judge Buchanan, on the 14th day of March, 1897, made an order in this case reciting that 'a levy has been made upon certain lands in the possession of the defendant Benjamin Graham, under an execution issued upon the judgment in favor of Pleasant M. Plyler vs. Samuel Robertson, and that a sale of said lands under said levy has been temporarily enjoined'; and ordering 'that, pending the hearing of this cause, the said levy, heretofore made under the judgment in favor of Pleasant M. Plyler vs. Samuel Robertson, be continued in force,' and 'that the status of the rights of the parties under the levy remain as it was at the time said levy was made until the final decree of this court.'

Whatever might have been the legal complications if the order of Judge Watts was the only one in the cause, yet, when that order is construed in connection with that of Judge Buchanan, it is evident that the case should be considered with reference to the rights of the parties as they existed at the time the levy was made, which was before 10 years had elapsed since the judgment was confessed. The order giving permission to issue an execution on the judgment had the effect of reviving the judgment. The rule is thus stated in *McLaurin v. Kelly*, 40 S. C. 488, 489, 19 S. E. 143: "This court has had occasion recently to examine critically the mode now provided for the renewal of judgments and executions. See *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861. It approves the method here adopted. * * * Suppose we were to admit that the judgment in summary process was irregular for not having been entered on the minutes of the court by the clerk, we apprehend the respondent is estopped from denying the fact of such judgment; for, when he was served with the summons to renew the execution,

he was bound to make any and all defenses he had to such renewal, and certainly no better defense could have been interposed thereto than that no such judgment was in existence. But this he did not do. He consented to an order reviving such judgment. This matter has become *res adjudicata* as to him. *Freer v. Tupper*, 21 S. C. 83. In the case last cited, the present chief justice took particular pains, in concurring in that judgment, to use this language: 'I concur in the result, upon the ground that the question as to the legality and sufficiency of the judgment and execution was adjudged by the order to renew the execution, and, Schultz being estopped from raising that question, one who claims under him since the sale is likewise estopped.' The exceptions raising this question are also overruled. For the reasons hereinbefore mentioned, the appellant cannot successfully set up the plea of purchaser for valuable consideration without notice. It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J., did not sit in this case.

JENNINGS, Clerk of Court, v. PARR.
(Supreme Court of South Carolina. Jan. 6, 1899.)

PLEADINGS—AMENDMENT—AFTER CASE
REMANDED.

1. The supreme court not having made final disposition of a case on appeal, but having remanded it for further proceedings, the pleadings may be amended in the lower court, except as to the questions on which the supreme court rendered its decision.

2. Amendment in the lower court, on the case being remanded by the supreme court for further proceedings, is "before trial," so that it is subject only to the provision of Code Civ. Proc. § 194, that it be "in furtherance of justice," and not to the part thereof allowing amendments, when they do not change substantially the claim or defense, by conforming the pleadings to the facts proved.

3. An affidavit is not a prerequisite to an amendment.

Appeal from common pleas circuit court of Fairfield county; J. O. Klugh, Judge.

Action by Robert H. Jennings, as clerk of the court of common pleas for the county of Fairfield, in the state of South Carolina, against Henry L. Parr. Judgment for defendant, and plaintiff appeals. Affirmed.

James G. McCants and J. E. McDonald, for appellant.

Ragsdale & Ragsdale, for respondent, on the question of the right to amend, cited: *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684; *Ruberg v. Brown*, 50 S. C. 398, 27 S. E. 873; *Trumbo v. Finley*, 18 S. C. 315; *Heyward v. Williams*, 48 S. C. 565, 26 S. E. 797; *Whaley v. Stevens*, 21 S. C. 221; *Mason v. Johnson*, 13 S. C. 20; *Cleveland v. Cohrs*, Id. 397; *Nesbitt v. Cavender*, 27 S. C. 1, 2 S. E. 702; *Wallace v. Railroad Co.*, 37 S. C. 841, 16 S.

E. 35; *Whitmire v. Boyd* (S. C.) 31 S. E. 308; *Jacobs v. Gilreath*, 41 S. C. 146, 19 S. E. 308, 310; *Clayton v. Mitchell*, 31 S. C. 204, 9 S. E. 814, and 10 S. E. 390; *Martin v. Fowler*, 51 S. C. 170, 28 S. E. 312.

GARY, A. J. For a full understanding of the facts of this case, it will be necessary to refer to the report of this case in 51 S. C. 191, 28 S. E. 82, 402.

His honor, Judge Klugh, granted the following order: "This case comes before me on a motion by the defendant to be allowed to amend his answer in several particulars, set out in affidavits and served by him in this proceeding, with certain proposed amendments. After hearing argument of counsel, pro and con, I am of opinion that it will be in furtherance of justice to allow some of the amendments sought, and it is ordered that the defendant be allowed to amend his answer by adding thereto the ninth defense, which is set out in the proposed answer. The tenth proposed defense is not allowed. It is further ordered that the eleventh defense in the proposed answer be allowed. It is further ordered that the defendant be allowed to amend his answer, by setting up, as an equitable defense to any claim on the part of the children or heirs at law of Mary Ann Elkin, deceased, her liability as surety on the bond of W. B. Elkin, as guardian of the estate of the defendant; and any amount which may be found due on said bond may be set up as an equitable defense to the claim of said parties in interest herein. It is further ordered that, as against any claim by Mrs. Carrie G. Elkin, one of the alleged parties in interest for whom plaintiff sues, the defendant may amend his answer, by setting up as an equitable defense her liability as a surety on the bond of W. B. Elkin, deceased, as administrator of the estate of Henry W. Parr, deceased; and any amount found due on said bond may be set up as an equitable defense to any claim of hers in this action. It is further ordered that the plaintiff amend his summons and complaint by making the administrator of William B. Elkin, deceased, and the administrator of Mary Ann Elkin, deceased, parties to this action, and Carrie G. Elkin. It is further ordered that a copy of the answer, amended in conformity with this order, be served on the plaintiff's attorneys within 20 days, and that they have leave within 20 days from such service to plead thereto."

The ninth and eleventh defenses, which his honor allowed, are as follows: "Ninth. And for a ninth defense to the alleged cause of action defendant alleges: (1) That he has been informed, since the trial of this case on the circuit, and believes, that after the purchase of the Montgomery place by William B. Elkin, the said William B. Elkin purchased from his sisters, Mary Ann Elkin and Judith W. Ruff, their remainder in said place under the deed of Silas W. Ruff, as sheriff,

to William B. Elkin, and that he paid for the same, and was, therefore, the legal owner of both his and their interest during the time of his possession of the said tract of land, and as such liable, under the decision of the supreme court in this case, for rents and profits, and that the only claim that the parties plaintiff now have is as heirs at law of said William B. Elkin, and not as remainder-men." "Eleventh. And for an eleventh defense to the alleged cause of action defendant alleges that more than 20 years have elapsed since the maturity of said bond and mortgage, and he denies that there has been any partial payment or acknowledgment to rebut the presumption of payment arising from lapse of time."

The exceptions are as follows: "(1) Because his honor erred in allowing any amendment to the answer in this case, on the ground that the allowance of the same was contrary to the express directions of the supreme court, contained in its said judgment in said case. (2) Because his honor erred in allowing said amendment to the answer in this case, upon the ground that he had no power or authority to grant the same after the judgment of the supreme court had been rendered therein, with the directions contained therein. (3) Because his honor erred in allowing said amendments to said answer, when by the allowance of the same the matters adjudged by the supreme court were reopened and made subject of further litigation, contrary to the principle of *res judicata*. (4) Because his honor erred in not rendering a judgment in favor of the plaintiff, carrying out the judgment of the supreme court, by simply allowing the defendant to have passed upon the question of the credits mentioned in the order of the supreme court refusing a petition for rehearing in said case. (5) Because the allowance of said amendments was not in furtherance of justice, and was an abuse of legal discretion on the part of his honor. (6) Because his honor erred in allowing said amendments, when the affidavits of the defendant did not set up facts sufficient to authorize the granting of the same."

This court, upon a petition for a rehearing, filed the following order: "A petition for a rehearing of this case was filed by the said Henry L. Parr upon the grounds which are set forth in the petition. The first ground will be first considered. The eleventh paragraph of the complaint alleges, *inter alia*, that no part of said bond has been paid, except the interest thereon up to the 20th day of November, 1874, paid by the said Henry W. Parr, and interest paid thereon by the said Henry W. Parr on the 6th day of February, 1876. The fourth paragraph of the answer denies these allegations. The circuit judge, under the view which he took of the case, did not think it necessary, and therefore did not pass upon said issues. The question as to the partial payments mentioned in said first ground was not before the supreme court for its considera-

tion. This court, in stating that the mortgage should be credited with the proceeds arising from the sale of the 181 acres, to wit, \$726, and with \$272 of the proceeds arising from the sale of the 'Mill' tract, did not intend to render a decision as to other payments which were not presented for its consideration; and as the partial payments mentioned in said first ground were not before this court for consideration, of course, the judgment of this court cannot be construed as affecting the question of such partial payments. We will next consider the other grounds urged for a rehearing. It is sufficient to say that the respondent did not give notice that he would ask this court, if it should find it necessary, to sustain the judgment of the circuit court on the grounds mentioned in said petition, and the questions raised by said grounds were not before the supreme court for consideration. It is therefore ordered that the petition for a rehearing be dismissed, without prejudice to the right of the defendant to have the question as to the partial payments mentioned in the first ground aforesaid passed upon by the circuit court, and that the remittitur be forthwith sent down to the circuit court."

The first four exceptions in different forms raise the question whether the circuit judge had the power and authority to allow the proposed amendments. This depended upon whether the matters set forth in the proposed amendments were adjudicated by this court when the former appeal was considered. An examination of the former opinion of this court will show that none of the defenses allowed by the circuit judge were considered by this court, and the order refusing the petition for a rehearing shows that the supreme court did not intend to decide all questions involved in the case, and that its judgment was only final upon the questions considered by it. When the supreme court does not make a final disposition of the case, but remands it for further proceedings, it then becomes subject to the provisions of section 194 of the Code of Civil Procedure, as fully as if there had not been an appeal, except as to those questions upon which this court has rendered its decision, which, of course, cannot again be put in issue, either by amendment or in any other manner. The reason of the rule is that the amendments are in furtherance of justice as to those issues which have not been decided, and it is in harmony with the liberal spirit of the Code as to amendments. There is no case in this state directly deciding this question, but the respondent's attorneys have cited a number of cases tending to sustain this principle, which need not be set out here as they will be mentioned by the reporter.

Having reached a conclusion that the circuit judge was clothed with the power to allow the amendments, we will next dispose of the question whether the allowance of said amendments was not in furtherance of justice,

and was an abuse of legal discretion on the part of the circuit judge. The exception raising this question does not specify in what respects the action of the presiding judge in allowing the amendments was an abuse of his discretion. This court, however, fails to discover anything in the "case" showing such abuse. The amendments must be considered as having been made before trial, and the only limitation is that they should be "in furtherance of justice." Therefore that part of section 194 of the Code of Civil Procedure, allowing amendments when they do not change substantially the claim or defense, by conforming the pleadings or proceeding to the facts proved, has no application. This distinction has been drawn in a number of cases, among which may be mentioned *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684, *Wallace v. Railroad Co.*, 37 S. C. 335, 16 S. E. 35, and *Whitmore v. Boyd*, 53 S. C. 315, 31 S. E. 306.

The last question presented by the exceptions is whether the circuit judge erred in allowing the amendments when the affidavit of the defendant did not set up facts sufficient to authorize the granting of the same. An affidavit is not a prerequisite to an amendment. Therefore, if the presiding judge was satisfied that the amendments were in furtherance of justice, he had the right to allow them, even in the absence of an affidavit. It is the judgment of this court that the judgment of the circuit court be affirmed.

PRIVETT v. WILMINGTON, C. & C. R. CO. et al.

(Supreme Court of South Carolina. Jan. 6, 1899.)

FLOODING LANDS—COMPLAINT—AMENDMENT.

1. A complaint, in an action against a railroad company, to which the road was conveyed after its construction, alleging that in the construction of the road an embankment was raised so as to obstruct the natural flow of the water, whereby plaintiff's lands have been overflowed, that the obstruction has existed from the time of its erection, and that defendant has maintained and continued it in the same or worse condition, is insufficient, because not alleging that defendant constructed it, or has increased it since becoming the owner of the road.

2. Though a demurrer is properly sustained to a complaint for failure to state certain facts, plaintiff should be allowed to amend; allegations therein tending to indicate that he intended to state such facts.

Appeal from common pleas circuit court of Horry county; W. C. Benet, Judge.

Action by Mary E. Privett against the Wilmington, Chadbourne & Conway Railroad Company and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The complaint is as follows: "The complaint of the above-named plaintiff respectfully shows to this court, for a first and only cause of action: (1) That she has lawful title to the following described real estate, situate

in the county of Horry, in said state, on Maple swamp, containing seventy-two acres, more or less; being part of a tract of land originally granted to James Chapel, 8th of December, 1870, and represented by a plat made by James C. Beaty, surveyor, 27th February, 1869; about one-half of said land being cleared, drained, and in cultivation; it being a portion of the plantation on which the plaintiff resides. That the clearing and draining of said land were difficult and expensive, but, when done, the same is highly productive and valuable. (2) That the defendant the Wilmington, Chadbourn & Conway Railroad Company and the defendant the Wilmington, Columbia & Augusta Railroad Company are each a body politic and corporate, duly chartered under the laws of the said state. (3) That the plaintiff is informed by an affidavit made by J. T. Barron, Esq., of date 3d September, 1896, and so alleges, that the defendant the Wilmington & Conway Railroad Company was a company organized under the laws of this state. Whether said company has or ever had a corporate existence, or not, plaintiff is not informed, neither has she any information as to who composed the said company; but she has reason to believe, and does believe, and so alleges, that the ownership of the said road, originally built by the Wilmington, Chadbourn & Conway Railroad Company, and hereinafter complained of, notwithstanding the ostensible transfers, remains practically the same, except that the interest of certain townships in Horry county which subscribed to the capital stock therein has been divested, and that the present management and ownership are liable for all the damage occasioned thereby. (4) That some time during the year 1887 the defendant the Wilmington, Chadbourn & Conway Railroad Company constructed a railroad through the aforesaid premises of plaintiff, known as the 'Wilmington, Chadbourn & Conway Railroad,' raising an embankment through her cultivated fields, and across the said Maple swamp, in such a manner and to such extent and dimensions as to obstruct the natural flow of water down said Maple swamp, and changed the course and current thereof, by means of which obstruction of the drains in her said fields, and of the natural course and flow of water along said swamp, her fields have been overflowed with water, to the great damage and depreciation of her lands, and destruction of the crops growing thereon, all of which is caused by the erection and maintenance of the said railroad embankment in such improper and unskillful and negligent manner through the plaintiff's lands, and across the said swamp, as to prevent the natural and usual flow of the water, and by reason of which the plaintiff has been damaged to the sum of twenty-five hundred dollars; that the said obstruction has existed from the time of the erection of the said embankment till the present time, and the damage to plaintiff's prop-

erty has been growing larger and larger each succeeding year; that she has frequently brought the matter to the attention of the defendants, but they have wholly failed and refused to remedy the matter in any way, or to offer her the slightest relief. (5) That the construction of the said railroad through plaintiff's lands was without any connivance on her part; that she neither gave nor sold the right of way, and never received the slightest compensation for it, which she alleges, not as a cause of action, but in justification of her complaint; that she has in no way contributed to the cause of her own injury, and, having suffered the defendants to construct and maintain the road through her lands without compensation, she deserves better treatment at their hands. (6) That plaintiff is informed by the aforesaid affidavit of J. T. Barron, Esq., and alleges, that the said railroad has at some time since its construction been bought by parties who organized under the name of the Wilmington & Conway Railroad Company, one of the defendants herein, and who afterwards sold the same, with all its rights and franchises, to the defendant the Wilmington, Columbia & Augusta Railroad Company, who are now in possession and control of same, and who are maintaining and continuing the said embankment in the same or worse condition, and continuing thereby to overflow the plaintiff's lands, and increasing the damage thereto day by day, and in the face of plaintiff's constant protest. Wherefore the plaintiff demands that the defendants be required to pay to her the sum of twenty-five hundred dollars for the damage done to her lands as aforesaid, and to construct and keep open such and so many waterways or open trestles through the said railroad embankment on her lands, and through said swamp, as may be necessary to prevent the backing of water on the plaintiff's lands and in her ditches, and to allow the water in said Maple swamp to flow unobstructed at all times, or to surrender the said premises."

Ferd. D. Bryant and Thomas S. Moorman, for appellant. J. T. Barron, for respondents.

GARY, A. J. The appeal herein is from an order sustaining a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that "there is no allegation that this defendant erected or constructed the obstructions complained of, or that this defendant had increased said obstructions since it became the owner of the road." The reasons assigned by his honor, the presiding judge, for sustaining the demurrer, satisfy this court that he was not in error. But, as there are allegations in the complaint tending to indicate that the plaintiff intended to state those facts, the absence of which rendered the complaint obnoxious to a demurrer, it is deemed advisable that the plaintiff should be allowed

to amend so as to allege such facts. It is therefore the judgment of this court that the order of the circuit court be affirmed, with leave, however, to the plaintiff to amend her complaint, within 20 days from the time the remittitur is sent down, in the manner hereinbefore indicated, and that the remittitur be forthwith sent down.

CENTRAL OF GEORGIA RY. CO. v. PRICE.

(Supreme Court of Georgia. Dec. 14, 1898.)

CARRIERS—PASSENGER CONVEYED BEYOND DESTINATION—DAMAGES.

Where, through the negligence of the conductor of a railway company, a passenger on its cars has been carried beyond the point of her destination, such conductor, in the absence of express authority so to do, cannot constitute the proprietor of an hotel, who is entirely unconnected with the company, its agent for the purpose of providing safe and comfortable lodgings for the passenger until she can return on the company's train to her destination. It follows, therefore, that the company is not liable for any injuries or damage such passenger may have sustained while at the hotel, in consequence of any negligence on the part of its proprietor.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Action by Mrs. John S. Price against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Wm. D. Kiddoo, for plaintiff in error. M. Felton Hatcher and Guerry & Hall, for defendant in error.

SIMMONS, C. J. In the view we take of this case, it is unnecessary to deal with the many special grounds of the motion for a new trial. The record discloses that Mrs. Price was a passenger on a train of the defendant company, and that her destination was Winchester, Ga. Through the negligence of the conductor, she was not put off at Winchester, but was carried on to Montezuma. Upon her arrival at the latter place, the conductor advised her to go to the hotel and spend the night, he agreeing to carry her back to Winchester in the morning when his train made the return trip. He accompanied her to an hotel, where a room was assigned her, the conductor agreeing with the proprietor to pay her expenses. She was taken to her room by the proprietor or his servants, and furnished with a kerosene lamp, which she left burning after she had retired to bed. Some time during the night, the lamp, she claims, exploded, and set fire to a mosquito net which covered the bed, and, in her efforts to extinguish the flames, her hands were badly burned. She sued the railway company for damages, and, under the charge of the court, the jury returned a verdict in her favor for \$400. A motion for a new trial was made, and was overruled by the trial judge. To this the company excepted.

The contention of the plaintiff in the court below was that when the conductor carried her to the hotel in Montezuma, and asked her to remain there until his return the next morning, he thereby made the proprietor of the hotel the agent of the railway company, and that, if the plaintiff was injured by the negligence of the proprietor or his servants in furnishing her a defective lamp, the railway company was liable, the contract of carriage not having been fully executed, and the plaintiff being still a passenger. The trial judge, in his charge, took this view of the law, and in substance so instructed the jury. We, however, think this was error. A conductor on a passenger train of a railway company is the agent of the company, and the company is bound by all of his acts within the scope of his employment. His business is to superintend the running of the train, look after the comfort and safety of the passengers, and do such other work, in and about the running of the train, as is imposed upon him by the rules of the company or by law. Being only an agent, he had no authority, without express power conferred by the company, to appoint a subagent. He could not delegate to another, an agent of his own appointment, the powers conferred upon him. Civ. Code, § 2999. It was not within the scope of his business to constitute the proprietor of an hotel the agent of the company for the purpose of taking care of the plaintiff during the night. We are aware that several of the courts have held that, where a passenger is injured by the negligence of a railway company, such company is liable for the compensation of a surgeon employed by the conductor or station agent for attendance upon the injured passenger. These rulings are put upon the ground of humanity and public policy in cases of such emergency, but, so far as we can ascertain, no court has ever held that the company would be liable to the injured passenger for the negligence or malpractice of a surgeon so employed.

It is argued that, whether or not the proprietor of the hotel was the agent of the company, the contract of carriage was not completed, and it was the duty of the company, by its agents, safely to care for the passenger until they had delivered her at her destination. Admitting, for the sake of the argument, that this is true, we still think that the company would not be liable for the consequences of the landlord's negligence. The negligence of the company consisted in passing the station where the passenger desired to alight, without giving her an opportunity to get off. Taking her version of the manner in which she was injured, the injury was occasioned by the negligence of the proprietor of the hotel or his servants in giving her a defective lamp. The negligence of the company in passing her station was therefore not the natural and proximate cause of her injury. There was the interposition of a separate, independent agency,—the negligence of the pro-

prietor of the hotel, over whom, as we have shown, the railway company neither had nor exercised any control. Civ. Code, §§ 3912, 3913; *Perry v. Railroad Co.*, 66 Ga. 746; *Mayor, etc., v. Dykes* (Ga.) 81 S. E. 443; *Railway Co. v. Trich*, 117 Pa. St. 390, 11 Atl. 627; *Wood v. Railroad Co.*, 177 Pa. St. 306, 35 Atl. 699; *Lewis v. Railway Co.*, 54 Mich. 55, 19 N. W. 744; *Hoag v. Railroad Co.*, 85 Pa. St. 293; *Sira v. Railway Co.*, 115 Mo. 127, 21 S. W. 905; *Railway Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, and 29 S. W. 652; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39. The injuries to the plaintiff were not the natural and proximate consequences of carrying her beyond her station, but were unusual, and could not have been foreseen or provided against by the highest practicable care. The plaintiff was not entitled to recover for such injuries, and the court erred in overruling the motion for new trial. Judgment reversed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO. v. JOHNSTON.

(Supreme Court of Georgia. Dec. 13, 1893.)

CARRIERS—INJURIES TO PASSENGERS—INSTRUCTIONS—MEASURE OF DAMAGES.

1. In the trial of a suit against a railroad company for personal injuries, when counsel for the defendant has stated in his argument to the jury that he did not take the position that the plaintiff was not hurt at all, and when the evidence in the case demands a finding, on this particular issue, that he was hurt, it was not error in the court to charge the jury that it was admitted by the defendant that the plaintiff was injured as the result of the accident.

2. It is not, in the trial of an action by a passenger against a railroad company for personal injuries sustained while traveling on its cars, an error of which the defendant can complain, for the court to define the degree of care and diligence which such a company should exercise as "an extra high degree of care," though in defining "extraordinary diligence" it is better practice for the trial judge to confine himself to the definition as given in the Code.

3. Where one of the theories of the plaintiff, upon which he relied for a recovery, was that the railroad company was guilty of negligence in running its cars over the switch where the injury occurred at an unusual and dangerous rate of speed, and the court charged that if the company ran upon the switch at an excessive or improper rate of speed, and thereby contributed to and caused the accident, then the defendant would be liable, the words "excessive or improper" might be treated as the equivalent of the word "negligent"; but it would be decidedly better for the court to use the latter word, when charging in such a connection.

4. When, in such a trial, there was evidence clearly tending to show that the plaintiff's earning capacity had not been totally destroyed, it was improper for the court, especially at the close of its charge, to use the language: "The measure of damages in this case; that is, should you find that the plaintiff is entitled to recover, under the rules of law that I have given you in charge, and the opinion you entertain of the testimony, then you will find what his earnings will or would be for the length of time he is expected to live; then you would reduce it to its present value." An error of this kind is, though the court had previously laid down the correct rule on this subject, cause for a new tri-

al, when, taking into view the large amount of the verdict rendered, it cannot be safely and fairly said that the jury were not misled by the erroneous instruction given at the conclusion of the charge.

(Syllabus by the Court.)

Error from superior court, Taylor county; W. B. Butt, Judge.

Action by F. C. Johnston against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Lawton & Cunningham, John D. Little, W. S. Wallace, C. J. Thornton, and O. M. Colbert, for plaintiff in error. Hoke Smith, H. C. Peoples, W. E. Steed, and Albert A. Carson, for defendant in error.

LEWIS, J. 1. It appears from the record in this case that the general counsel for the plaintiff in error, in his argument on the trial before the jury, stated that he did not take the position that plaintiff was not hurt at all. Error is assigned on a statement made by the judge in his charge to the jury that it was admitted by the defendant that the plaintiff was injured as the result of the accident. Conceding that this charge was based entirely upon the above statement of counsel, we do not think an unfair construction was given this language. Although such an issue was presented by the pleadings in the case, the defendant alleging in its plea that the plaintiff had received no injury whatever as the result of the accident, yet the court and jury might very reasonably have inferred from the above statement of counsel that it was no longer contended that plaintiff received no injury whatever, and that the contention in the pleadings on this point had been abandoned. But, apart from this, after a careful review of the entire testimony in the record, the proof was so positive, direct, and overwhelming that the plaintiff was hurt in consequence of the derailment of the train, that a finding of this issue was demanded by the evidence. If this be true, even if the court erred in concluding that a formal admission had been made as he charged, it was a harmless error, and is not, therefore, ground for granting a new trial. On this particular point, with reference to the injuries received by the plaintiff, considered in the light of all the testimony on the subject, the real contest between the litigants seems to have been in reference to the extent of the plaintiff's injury,—the one side contending that he was seriously and permanently injured; and the other, that his injuries were only of a slight and temporary nature. In the case of *McCurdy v. Binion*, 80 Ga. 691, 6 S. E. 275, it was held not to be error for the judge to state certain facts as data which might be used by the jury in reaching their verdict; it having been proved in the case that the facts stated were admitted by the defendant, and were not in contest. To the same effect, see *Chambers v. Walker*, 80 Ga.

643 (Syl. point 3), 6 S. E. 165; *Orusselle v. Pugh*, 67 Ga. 430 (Syl. point 2). The inference is unavoidable in this case that the charge of the court complained of, even if erroneous, did not affect the finding of the jury. Judging from the amount of their verdict, they must have reached the conclusion that the plaintiff was hurt to the full extent he claimed, and that his injuries were of a serious and permanent nature. They were certainly not constrained to reach this conclusion from the statement of the court that it was conceded that the plaintiff was hurt as the result of the accident; for the judge, in other portions of his charge, fully and fairly covered the contentions and issues between the parties with reference to the extent of plaintiff's injuries. This disposes of the eighth, ninth, tenth, and eleventh grounds of the motion for a new trial.

2. Complaint is made in the twelfth ground of the motion of the charge of the court, which, in effect, defined the diligence required of the railroad company to be "an extra high degree of care." The plaintiff being a passenger upon the defendant company's car when he was injured, the duty it owed to him, under section 2206 of the Civil Code, was extraordinary diligence. Section 2899 defines that diligence to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." In charging upon this subject, the proper and safer method for the judge to adopt would be to confine himself to the statute. Its definition cannot well be simplified or made clearer by an attempt to use synonymous terms, or to convey its meaning in other words. But the definition given by the court, even if erroneous, is not such an error as the defendant can complain of. If there was any error in it, it was in favor of the company, and not the plaintiff, for the words used by the judge do not indicate in such forcible language the degree of care required as do the words in the statute. That extreme care and caution which very prudent and thoughtful persons use would naturally impress one as meaning something more than an extra high degree of care. Many courts of last resort in other states of the Union have defined the diligence required by carriers of passengers to be the "highest degree of care," and some have gone possibly to a greater extent, by defining the rule to mean: "Every precaution which human skill, care, and foresight can provide." *Caldwell v. Steamboat Co.*, 47 N. Y. 282. "The utmost care and diligence in providing against those injuries which can be avoided by human foresight." *Dodge v. Steamboat Co.*, 148 Mass. 219, 19 N. E. 373. "The utmost care and diligence of very cautious persons." *Taylor v. Railway Co.*, 48 N. H. 304. "The greatest possible care and diligence." *Railroad Co. v. Noell's Adm'r*, 32 Va. 399. But, as our statute specifically defines what is meant by "extraordinary diligence," nei-

ther the adjudications of other courts on the subject, nor the definitions in standard dictionaries, need be invoked to throw light upon the subject. No request having been made to the court to give in charge this statutory definition, the defendant company cannot complain of a construction of the law which, to say the least of it, does not impose upon the railroad a greater degree of diligence than that required by law. This disposes of the twelfth and thirteenth grounds of the motion.

3. In the argument for plaintiff in error it was especially contended that the charge complained of in the fourteenth and fifteenth grounds of the motion, to the effect that if defendant ran upon the switch at an excessive or improper rate of speed, and thereby contributed to and caused the accident, then it would be liable to the plaintiff, was error, because the question of negligence was one solely for the jury, and that, even if the speed of the train was excessive or improper, it was still for the jury to say whether, under all the circumstances of this particular case, such a rate of speed constituted negligence. It is unquestionably true that questions of negligence are for the jury, and the court cannot instruct them that particular acts amount to negligence. But this the judge did not undertake to do in his charge. The term "excessive" means tending to, or marked by, excess, which is defined by Webster to be "the quality or state of exceeding the proper or reasonable limit or measure." In the case of *Chadbourn v. Town of Newcastle*, 48 N. H. 196, the term "improper," when applied to human conduct, is defined to be "such conduct as a man of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of." It would have been manifest error if the judge had charged the jury what particular rate of speed would have been excessive or improper; but, if a person is guilty of excessive or improper conduct which results in injury to another, it necessarily follows that the injury is occasioned by the negligence of the wrongdoer. For the judge, therefore, to charge the jury in the words used by him, was nothing more or less than telling them, in effect, that, if the plaintiff's injuries were caused by the negligent conduct of the defendant in the rate of speed at which it was running its car, the defendant would be liable. The question as to whether the speed actually used was improper or negligent was left entirely to the jury. We think, therefore, that the words "excessive or improper," in the connection in which they were used by the court in his charge, might fairly and properly be considered as equivalent to the word "negligent," and that there was no error in overruling the motion for a new trial on this ground. It would, however, have been decidedly better for the court to have used the word "negligent" itself in lieu of the above language employed by him, as this would not have left the legality of the charge, or its

true intent and meaning, open to criticism or doubt.

4. It clearly appears from the record in the case that the earning capacity of the defendant in error was not totally destroyed by the injuries he received. He himself admitted upon the stand that he had pursued the practice of his profession to some extent after receiving these injuries, and had made some money in his business; specifying the amount. Indeed, it was not contended by his counsel that there was any testimony in the record from which it could be inferred that the ability of the defendant in error to pursue his regular occupation to some extent, and to earn money in such pursuit, had been entirely destroyed. In the charge of the court complained of, the jury were, in effect, instructed that they could take as a basis of a recovery for any financial loss which the plaintiff below may have sustained what his earnings will or would be for the length of time he is expected to live, and, after ascertaining such amount, they should then reduce it to its present value. It was manifest error, inasmuch as the language used gave the jury the latitude of basing their finding of damages upon the entire earnings of the plaintiff, instead of upon the difference between what his earnings would be after the injury and what they would have been had he not been hurt. It was contended, however, by counsel for defendant in error, that in other portions of the charge the court fairly and fully instructed the jury on this subject, and that, considering the charge complained of in connection with the entire charge upon this subject, the jury could not have been misled by the instructions given them. It is true, as contended, that the judge did, in another portion of his charge, correctly state the law on this particular point. The charge complained of, however, was not given in the same connection. After instructing the jury fully upon the measure of damages, the court proceeded to give them at considerable length the rules of law in regard to pleadings, degree of diligence railroad companies should exercise in such cases, rules of evidence, and other matters not directly connected with the subject relating to the measure of damages in this particular case. The judge then, at the conclusion of his charge, again adverted to this subject relating to the measure of damages; instructing the jury that they should find what the plaintiff's earnings will or would be for the length of time that he was expected to live, and to reduce that amount to its present value. We think the language used was calculated to leave upon the minds of the jury an erroneous impression as to what rule should govern them in reference to this very important issue on trial; and coming, as it did, at the conclusion of the charge, and being the last impression received from the court, it might have supplanted the correct ideas the jury may have at first entertained from previous

portions of the court's language. This court has repeatedly held that, where an erroneous rule of law is given to the jury on a material issue in a case, a new trial will be granted, notwithstanding the correct rule may have been announced in other portions of the charge. *Railroad Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613; *Powell v. State*, 101 Ga. 11, 29 S. E. 309 (Syl. point 6); *Railway Co. v. Davis* (Ga.) 30 S. E. 202. It does not follow, however, that because one portion of the charge is totally repugnant to another, even on a material point, such a mistake on the part of the court will necessarily be reversible error. If, for instance, the verdict rendered by the jury was demanded by the evidence, a new trial will not ordinarily be granted, regardless of errors of law committed. Or if the verdict was for such an amount as to clearly indicate upon its face that the jury must have applied the correct rule laid down by the court, and not the erroneous rule, it would be at once concluded that the error worked no harm to the plaintiff in error. The real question seems to be whether or not, on account of such conflicts or inconsistencies in the instructions of the court upon vital issues in a case, it can with perfect safety and fairness be said that the jury were not misled to the injury of the complaining party. Applying this doctrine to the case at bar, we think there was error in overruling this ground of the motion for a new trial. The verdict found by the jury was certainly not demanded by the evidence, nor was there anything in the amount of the finding to indicate, or to authorize the inference, that they did not apply the erroneous instead of the correct rule on the subject of the financial damages which the defendant in error has sustained; for, if the last rule on this subject laid down by the court had been adopted by the jury, the most favorable view of the evidence that could be taken indicates that they nevertheless found, in addition to such damages, several thousand dollars for pain and suffering. We do not mean to intimate that the verdict in this case was contrary to evidence, or that it was so excessive as to authorize this court to infer bias and prejudice in the minds of the jury either against the plaintiff in error or for the defendant in error. As the case goes back for a new trial, we refrain from expressing any opinion whatever on this subject. The judgment of the court below is reversed solely on the ground indicated in the fourth headnote. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

FLANNAGAN v. STATE

(Supreme Court of Georgia. Dec. 13, 1898.)

HOMICIDE — INSANITY AS DEFENSE — EVIDENCE — NEW TRIAL.

1. It was, in a trial for murder in which the sole defense was that the accused was insane

at the time of the homicide, improper and illegal to allow the following question to be propounded to an expert witness, the answer there-to being in the negative: "State whether, in your opinion, from your examination of [the accused], from all that you know of him, have observed of him, or heard of him, he was laboring, at the time this crime was committed, under any overmastering delusion."

2. A new trial is granted in the present case, not only because of the error indicated, but also because the record discloses grave reasons for fearing that one of the jurors was not impartial, and also because it appears that the leading counsel for the accused was so ill before the trial concluded that he was not in a proper physical condition to give to the case that degree of care and attention which its importance required.

3. The numerous grounds of the motion for a new trial not referred to in the preceding notes do not present any question which it is essential to decide at this time.

(Syllabus by the Court.)

Error from superior court, Dekalb county; John S. Candler, Judge.

E. C. Flannagan was convicted of murder, and brings error. Reversed.

Geo. C. Spence and Glenn & Rountree, for plaintiff in error. W. T. Kimsey, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. Flannagan was indicted for murder, and defended on the ground of insanity. The jury returned a verdict of guilty, but a new trial was granted. Flannagan v. State, 103 Ga. 619, 30 S. E. 550. Upon his second trial, the accused was again convicted, without recommendation. His motion for a new trial was overruled, and he excepted.

1. The following question was propounded by the state's counsel to one of the expert witnesses introduced by the state: "State whether, in your opinion, from your examination of [the defendant], from all that you know of him, have observed of him, or heard of him, he was laboring, at the time this crime was committed, under any overmastering delusion." To this question the witness was allowed, over the objections of the defendant's counsel, to give a negative answer, the objections made to the question being that it was "not in proper shape," was "not a proper question for the witness to form an opinion on," and was "not a proper hypothetical question." To this ruling exception was taken. An expert on insanity, as was the witness of whose evidence complaint is here made, may give an opinion based upon his own examination of a person, upon his observation of that person, or upon any state of facts, supported by some evidence in the case, which he assumes as true. The jury should be informed whether he bases his opinion on his own knowledge or upon a hypothetical state of facts, and should know what portion of the evidence he has assumed to be true in forming his opinion. In the present case, the witness gave an opinion which may have been based, in whole or in part, upon what he had heard of the defendant, and we think it should not have been received. Suppose another expert witness had testified that, from

what he had heard, the homicide was committed under an overmastering delusion; how could the jury have possibly derived any assistance from this evidence? The two experts might have testified thus contradictorily, and yet been each correct, because of their having heard very different things of the defendant, and the jury would have been unable to form any conclusion as to the truth of the facts upon which either opinion was based. "It has never been held that a medical expert has the right to give in evidence an opinion based on information which he has derived from private conversations with third parties." Rog. Exp. Test. § 46; Railway Co. v. Shires, 108 Ill. 617, 630. "Expert opinions are admissible if based upon a state of facts which the evidence on behalf of either party tends to establish; but the jury should know upon what facts the opinion is founded, for its pertinence depends upon whether the jury find the facts on which it rests. * * * An opinion, based mainly upon representations out of court, can be no more competent testimony than the representations. If the jury are not informed what the representations were, they do not know upon what hypothesis of facts the opinion rests. If they are informed, they are still left with no evidence of the existence of the facts, except unsworn declarations of a third person out of court, which are not proof in courts of law." Wetherbee's Ex'rs v. Wetherbee's Heirs, 38 Vt. 454. See, also, Heald v. Thing, 45 Me. 392; Hunt v. State, 9 Tex. App. 166; Polk v. State, 36 Ark. 124; Hurst v. Railroad Co., 49 Iowa, 76; Lawson, Exp. Ev. p. 144 et seq. "Medical men are permitted to give their opinion as to the sane or insane state of a person's mind, not on their own observations only, but on the case itself, as proved by other witnesses on the trial; and, while it is improper to ask an expert what is his opinion upon the case on trial, he may be asked his opinion upon a similar case hypothetically stated." Choice v. State, 31 Ga. 468. In the present case, the expert witness testified as to his opinion, based, to how great an extent does not appear, upon what he had heard. The jury had no possible means of knowing whether his opinion was not based upon an assumption of the truth of rumors or reports which the jury did not believe to be true, or of whose truth there had been submitted to them absolutely no evidence. It is therefore clear that the question was improper, because it allowed an opinion based upon what the witness had heard of the accused, and that the evidence was inadmissible. Nor was the evidence otherwise unobjectionable. It was not competent for the expert to give in evidence an opinion based upon what he knew of the accused, without stating what he knew of him. The opinion may have been based upon facts known to the witness, but altogether unknown to the jury; or the jury, had they known such facts, might have attached to them so little importance as to disregard an

opinion known to be based upon them, and to lose faith in an expert who regarded them as sufficient foundation for a positive opinion as to such a weighty matter. As was said in the case of *Burns v. Barenfield*, 84 Ind. 43, 48: "It is the clear right and duty of the jury to judge of the truth of the facts upon which the opinion of the expert is based. If his opinion is based upon what he may suppose he knows about the case, upon facts, it may be, altogether irrelevant and unknown to the jury, it would be impossible for them to pass upon the truth of the facts upon which the opinion may be based, or to apply the opinion of the expert to the facts. Neither court nor jury can know the facts upon which the opinion rests. It is obvious that, where the expert delivers his opinion from what he supposes he knows about the case, he must assume and exercise both the functions of the court and the jury,—he determines that what he knows is both relevant and true. The relevancy of the facts must be determined by the court, their truth by the jury. The witness cannot pass upon such questions." See, also, *Railroad Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908; *Van Densen v. Newcomer*, 40 Mich. 90, 119, 120. In addition to these objections, the question was "not in proper shape," and was certainly "not a proper hypothetical question." Where the question at issue is one of opinion merely, as that of sanity or insanity, a witness who has "knowledge of the facts and their surroundings may give his opinion by showing the reason for it, whether he be an expert or not." *Killian v. Railroad Co.*, 78 Ga. 749, 8 S. E. 621; Civ. Code, § 5285. When, however, an expert is asked to give an opinion on facts not coming within his own knowledge, the question should be hypothetical. *Telephone Co. v. Jordan*, 87 Ga. 69, 13 S. E. 202. "A scientific expert who has observed none of the facts for himself should give his opinion on a hypothetical case similar to that before the jury, and not on the actual case, as if he were a juror instead of a witness." *Griggs v. State*, 59 Ga. 738; *Choice v. State*, supra. In the present case the question was not hypothetical, and yet was so framed as to allow the witness to give an opinion on facts unknown to him, but testified to or stated by others. Not only was his opinion asked directly as to the case, but it was asked as to the controlling, and, indeed, the only, issue in the case. The defense relied upon was that of delusional insanity, and it was contended that at the time of committing the homicide the accused was acting under such a delusion, brought about by mental disease,—that his will was overmastered. The testimony of this expert that the accused was not "laboring, at the time this crime was committed, under any overmastering delusion," was, therefore, tantamount to the expression of an opinion that the accused was guilty of murder. "Questions should be so framed as not to call on the witness for a critical review

of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of fact from the testimony, or to pass on the credibility of the witnesses, the general rule being that an expert should not be asked a question in such a manner as to cover the very question to be submitted to the jury. As expressed in one of the opinions, 'a question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them.'" *Rog. Exp. Test.* § 26, and cases cited. And in *State v. Felter*, 25 Iowa, 67, 74, the following question was said to be improper, for the reason that it "practically [put] the medical witness in the place of the jury": "From the facts and circumstances stated by previous witnesses, and from those testified to by still other witnesses, relating to the homicide, and from defendant's conduct on the trial, is it your opinion that the defendant was sane or insane when he committed the act?" See *Rog. Exp. Test.*, supra. For the reasons above given, we think the evidence was manifestly inadmissible, and that the court erred in overruling the objection made to the question. Nor can the error be treated as one of little importance. There was evidence in the case which would have supported a finding that the will of the accused, in consequence of a delusion brought about by mental disease, was overmastered, so that there was no criminal intent as to the act in question, and that this act was connected with the peculiar delusion under which the accused was laboring. Where such evidence was before the jury, who can say whether their finding to the contrary was or was not brought about by this illegal evidence? This court cannot do so. This testimony was given by the principal expert witness for the state, and went directly to the very subject which the jury had to decide, and we cannot say that their finding may not have been based upon such testimony, or that it may not have served to remove from their minds a reasonable doubt which would otherwise have existed there as to the sanity of the accused.

2. We think we have demonstrated that it was reversible error to allow the question and answer of the expert witness alluded to above. That error was in itself sufficient to require the grant of a new trial, but there were other errors complained of which, taken in connection with that heretofore discussed, make us the more certain that the ends of justice require a new trial. It was established, almost beyond dispute, that one of the jurors was incompetent to serve upon the trial. There was positive proof that, a day or two before the trial, he expressed an opinion that the accused was sane at the time of the commission of the homicide, and should be hung. The juror made no denial of this, except to swear that another used the expression, and that he agreed to it in an unthink-

ing way. If we could consider, in addition to the affidavit of the person to whom the juror expressed his opinion, the affidavit which contains a written admission of the juror, the latter's incompetence would be established; but the general trend of the decisions of this court is that admissions of a juror, made after the trial, cannot be used to impeach his verdict, although in the case of *Martin v. State*, 25 Ga. 494, a new trial was granted solely upon the admissions of a juror. Furthermore, it appears from the record that on the trial Mr. Rountree was the leading counsel for the defense; that, after two speeches had been made on Wednesday, Mr. Rountree was taken ill with a severe attack of cholera morbus, and the court adjourned from time to time until Friday afternoon. At that time Mr. Rountree appeared, having previously filed an affidavit by his physician that he was physically unable to conduct the case, and stated in his place in court that he had been sick since Wednesday night with this attack of cholera morbus, that he was unable to proceed with the argument, and that he, having tasted no food in 56 hours, could not in his then condition do his client justice. The refusal, under these circumstances, to grant a mistrial is assigned as error. The trial judge, in approving this ground of the motion for new trial, says, in substance, that in a private conversation he had announced to Mr. Rountree a willingness to take another recess; that Mr. Rountree did not so understand the court; that the announcement was not made from the bench; that in his opinion Mr. Rountree was able to make his argument to the jury; and that he ordered the trial to proceed. The motion for mistrial was made in open court, and in open court the judge overruled it. What was said in private conversation, off of the bench, was not binding upon the judge or counsel, for it was not such a ruling as could be excepted to and assigned as error in this court. *Grant v. State*, 97 Ga. 780, 25 S. E. 369. There was an affidavit of Mr. Rountree's condition, and his statement in his place that he was unable to make the concluding argument for his client. The judge, it seems, thought that he knew the condition of Mr. Rountree better than did the latter or his physician. When an attorney makes a statement in his place, it is considered as binding as though he were under oath. This attorney, therefore, stated in a manner equivalent to an oath that he was too ill, on account of a sudden attack of cholera morbus, and the consequent weakness and debility, to proceed with the trial. It does seem to us that an attorney who had been thus afflicted, who had been without food from Wednesday night until Friday afternoon at 4 o'clock, was physically incompetent to discharge properly the duties of his office on the trial of a murder case. The constitution and laws of this state guaranty to every person charged with an offense against its laws a fair and impartial trial and the benefit of counsel. Whether or

not the accused was guilty of murder, whether or not he had capacity to form a criminal intent, his guilt must be ascertained in a fair and lawful manner. As was said by Warner, C. J., in the case of *Moncrief v. State*, 59 Ga. 470, 472: "The defendant may or may not be guilty of the offense with which he is charged; but, if he is guilty, that is no reason why the court should be less careful to see that he is tried and convicted in accordance with the laws of the state, inasmuch as the penalty is the loss of life." Believing that this has not been done in the present case, we cannot, as judicial officers, affirm the conviction, but must, in the performance of our duty, reverse the judgment of the trial court, and direct that the accused be again put upon trial.

3. The motion for new trial contained many grounds with which we do not here deal. Some of these the trial judge did not verify as made, but qualified and explained in approving them. As they now stand, it is not necessary to mention them here. None of them will be at all likely to arise upon another trial of this case, and a decision of them would not be helpful. Judgment reversed. All the justices concurring, except LEWIS, J., disqualified.

HOLLEMAN et al. v. BRADLEY FERTILIZER CO.

(Supreme Court of Georgia. Dec. 14, 1898.)

SALES—CONTRACTS—CONSTRUCTION—LEGALITY—AGENCY—DEMURRER—APPEAL—WAIVER.

1. A. and B. enter into a written contract, whereby it is stipulated that A. shall furnish B. a given quantity of fertilizers at a certain price per ton; that B. shall make a complete statement of the list of purchasers of the fertilizers from him, shall furnish such list to A. by a given time, and shall settle for all such sales by giving his individual note or notes to A.; that the cash, notes, and other obligations received by B. in payment for the goods sold by him are to be held in trust for A., and forwarded to him at a given date, to secure B.'s individual notes, and all such like notes and other obligations received by B. from purchasers to be guaranteed by him, and, if returned to him for collection, are, with the proceeds, to be at all times the property of A. until B.'s individual note or notes are paid in full; that the individual note or notes of B. to A. shall be met at maturity, and their prompt payment shall not depend upon the collection of the notes and accounts of the persons who have purchased the fertilizers from B.; and that said fertilizers, until sold, are the property of A.; and any part thereof unsold on a given date are to be subject to his order. *Held*, that this contract created between the parties a del credere agency, and that the title to the fertilizers did not pass to B. upon their delivery to him by A., but remained in A., the principal, until sold by B., the agent.

2. In a suit by such principal against his agent, for money collected by the latter as the proceeds of sales he had made of the principal's goods, the agent cannot set up as a defense to the action the fact that, when he sold the fertilizers to third parties, the same had not been inspected, analyzed, tagged, or branded, as required by law.

3. Alleged error in overruling a demurrer to an amendment filed to a petition cannot be

made the subject-matter of review in a motion for a new trial.

4. The above covers all the grounds of error complained of which were insisted on by plaintiff in error before this court. All exceptions in the record not mentioned either in the brief or argument of counsel for plaintiff in error will be considered by this court as being abandoned.

(Syllabus by the Court.)

Error from superior court, Taylor county; W. B. Butt, Judge.

Petition by the Bradley Fertilizer Company against G. T. Holleman & Son. There was a judgment for plaintiff, and defendants bring error. Affirmed.

W. S. Wallace, W. P. Edwards, R. D. Smith, and J. Y. Allen, for plaintiffs in error. C. C. West, J. H. Worrill, and Brannon, Hatcher & Martin, for defendant in error.

LEWIS, J. 1. The following is the written contract declared upon by plaintiff below in its amended petition, and which was introduced on the trial of the case: "Bradley Fertilizer Company, Boston, Mass. This agreement, made this 13th day of March, 1888, between Bradley Fertilizer Company, of Boston, Mass., and G. T. Holleman & Son, of Lamar's Mill, Upson Co., Ga., witnesseth: That said Bradley Fertilizer Company hereby agrees to supply said G. T. Holleman & Son with a limited quantity of fertilizer for sale by them during the season of 1887 and 1888, upon following terms and conditions: The fertilizers to be delivered f. o. b. cars at Butler, Ga., viz.: 12 tons sea fowl guano, at 20 dollars per ton 2,000 lbs., which price is to be net to the Bradley Fertilizer Co., exclusive of all charges and commissions. A complete statement of the season's sales, with a list of the purchasers names in full, is to be furnished said Bradley Fertilizer Company by said G. T. Holleman & Son, not later than May 1, 1888. Settlement is to be made on or before May 1, 1888, for all said fertilizer sold to date of settlement by said G. T. Holleman & Son, by note or notes of said G. T. Holleman & Son, maturing not later than November 15, 1888, and payable at Macon, Ga., without any expense whatever of remittance to said Bradley Fertilizer Company. The specific cash, checks, notes, liens, and other obligations received from time to time by said G. T. Holleman & Son, in payment for or on account of said goods sold by them, are to be so kept and held in trust for the Bradley Fertilizer Company, and forwarded to said company not later than May 1, 1888, to secure the payment of note or notes of said G. T. Holleman & Son. All checks, notes, liens, and other obligations so received are to be guaranteed by said G. T. Holleman & Son, and, if returned to or left with them for collection, are, with the proceeds, to be at all times the property of the Bradley Fertilizer Company, until the note or notes of said G. T. Holleman & Son are paid in full. Said notes of G. T. Holleman & Son must be met at maturity, and their prompt payment must not

depend upon the collections of the notes or accounts of the persons who have purchased said fertilizers. Said fertilizers, until sold, are the property of the Bradley Fertilizer Company, and any part thereof unsold on May 1st next are to be subject to their order, but the said G. T. Holleman & Son hereby agree to keep them well sheltered, and to hold the same free of all charges and storages. [Signed] Bradley Fertilizer Company, by F. M. Johnson, Jr., Agent. G. T. Holleman & Son, Lamar's Mills, Ga. Shipping Point, Butler, Ga. Subject to approval of home office. 36 tons to date, Mch. 21, 1887. Freight from Pensacola, per ton, \$1.41." In several of the grounds of the motion for a new trial, error is assigned on the construction of the above contract given by the judge in his charge to the jury. On this point the court charged the jury that the contract meant that Holleman & Son were the agents of the Bradley Fertilizer Company; that the contract constituted Holleman & Son agents of the company to sell a certain specific amount of guano, at a certain specified price; and that, under and by virtue of the terms of that contract, title never passed out of the Bradley Fertilizer Company until it was disposed of by their agents to the consumers. Counsel for plaintiffs in error contend that this was an erroneous construction of the contract; that the stipulations entered into between the parties constituted Holleman & Son purchasers of the goods from the company; and that, therefore, when the goods were delivered to them, title passed out of the company and vested in them. We think the court was right in its ruling upon the subject. Manifestly, under the terms of the contract, Holleman & Son were under no obligation to the company, and had incurred no liability, until they had made sale of the goods to third parties; and, until this sale was made, the title to the property remained in the company. If there were any doubt about what the real intention of the parties was, under the terms of the contract, down to the last sentence, that sentence clearly removes all ambiguity in stipulating that "said fertilizers, until sold, are the property of the Bradley Fertilizer Company, and any part thereof unsold on May 1st next are to be subject to their order." The case of Snelling v. Arbuckle (Ga.) 30 S. E. 863, is cited by counsel for plaintiffs in error to sustain their contention. By a comparison of the contract in that case with the one now under consideration, a very marked difference will appear. It appears there that the consignee of the goods not only guaranteed the sale of each consignment, but agreed to pay for the goods at a definite time named, regardless of the fact whether he had made any sale thereof or not. Other distinctions could be drawn, but this one is quite sufficient to show that the case above cited has no application to the issue in the record before us.

2. In the motion for new trial error is alleged in the charge of the court to the effect

that, if Holleman & Son, by reason of the fact that they had sold the guano, and parties had refused to pay for it on the ground that it was not tagged and branded, had turned over the notes they had received, with all the cash they had received thereon, and had made an effort to collect the same, and had failed to do so because the guano was not tagged and branded, the company would only be entitled to a judgment against them for the amount actually collected; and, if Holleman & Son turned the notes over to the company that they had failed to collect for this reason, then Holleman & Son would have been discharged; but if they took these notes, and collected them, and took the money and kept it, then the company would be entitled to a judgment against them for whatever amount may have been retained in their hands unaccounted for to the company. And in refusing to charge, as requested, that "no rights can arise to either party out of an agency created for an illegal purpose; and that for a principal to furnish his agent guano to be sold in Georgia which has not been 'inspected,' 'branded,' or 'tagged' is to furnish the same for an illegal purpose, and the courts will not help or aid either party, in a suit by either against the other, respecting the liabilities of either to the other growing out of said contract." It was contended by counsel for plaintiffs in error that, even if the relation of principal and agent existed between the parties, this agency was created for an illegal purpose; that both are at fault, and the courts will not help either in a suit by one against the other based upon such an illegal contract. The reply to this contention is that this suit was not based upon such an illegal contract; nor was it an effort to enforce a contract executed for an illegal purpose. There is nothing upon the face of the contract itself to indicate that it was the purpose of the company to have the agents sell its fertilizers in violation of the law requiring an inspection, branding, and tagging of the same. There is nothing in the testimony outside of the contract to indicate such a purpose. On the contrary, it was shown that there was simply an omission to tag and brand a portion of the fertilizers shipped by the company to its consignees, and the company afterwards telegraphed to them to hold these goods that were not branded until the same could be inspected and tagged, etc. It happened that the telegram was received too late as to some of the goods, which had been sold to farmers by the agents. Was it not the duty of the agents themselves, when they saw the statute had not been complied with as to some of the fertilizers, either to have had the fertilizers tagged, etc., or to have informed their principal of the omission, and not to have sold the goods in violation of the law? We infer from the record that it was evidently not the purpose of the company to ignore the statute, and its violation was really the act of their

agents. They were at least particeps criminis; and ordinarily, in such cases, agents will not be heard to set up their own wrong and illegal conduct in violating the law as a defense to an action for money they had actually collected for their principal. There was evidently no violation of the statute upon delivery of the goods to these agents by their principal; for, as before seen, this was not a sale. Besides, the record shows the company was located in Boston, Mass., and the inference is the fertilizers were shipped from there to Georgia. The goods could not have been properly inspected and tagged till they reached this state. *Hammond v. Wilcher*, 79 Ga. 421, 5 S. E. 113. It follows, therefore, that there was no violation of the law before the goods reached the agents, and they were really the violators of the statute by making sale of the goods before the law had been complied with. It appears from the testimony that some of the purchasers of this guano were introduced as witnesses, who testified that the same was not tagged or branded, but who nevertheless waived any defense they might have had growing out of this fact, and voluntarily paid the purchase price of the goods to these agents. The purchasers had a right to make this waiver. They had the right, in spite of the violation of the law, to have paid the money; and when such a payment is made voluntarily, and without protest or compulsion, it could not be recovered back, even by the purchaser, without some special statute authorizing its recovery. When the money went into the hands of the agents, it was manifestly not their property. It had ceased to be the property of the purchaser, and it necessarily follows that it belonged to the principal. In the case of *Ingram v. Mitchell*, 30 Ga. 547, it was decided: "(4) Where an agent receives money for his principal upon an illegal contract, he cannot avail himself of that defense in an action brought against him by the principal for money had and received to the plaintiff's use, especially when those who paid over the money to the agent do not desire that he should retain it. (5) When money is actually paid over upon an illegal contract, it is clear that it cannot be recovered back, the contract being executed, and both parties being in pari delicto. (6) A party may, in some cases, be allowed to retain money which was due to him ex equo et bono, but which he could not have recovered at law; yet he never can be allowed to retain money to which he has no claim whatever against the true owner." This decision was based upon the sale of a negro slave, made by an agent for the owner for the purpose of saving the slave's life then endangered by a charge against him of a capital offense. The object of the sale was evidently illegal; yet, the agent having actually sold the slave and received money for the principal, he was held liable. See authorities cited in the opinion, collected by Lumpkin, J. This case is

cited approvingly in *Clarke v. Brown*, 77 Ga. 610. In that case Chief Justice Jackson, delivering the opinion, says: "The agents cannot set up the illegal contract, because they made it, and got a consideration for using the money illegally, and are particeps criminis. Just as if it had been necessary for the plaintiff—the principal—to use the illegal contract to recover the money, which would have been necessary had he sued for the profits of the venture, so it is illegal for the agents to use it to defend the suit for money they have belonging to the principal." The case in 30 Ga., cited above, is much stronger than the one at bar, for invoking an illegal contract as a defense to an action; for in this case the illegal contract was made by the agents themselves, who set it up as a defense, besides being fully executed by the purchasers paying to the agents the money agreed on in the illegal contract. This money the agents held in trust for their principal. If the contention of plaintiffs in error be correct, then it would lead to results revolting to reason, and shocking to every sense of justice. If an agent can thus defend a suit for money so collected by him for his principal, it would follow that, had the claims against the purchasers of this fertilizer been put in the hands of an attorney at law, and they had voluntarily paid him, waiving their defense growing out of a violation of the statute by the creditor, such attorney could pocket the money, appropriate it to his own use, and defend an action therefor by replying to his client, "You have made an illegal contract, and, though I have collected the money on it for you, I am released under the law from my obligation to pay it to you." The charge of the court complained of in this case restricted the finding of the jury to such amounts as the testimony showed these agents had actually received for the sale of the goods. We think it quite as fair to the plaintiffs in error as could reasonably have been expected; and, if any error was committed, it was prejudicial to the fertilizer company.

3. Another ground in the motion for a new trial is alleged error of the court in overruling defendants' motion to strike plaintiffs' amendment to their petition declaring on the contract, and seeking to hold defendants liable to them under the contract as agents *del credere*, on the ground that the amendment made a different and new cause of action and new parties, or sought to make them liable in a different capacity to that set out in the original cause of action. Although this was called a "motion to dismiss the amendment," it was, properly speaking, a demurrer to the amendment. There were no exceptions *pendente lite* filed to the judgment of the court overruling this demurrer, nor were any exceptions specifically taken thereto in the writ of error to this court. Under well-established rules of this court, such a question is not a subject-matter of

review in a motion for a new trial. *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448. The rule in regard to demurrers to original petitions would apply with equal force to such objections when raised to an amendment to a petition.

4. The above deals with most of the various grounds in the amended motion for a new trial, and covers all the points argued or presented to this court for review by counsel for plaintiffs in error. We, therefore, according to previous rulings of this court, treat the silence of the attorneys for plaintiffs in error on other questions made in the record as an abandonment of these grounds in their motion. Such a construction is particularly applicable to this case; for, upon an examination of the remaining grounds of the motion, we think they are void of all merit. The principles decided in the first two headnotes are really upon the controlling issues in the case. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., disqualified, and LITTLE, J., absent on account of sickness.

CALHOUN v. LITTLE.

(Supreme Court of Georgia. Dec. 23, 1896.)

TOWN CHARTER—ORDINANCE—JUDGES—LIABILITY FOR JUDICIAL ACTS—STATUTES—CONSTRUCTION—MEMBER OF TOWN COUNCIL.

1. The town of Waresboro derives its authority to exercise corporate functions from an act of the general assembly passed on December 9, 1893 (Acts 1893, p. 335), granting a new charter to such town. Under this act, an ordinance which confers upon the police court of the town authority to punish by imprisonment without giving persons convicted of offenses against the town an opportunity to pay a fine is void for want of authority in the town council to pass it.

2. In all cases where judges of courts of general jurisdiction are exempt from civil liability in damages for their judicial acts, presiding officers of courts of limited jurisdiction are likewise exempt. (a) It follows, therefore, that where the presiding officer of a municipal court judicially determines that a given ordinance is valid, though in fact it is void for want of authority in the town council to pass it, he will not be liable in damages to a person convicted in his court of an offense against the town, and punished under such ordinance by imprisonment, without having been given an opportunity to pay a fine, provided the court in which such person is convicted has jurisdiction of the subject-matter of the offense.

3. Where a section of the Code has been codified from a decision of this court, it will be construed in the light of the source from which it came, unless the language of the section imperatively demands a different construction. (a) Section 752 of the Political Code has no application to acts of a member of a town council when he is presiding in a police court which is authorized by the charter of the town.

4. The principles above announced control the case. There was no material error in the charges complained of. The evidence amply warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by B. S. Calhoun against E. P. Little. Judgment for defendant, and plaintiff brings error. Affirmed.

Hitch & Myers, for plaintiff in error. Leon A. Wilson, for defendant in error.

COBB, J. On June 28, 1893, Little, as mayor pro tem. of the town of Wareboro, tried Calhoun upon the charge of violating the following ordinance of the town: "It shall be unlawful for any person or persons to engage in fighting or riotous conduct within the corporate limits of the town of Wareboro, or resist or obstruct the marshal or any policeman while in the discharge of their official duties." The accused was convicted, and the following sentence was passed upon him: "After hearing the evidence in the above-stated case, it is ordered and adjudged by the court that the defendant be kept in the jail of the town of Wareboro for three days." It appears from the minutes of the town council that this sentence was afterwards commuted, by the officer who tried the accused, to imprisonment for one day. This sentence was passed pursuant to the following ordinance: "Any person who shall commit any or either of the offenses hereinafter mentioned * * * shall on conviction for each offense be sentenced to pay a fine of not less than one dollar nor exceeding twenty dollars, or imprisonment and work on the public streets not exceeding thirty days." The ordinances herein quoted were passed in 1888. The present suit is an effort on the part of Calhoun to recover damages from Little on account of the alleged illegal detention of the plaintiff in the town jail. The petition alleges that the sentence above quoted was without authority of law, and that the imprisonment of petitioner thereunder was malicious and in violation of law; that petitioner had violated no ordinance of the town; and that the conviction and sentence was a willful and malicious persecution. The petition further alleges that efforts were made on the part of friends of petitioner to give bond or deposit any sum of money required to enable him to have the sentence reviewed and set aside, but that these efforts were unavailing. The defendant answered, denying that the sentence and imprisonment thereunder were malicious or without authority of law, and averred that his acts were in furtherance of law and order. The allegations in the petition as to efforts to give bond in order to have the sentence reviewed are also denied. At the trial the evidence showed that the defendant was regularly elected a member of the town council on June 22, 1893. From an extract of the minutes of the council it appears that the defendant was elected mayor pro tem. on July 6, 1893, but there was testimony showing that he was mayor pro tem. at the date of the trial of the plaintiff, for the alleged violation of the ordinance of the town. The defendant testified that no bond was ever offered him either by Calhoun or by any one

in his behalf. The jury returned a verdict for the defendant, and, plaintiff's motion for a new trial being overruled, he excepted.

1. Were the ordinances under which the plaintiff in error was convicted and sentenced to imprisonment by the defendant valid at the time of the trial? These ordinances were passed under authority of a charter granted to the town by the superior court, the provisions of which charter will be found in sections 685-710 of the Political Code. An examination of these provisions will show that the ordinances were valid at the time of their passage. In 1891 an act was passed prohibiting the general assembly from granting charters to towns of less than 2,000 inhabitants, and conferring upon the superior courts exclusive power to grant such charters. Acts 1890-91, p. 190. This act was repealed on December 1, 1893. Acts 1893, p. 65. In the case of Fullington v. Williams, 98 Ga. 807; 27 S. E. 183, this act was held to be constitutional and valid. On December 9, 1893, a new charter was granted the town of Wareboro by the general assembly. Acts 1893, p. 335. This act has never been repealed either expressly or by implication, nor has its validity been in any way impaired. From it, therefore, the town of Wareboro must derive whatever authority it has to exercise corporate functions. This act repeals all former charters granted to the town, but provides that all ordinances then in force, and not inconsistent with its provisions, shall be valid and of force until amended or repealed by the mayor and aldermen of the town. An examination of the act will show that the ordinance which defined the offense for which Calhoun was tried is perfectly consistent with its provisions. Is the ordinance which prescribes the punishment to be inflicted upon persons convicted of offenses against the town also consistent with the provisions of the act? Section 11 of the act is as follows: "Be it further enacted, that the mayor or mayor pro tem. of said town shall hold a police court in said town at any time for the trial and punishment of all violators of their ordinances, by-laws, rules and regulations of said town, the punishment inflicted not to exceed a fine of one hundred dollars, or in default of the payment of said fine and costs, by labor on the streets of said town or public works of said town not to exceed sixty days, or confinement in the common jail of the said town not to exceed sixty days." It needs no argument to show that an ordinance of the town which allows imprisonment without first giving the person convicted an opportunity to pay a fine is rendered void by this section of the act.

2. The question therefore arises: Is the defendant liable to the plaintiff in damages for inflicting a punishment upon him under a void ordinance? The court over which the defendant presided had jurisdiction of the person of the plaintiff, and jurisdiction to try and punish him for the offense with which he was

charged. The defendant has only exceeded his authority in fixing the punishment. It is universally conceded that judges of courts of superior and general jurisdiction are exempt from liability in damages for judicial acts, even when such acts are in excess of their jurisdiction. This doctrine has become firmly fixed in the jurisprudence of both England and the United States. Upon its strict application depends, to a very great extent, the usefulness of courts, and the fearless and impartial administration of justice. See *Broom, Comm. pp. 103-106*; 7 *Am. & Eng. Enc. Law*, 668; *Pratt v. Gardner*, 2 *Cush. 63*; 2 *Hill. Torts*, p. 161; *Cooley, Torts*, p. 472 et seq.; *Bish. Noncont. Law*, § 781; *Randall v. Brigham*, 7 *Wall. 523*; *Bradley v. Fisher*, 13 *Wall. 335*.

But it is said that the law affords no protection to presiding officers of inferior courts when they exceed their jurisdiction. *Piper v. Pearson*, 2 *Gray*, 120; *Vanderpool v. State*, 34 *Ark. 174*; *Tracy v. Williams*, 4 *Conn. 107*; 7 *Am. & Eng. Enc. Law*, 669. Judge Cooley, after stating that there is a distinction as to liability for judicial acts between judges of courts of general and those of limited jurisdiction, gives as the reasons for this distinction the following: "The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty by doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court, which, under the law, appears doubtful." *Cooley, Torts*, p. 491. We are unable to appreciate the force of the reasons embodied in the above quotation, which contains all the arguments we have been able to find in favor of the distinction. On the other hand, we quite agree with the supreme court of Iowa when it says, in *Thompson v. Jackson* (Iowa) 27 *Lawy. Rep. Ann. 92*, 95 (s. c. 61 *N. W. 1006*), that, "after an exhaustive examination of the cases which make this distinction, we have to say that we do not think they are founded upon grounds which can be sustained by any logical or reasonable argument." In the case just referred to, it was held that "a justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith, believing he had jurisdiction." Mr. Bishop, in his work on *Noncontract Law* (section 783), com-

menting upon this distinction, says: "But, in reason, if judges properly expected to be most learned can plead official exemption for their blunderings in the law, a fortiori those from whom less is to be expected, and who receive less pay, should not be compelled to respond in damages to their mistakes honestly made after due carefulness." And this, we think, is a complete answer to all of the reasons given why such distinction exists. In *Bell v. McKinney*, 63 *Miss. 187*, it was held that where a magistrate had authority to require a person brought before him to give bond to appear at the circuit court, but under an erroneous judgment as to the extent of his authority, and in good faith, tried such person, and upon his conviction sentenced him to pay a fine or be imprisoned, the magistrate was not liable in damages to the person aggrieved. In the case of *Henke v. McCord*, 55 *Iowa, 378*, 7 *N. W. 623*, the facts were almost identical with those in the present case. It was there held that "a justice of the peace who enforces an ordinance which is void for want of power in the city to enact it cannot be held liable therefor in a civil action." The distinction between the liability of presiding officers of inferior and those of superior courts is mentioned, but it was not necessary to decide whether or not the distinction was rational. We have seen, however, that this same court, in a more recent case, declared in very vigorous terms that the distinction was utterly illogical. In *Brooks v. Mangan*, 86 *Mich. 576*, 49 *N. W. 633*, it was held that a justice of the peace who, in the exercise of his honest judgment, holds an unconstitutional ordinance constitutional, is not liable for such an error of judgment. In the opinion, Grant, J., uses this language: "These inferior tribunals should be left to the exercise of their honest judgment, and, when they have so exercised it, they are exempt from civil liability for errors." In *Clark v. Holdridge*, 58 *Barb. 61*, it was held that a justice of the peace who inflicted a larger fine than the law required would be protected by the principle of judicial irresponsibility. See, also, *McCall v. Cohen*, 16 *S. C. 445*; *Scott v. Fishblate* (N. C.) 23 *S. E. 436*; *Lange v. Benedict*, 29 *Am. Rep. 80*; *Austin v. Vrooman* (N. Y. App.) 28 *N. E. 477*.

These decisions settle, we think, beyond doubt, that no good reason exists in law why presiding officers of inferior courts should not be measured by the same rules with respect to liability for their judicial acts as judges of courts of general jurisdiction. We must not be understood, however, as ruling that these officers have immunity from civil liability in all cases. As was said in *Bradley v. Fisher*, 13 *Wall. 335, 352*: "Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." But all judicial officers stand on the

same footing, and must be governed by the same rules. It follows from what has been said that where the court has jurisdiction of the subject-matter of the offense, and the presiding officer erroneously decides that the court has jurisdiction of the person committing it, or commits an act in excess of his jurisdiction, he will not be liable in a civil action for damages. But, where there is a clear absence of jurisdiction over the subject-matter, the officer will be liable for exercising it, provided such want of jurisdiction is known to him. There is nothing in section 3852 of the Civil Code to conflict with the ruling made in the present case. That section is as follows: "If the imprisonment is by virtue of a warrant, neither the party bona fide suing out, nor the officer who in good faith executes the same, is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction. In such cases the good faith must be determined from the circumstances of each case. The same is true of the judicial officer issuing the warrant, the presumption being always against him as to good faith, when he has no jurisdiction." The section seems to provide that a judicial officer who in bad faith issues either a defective or a void warrant will be liable in an action for false imprisonment, at the instance of the person imprisoned thereunder. It is, however, limited by its very terms, not only to an act done out of court, but one which, though to some extent judicial, is largely ministerial in its nature; and in no event can it have any application to the acts of a judicial officer while presiding in court, and, as a court, is passing upon a question involving the jurisdiction of his court, and which he is bound to decide.

In the present case, the court over which the defendant in error presided had jurisdiction of the subject-matter of the offense, and of the person of the plaintiff in error. The sentence was passed pursuant to a void ordinance, it is true; but on the defendant in error, in the first instance, was cast the duty of determining whether or not this ordinance was valid. Acting in a judicial capacity, he, in effect, decided that the ordinance was valid. True, the question was not directly made before him, but he necessarily held it to be valid, because this was the only source from which he could derive his authority. To hold that he was liable in a civil action for damages for erroneously deciding that this ordinance was valid would be, in effect, to hold that the law makes it the duty of an officer to decide a question, and then punishes him for not deciding it correctly. The law never does this. The presiding officer of a court clothed with authority to decide questions of law which may come before it will be protected in the exercise of this authority, however erroneous the decision might be. It is far better for a few innocent persons to

suffer than for the ends of justice to be thus hampered.

3. It is contended, however, by counsel for the plaintiff in error, that section 752 of the Political Code makes a different rule applicable to the defendant in error. That section is as follows: "Members of the council and other officers of a municipal corporation are personally liable to one who sustains special damages as the result of any official acts of such officer, if done oppressively, maliciously, corruptly, or without authority of law." By reference to the margin of the page on which this section appears, it will be seen that it is codified from a decision of this court. Unless the language of the section imperatively requires a different construction, it will be presumed that the general assembly, in adopting it, intended merely to adopt the principle of law announced in the decision from which it is taken. See, in this connection, *Suth. St. Const.* § 300. The decision from which the section is codified is *Pruden v. Love*, 67 Ga. 180. In that case it appears that the town council, at a meeting appointed for that purpose, and of which the plaintiff (*Love*) had no notice, condemned as a nuisance the house of the plaintiff, and had it torn down, without giving him a hearing. The court held that for this act the members of the town council were personally liable in damages to the owner of the building. Chief Justice Jackson, in the opinion, says: "Whilst, therefore, we hold, with the judge below, that the mayor and council could not be held personally liable unless they acted either maliciously, corruptly, oppressively, or without authority of law, yet we agree with him, too, in the opinion, evinced by his denial of a new trial, that there is sufficient evidence to uphold a verdict that they did act without complying substantially with the law in a most essential element of a fair trial,—notice of time and place,—and thereby acted so as to oppress the defendant in error." The mayor and council in that case were not a court, and were not held liable because, when sitting as a court, they made an erroneous decision. The section of the Code, it will be noticed, uses the expression "official acts," and can have no application to a member of a town council when presiding as a judge over the police court of the town.

4. It is not necessary to express any opinion as to whether or not the defendant in error would have been liable for a refusal to accept a valid bond tendered by the plaintiff in error for the purpose of having the decision reviewed, as the evidence on this point was conflicting, and no ruling of the trial judge on this point was excepted to. Under the views above expressed, if any errors were committed by the presiding judge in charging the jury, such errors were immaterial. Judgment affirmed. All the justices concurring, except LITTLE, J., disqualified.

JOINER v. SINGLETARY.

(Supreme Court of Georgia. Dec. 17, 1898.)

WRIT OF ERROR—DISMISSAL—DISTRESS WARRANT.

1. A writ of error will not be dismissed on the ground that the bill of exceptions does not designate with sufficient certainty the name of the plaintiff in error, when it is recited in the bill of exceptions that, on the trial in the court below of a suit by A. against B., A.'s action was, on motion of B., dismissed, and that the plaintiff in error excepted; it being manifest from the recitals in the bill of exceptions who was the plaintiff in error.

2. The fact that a landlord has sued out a distress warrant in his own name, for the use of another party, for rent due him, is not a sufficient reason for dismissing the distress warrant.

(Syllabus by the Court.)

Error from superior court, Pulaski county; W. N. Spence, Judge.

Distress warrant by D. C. Joiner, for the use of one Vaughn, against R. G. Singletary. Warrant dismissed, and plaintiff brings error. Reversed.

M. S. Means, and J. H. Martin, for plaintiff in error. W. L. & Warren Grice, for defendant in error.

SIMMONS, C. J. 1. Joiner was the landlord, and Singletary the tenant. The rent becoming due, Vaughn sued out a distress warrant, as the agent of Joiner, for the use of Vaughn. A counter affidavit was filed by Singletary, the tenant. Upon the call of the case for trial in the superior court, Singletary moved to dismiss the distress warrant on the ground that a distress warrant could not be sued out by one person for the use of another. The court sustained the motion and dismissed the warrant upon this ground. Joiner excepted, and brought that decision to this court for review. Upon the call of the case here, counsel for the defendant in error, Singletary, moved to dismiss the writ of error on the ground that the bill of exceptions did not specially name Joiner as the plaintiff in error. The motion to dismiss was reserved by the court, and the case was argued upon its merits. After a careful consideration of the point made, we have come to the conclusion that the motion to dismiss on the ground stated ought not to prevail. The bill of exceptions recites that "there came on to be heard and tried the case of D. C. Joiner, for the use of W. R. Vaughn, against R. G. Singletary, the same being the levy of a distress warrant, and counter affidavit, pending in said superior court on appeal from Pulaski county court." It then recites the motion of Singletary to dismiss the distress warrant on the ground above stated, and that after hearing argument "the court sustained said motion, and rendered a judgment dismissing said distress warrant, to which judgment of the court the plaintiffs in error then and there excepted, and now excepts, and specifically assigns the same as error." It would have been better practice for the pleader to have stated unequivocally who was the plaintiff in error, but we

think that where he states who the plaintiff in the court below was, and who the defendant was, and states that that defendant made a motion which prevailed, and that the plaintiff in error excepted, that is such a statement of the parties plaintiff and defendant in this court as will authorize us to hold the case and decide it upon its merits. We know from this recital that Joiner was the plaintiff in the court below, and that Singletary was the defendant. We also know that Singletary made a motion to dismiss Joiner's case, which was granted, and can easily infer that by the use of the words "plaintiffs in error" the pleader meant Joiner. If the case should be decided against Joiner here upon the merits, we would have no hesitation in entering a judgment against him for the costs in this court; or, if it should be decided against Singletary, judgment for the costs would go against him. The judgment upon the merits about to be rendered will be binding both upon Joiner and Singletary. This case differs from that of *Swift v. Thomas*, 101 Ga. 89, 28 S. E. 618. In that case Swift was the only plaintiff in error mentioned in the bill of exceptions, and it appeared therefrom that she was not a party to the caveat in the court below; and this court dismissed the writ of error because there was no party plaintiff mentioned in the bill of exceptions who had a right to except to the judgment of the court below. In this case the real plaintiff in the court below is named in the bill of exceptions, which recites that he lost his case, and that the plaintiff in error excepts to the judgment of the court dismissing it.

2. We think the court erred in dismissing the distress warrant on the ground that the landlord could not sue out the same for the use of another person. The general rule of law is that a plaintiff can institute a suit for the use of any person he wishes. In the case of *Railroad Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676, this court held that "a plaintiff, having a right of action for breach of a contract, may sue for the use of any person he may designate to take the proceeds of the action." It was argued here by counsel for defendant in error that he could not make the defense, as he did not know who the real plaintiff was. We do not think there is any merit in this contention. The person who brings the suit for the use of another is the real plaintiff, and any defense which the defendant has against him can be set up. *Foster v. McGuire*, 96 Ga. 447, 23 S. E. 898.

For these reasons the court erred in dismissing the distress warrant. Judgment reversed. All the justices concurring.

GRESS LUMBER CO. v. NEW EBENEZER ASS'N et al.

(Supreme Court of Georgia. Dec. 15, 1898.)

DIRECTING VERDICT—APPEAL—REVIEW.

1. Applying to the evidence introduced at the last trial of this case the principles of law gov

erning the same, as heretofore announced by this court, the plaintiff failed to establish its right to a recovery, and consequently there was no error in directing a verdict for the defendants.

2. It does not appear that any error was committed in admitting evidence offered in behalf of the defendants; but, were this otherwise, the result would be the same, because, even if this evidence had been excluded, it would still appear that the plaintiff failed to make out a case.

(Syllabus by the Court.)

Error from superior court, Pulaski county; W. N. Spence, Judge.

Action by the Gress Lumber Company against the New Ebenezer Association and others. From an order directing verdict for defendants, plaintiff brings error. Affirmed.

De Lacy & Bishop, for plaintiff in error. J. H. Martin, A. C. Pate, and L. C. Ryan, for defendants in error.

LUMPKIN, P. J. This is the fourth appearance here of the present case. See 85 Ga. 587, 11 S. E. 867; 89 Ga. 125, 14 S. E. 892; and 100 Ga. 89, 26 S. E. 83. At the trial now under review, the judge directed a verdict for the defendants. The plaintiff's motion for a new trial, which was overruled, complains of alleged errors in admitting evidence, and also that the verdict was contrary to law and the evidence. We have carefully and closely read the brief of the evidence. Applying to it the rules of law governing this case, as laid down in 89 Ga. and 14 S. E., *supra*, we are of the opinion that the only legal outcome of the evidence was the verdict which the court directed. It does not appear that any error was committed in admitting the testimony objected to; but, were this otherwise, the result would be the same, because, even if this testimony had been rejected, it would still appear that the plaintiff failed to make out a case. Judgment affirmed. All the justices concurring.

RAY v. RAY.

(Supreme Court of Georgia. Dec. 17, 1898.)

DIVORCE—TEMPORARY ALIMONY—EVIDENCE.

1. Where a suit for divorce is pending, application for temporary alimony may be heard and determined by the judge in vacation.

2. On the hearing of an application by the wife for temporary alimony pending a suit for divorce brought by her against her husband, on the ground of cruel treatment, which consisted partly in slanderous reports made by the husband charging the wife with infidelity, it is error to exclude testimony showing that the husband had circulated such reports, and that they had been communicated to the wife.

(Syllabus by the Court.)

Error from superior court, Telfair county; O. C. Smith, Judge.

Suit by Georgia Ray against C. H. Ray for divorce. From an order refusing alimony, plaintiff brings error. Reversed.

E. D. Graham, for plaintiff in error. Eason & McRae and B. M. Frizzell, for defendant in error.

LEWIS, J. 1. It appears from the record in this case that the judge heard and passed upon the application for temporary alimony in vacation. It does not appear that any objection was made to the hearing in vacation, nor that the judge refused the alimony for want of jurisdiction to grant the same out of term. It is insisted, however, by counsel for defendant in error, that, where a suit for divorce is pending, application for temporary alimony can only be made and heard in term time, and section 2457 of the Civil Code is relied upon to sustain this position. By virtue, however, of the act of 1870, codified in 2461 of the Civil Code, it is provided that in suits for divorce the judge presiding may, either in term or vacation, grant alimony. His jurisdiction to pass upon questions of temporary alimony during vacation is recognized by this court in the case of *Bender v. Bender*, 98 Ga. 717, 718, 25 S. E. 924.

2. It seems from the record that the main ground relied upon by the wife to justify her separation from her husband was cruelty he had inflicted upon her by circulating reports among his neighbors to the effect that she was untrue to her marital vows, and was guilty of illicit intercourse with another person. It is difficult to conceive of greater cruelty than could be inflicted upon the mind of a virtuous woman than a circulation of such reports. The mental anguish thus occasioned would doubtless be more keenly felt, and would produce more mental pain, than could result from personal injuries by physical blows. Unquestionably, such cruelty would not only justify a separation, but would sustain an action for total divorce. *Myrick v. Myrick*, 67 Ga. 771; *Glass v. Wynn*, 78 Ga. 319. Under section 2460 of the Civil Code, the judge, on applications for temporary alimony, though the merits of the cause are not in issue, may inquire into the cause and circumstances of the separation rendering the alimony necessary. Such an inquiry being made in this case, it was manifestly error to refuse to hear testimony touching the main cause of separation and of the wife's complaint. As to whether or not the husband had circulated the reports against the wife's chastity was necessarily a material question at issue between the parties; and as to whether or not such reports had reached the ears of the wife was likewise material, as illustrating her motive, and the bona fides of her conduct in leaving him, for she could not have deserted him for a cause the existence of which she did not know at the time of the separation. The court heard the denial of the husband as to these charges, but refused to hear counter proof offered by the wife, not only that he had actually made these charges to different persons, but they had been communicated to her. The court, regarding such testimony as illegal, must have passed upon the case on the theory that there was no evidence be-

fore him supporting the main cause which tended to justify the separation of the wife from her husband. We think the error, therefore, in excluding such pertinent and legal testimony, requires a reversal of the judgment of the court refusing alimony. Judgment reversed. All the justices concurring.

SMITH v. WILLIS.

(Supreme Court of Georgia. Dec. 15, 1898.)
FAST WRIT OF ERROR—ERRONEOUS DOCKETING OF CASE.

1. A "fast" writ of error will not lie to a refusal to dissolve an injunction. *Armstrong v. Lewis*, 48 Ga. 127; *Ballin v. Ferst*, 53 Ga. 551; *Kaufman v. Ferst*, 55 Ga. 350; *Hollinshead v. Town of Lincolnton*, 10 S. E. 1094, 84 Ga. 590.

2. This case having been improperly docketed to the present term of court, it is ordered, on the application of counsel for plaintiff in error, that it be transferred to the docket of the next term.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Action between John Smith and Reuben Willis. From the judgment, John Smith brings error.

E. D. Graham, for plaintiff in error. J. H. Martin, for defendant in error.

PER CURIAM. Transferred to docket of next term.

BRUNSWICK GROCERY CO. v. BRUNSWICK & W. R. CO.

(Supreme Court of Georgia. Dec. 20, 1898.)
DISMISSAL OF ACTION—CARRIERS—LIABILITY AS WAREHOUSEMEN—HARMLESS ERROR.

1. It is too late for the plaintiff in a civil action to dismiss the same, after positive knowledge by his counsel that the jury have agreed upon a verdict for the defendant and are about to return the same into court, especially when it appears that this knowledge had been acquired with the assent of the presiding judge and of counsel on both sides.

2. A railroad company, as warehouseman, is not liable to the owner of goods for a destruction of the same occasioned by fire resulting from the negligence of its employé, who was an independent contractor, was exercising an independent business, and was not subject to the immediate direction and control of the employer.

3. The uncontradicted evidence in this case showing that the loss of the goods was not the result of any negligence on the part of the warehouseman, the verdict for the defendant was demanded by the evidence; and, even if there was any error in the charge of the court upon the subject of the burden of proof, such error was harmless, and is not good ground for a new trial.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by the Brunswick Grocery Company against the Brunswick & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Crovatt & Whitfield, for plaintiff in error.
Goodyear & Kay, for defendant in error.

LEWIS, J. The Brunswick Grocery Company sued the Brunswick & Western Railroad Company for the value of certain salt stored by the plaintiff with the defendant as a warehouseman. The defense relied upon was that the salt was destroyed by fire, without negligence upon the part of the defendant. On the trial of the case the defendant admitted the contract set out in plaintiff's petition; admitted the value of the salt to be \$496.16, and that the plaintiff had such ownership in the salt as would give it a right of action. The plaintiff showed that on April 2, 1896, the salt was in the possession of the railroad company; that since that date, and before bringing the suit, plaintiff made demand on the defendant for the salt, and it was not delivered. The reply which the plaintiff's agent received to his demand was that the salt was destroyed by fire. The defendant introduced testimony substantially to the following effect: A fire on April 2, 1896, destroyed almost the entire railroad property of the company at the wharf, and all the salt in question was consumed by the fire. The fire was not started by the consent, knowledge, or procurement of any employé of the company. There were quite a number of railroad tracks upon the wharves. Cars were being moved by engines backward and forward daily upon that wharf. At the time of the fire a portion of the wharf was being rebuilt. There was a portable pile-driving engine used in this work. There was some evidence that the wind was blowing from the direction of the engine to the warehouse, and that the smokestack of the engine had on it no spark arrester. The warehouse containing the salt was the one first found on fire. Brown, the contractor, who had charge of the pile-driving engine, and who had control of the entire machinery used in repairing the wharf, was employed by the agent of the defendant to do this work. Brown had previously done other work of the kind for the defendant. His time was not confined to the company's work. He did such other work as he wished to, and had a perfect right to take other work. Neither defendant nor its agents had any control whatever over Brown's hands, nor any control over his machinery. The work of repairing the wharves was given to Brown, who employed, paid, and superintended his own hands, and furnished his own machinery; the company, upon completion of the work, simply settling with Brown at the contract price. It was customary to use such an engine in this kind of work, and witness never knew before of any fire being communicated to the wharf by the engine. It appears from the record that the judge, at the conclusion of his charge to the jury, being about to take a recess until the next day, instructed the jury that, if they should agree upon a verdict during the recess,

the foreman should retain it, and the jury might then disperse until court convened. The court then, upon request of counsel for both parties, gave permission of counsel to ascertain from the jury their finding, when made. During the recess, counsel for plaintiff ascertained that the verdict was in favor of the defendant; and when the judge, upon the convening of court next day, was about to receive the verdict of the jury, counsel for plaintiff moved to dismiss the case. The court, upon objection of counsel for defendant, overruled the motion to dismiss, and ordered that the verdict be entered of record, which was done. To the overruling of the motion to dismiss the case, counsel for movant excepted. The jury returned a verdict for the defendant, and error is assigned by plaintiff's counsel on the judgment of the court overruling his motion for a new trial.

1. Section 5044 of the Civil Code allows the plaintiff in any action to dismiss his case either in vacation or in term time. Under the decisions of this court, the plaintiff has this privilege at any time, even after the commencement of the trial, provided it is exercised before the rendition or publication of a verdict. Manifestly, there is no right on his part to dismiss the case after a formal return by the jury of their verdict into court, and after counsel had thus been made aware of the result of the trial. In this case permission was given by the court for the jury to disperse after they had found their verdict, and they were also authorized to make known their finding to the counsel who represented the contending parties. It was ascertained by counsel for plaintiff, during the recess of the court, what the verdict was. So far as the right of plaintiff to dismiss his action was concerned, we think the ascertainment of the verdict in this way was tantamount to its publication. In the language of Bleckley, J., in *Meador v. Bank*, 56 Ga. 609, "The plaintiff had lost his wager, and it was too late for him to withdraw the stake." In *Peeples v. Root*, 48 Ga. 592, it was decided that one plaintiff may dismiss his case at any time before the verdict is published, if unknown to him. Warner, C. J., delivering the opinion in that case, says: "If it had been shown to the court by competent evidence that the plaintiff had surreptitiously or otherwise ascertained that the jury had found a verdict against him before the motion was made to dismiss the case, and the court had then refused to dismiss it, on that account, we should not have been disposed to interfere with that judgment; but nothing of that kind was made to appear to the court in this case." Such a state of facts was made clearly to appear in the present case, and we think the court was right in overruling the motion to dismiss.

2, 3. There were various grounds in the motion for a new trial, based upon alleged errors in different portions of the court's charge on the subject of the burden of proof in this

case. As we construe the charge as a whole, its effect was to instruct the jury that if the proof showed goods were intrusted to a warehouseman by the owner, and the warehouseman failed to deliver the same on demand, this raised a presumption of negligence against the defendant, but that, if the defendant accounted for the same by showing they were destroyed by fire not caused by the defendant or its agents, this removed the presumption, and the burden of proof was then upon the plaintiff to show that the loss was due to the negligence of the defendant, before there could be a recovery. Civ. Code, § 2930, declares, "A failure to deliver the goods on demand makes it incumbent on him [the warehouseman] to show the exercise of ordinary diligence." There is quite a conflict of authority upon this subject, but we think the weight of it will sustain the charge of the court as above interpreted. For authorities in point, see 28 Am. & Eng. Enc. Law, 648-650; Hale, Bailm. & Carr. p. 240 et seq.; *Schmidt v. Blood*, 24 Am. Dec. 149-155; Abb. Tr. Ev. p. 562; and numerous authorities cited in above works. On the same line with the weight of authority above cited seems to be the ruling of this court in *Cunningham v. Franklin*, 48 Ga. 531. We hardly think the section of the Code above cited changes the common-law rule upon the subject. The authorities seem to be uniform to the effect that, where there is failure on the part of the warehouseman to deliver goods on demand, there is a presumption of liability, and the burden is on him of accounting for the goods; but it does not follow from this that the burden necessarily remains on him throughout the case, for he may account for the goods by showing their loss in such a way (by burglary or an accidental fire, for instance) as will shift the onus, and will raise the presumption that the loss thus accounted for was not the result of the warehouseman's negligence. But we do not deem it necessary to pass directly upon this question in the decision of this case. Even if the onus probandi was upon the defendant to the fullest extent claimed by the plaintiff in error, we think it was successfully carried by the uncontradicted testimony in the case. The theory of plaintiff's counsel evidently was that the fire was communicated to the warehouse from the engine that was being operated by the contractor, Brown, and was the result of negligence, in not having the engine provided with a spark arrester, or with some contrivance to prevent the spread of fire, and that, this contractor being an employé of the defendant company, this negligence was attributable to the company. There is no question, under the testimony, but that the party engaged in the operation of this engine was an independent contractor, and was not subject to any direction and control in the management of his machinery and in the operation of his business by the railroad company. Civ. Code, § 3818, declares, "The em-

ployer generally is not responsible for torts committed by his employé when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer." The work and business of the employer in this particular case did not fall within any of the provisions of section 8819 of the Civil Code. The work was not wrongful in itself, nor was it a nuisance. From previous experience and knowledge of the defendant's agents, the work was not, in its nature, dangerous to others. The act which the contractor was doing was in violation of no duty imposed by contract with the employer, nor in violation of any duty imposed by the statute; and the employer did not retain the right to control the time and manner of executing the work, or interfere and assume control, so as to create the relation of master and servant; nor did the employer ratify the wrong of the independent contractor. Where none of these things exist, it manifestly follows from the statutes above cited that there can be no liability on the part of the employer. In *Railroad Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277, it was decided a railroad company is not liable for an injury caused by the negligence of an independent contractor in constructing its railroad, where it retains no control over the contractor, except to see, by its superintendent, that the railroad is built according to the contract. To the same effect, see *Railroad Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828; *Wilson v. White*, 71 Ga. 506. Even, then, if there was any error in the charge of the court on the subject of the burden of proof, such error is not cause for a new trial, when another trial could not legally result in a different verdict. Judgment affirmed. All the justices concurring.

BAXTER et al. v. MATTOX.

MATTOX v. BAXTER et al.

(Supreme Court of Georgia. Dec. 23, 1898.)

APPEAL—REVIEW—LOGS AND LOGGING—CONVEYANCES OF TIMBER—CONSTRUCTION—LICENSE.

1. Where the judge of the superior court has granted a temporary injunction after a hearing upon the merits of the issues made by the pleadings in a case, this court will not reverse his judgment solely on the ground of a technical defect in plaintiff's petition, when it does not appear from the record that such defect was insisted on in the court below as a reason why the injunction should not be granted.

2. Where a grantor conveys by deed "all of the timber, wood, logs, and growing trees suitable for sawmill purposes, and being manufactured into lumber, now upon, or that may hereafter grow upon, all or any of the following lots or parcels of land [describing the same by giving the number of each, and district where located]," which words in the conveyance are followed by a clause that "this lease to expire ten years from the time said [grantee] begins cutting said timber" from the lots of land mentioned, the effect of the instrument is not to convey to the grantee a perpetual right to use timber on the land as long as any may be growing thereon, but to limit the right of such use to a

period of ten years, to be computed from the time the grantee begins cutting the timber.

3. The period of limitation in such a conveyance should be computed as to the entire lands embraced in the deed from the time the grantee enters upon any one of the lots, there being nothing in the conveyance to indicate an intention by the parties that the instrument should be treated as a separate lease to each lot, and to limit the time of occupancy of any particular lot to a period of ten years from the date the grantee begins cutting the timber on such lot.

4. The evidence showing a clear title in the plaintiffs to the premises in dispute as to which the injunction was granted; and further showing that the defendants intended to cut timber from the land for sawmill or cross-tie purposes after the expiration of the lease under which they held without any right or legal interest in the property,—the court did not err in granting the temporary injunction.

5. There was no error in that portion of the judgment of the court below, complained of in the cross bill of exceptions, which refused to enjoin the defendants from cutting and using timber suitable for sawmill purposes on certain of the lands mentioned in the plaintiff's petition; it appearing from the testimony on the hearing that the defendants had acquired all rights to such timber which the original owner of the land had conveyed by deed that specified a sale to the grantee, his heirs and assigns, of all the timber, growing trees, etc., suitable for sawmill purposes "now upon or that may hereafter grow upon all or any of the said lots of land;" the said deed containing no limitation whatever as to the time of enjoyment of the privileges therein conveyed; and it not appearing a reasonable time for their exercise had expired.

(Syllabus by the Court.)

Error from superior court, Clinch county; J. L. Sweat, Judge.

Action by W. H. Mattox against G. S. Baxter & Co. and others. A judgment was rendered, and defendants bring error, and plaintiff files a cross bill of exceptions. Affirmed.

Spencer R. Atkinson, Toomer & Reynolds, and Leon A. Wilson, for plaintiffs in error. R. G. Dickerson and Hitch & Myers, for defendant in error.

LEWIS, J. 1. It is insisted by counsel for plaintiffs in error that the plaintiff below, in his application for injunction, did not proceed according to the provisions of section 4927 of the Civil Code, and that, no insolvency of the defendants and no irreparable damages being shown, the injunction should have been denied. It was manifestly the intention on the part of the petitioner to bring his case within the provisions of the section above cited, which declares, "In all applications to enjoin the cutting of timber for sawmill purposes," etc., "it shall not be necessary to aver or prove insolvency, or that the damages will be irreparable." It is true there is not attached to the petition an abstract of title, as required by that section. The petition, however, alleges that both plaintiff and defendants claim under a common grantor,—the defendants under a lease which had expired,—and that, therefore, it was unnecessary to attach an abstract of title. The answer denied the title of the plaintiff, and alleged a perfect title in the

defendants. It seems, upon the issue thus made the case was heard before the judge. It nowhere appears in the record that any objection was made to the plaintiff's petition for want of sufficiency, or that the respondents ever urged that the injunction should not be granted on account of this defect in the petition. It is true, the court could not have passed upon a formal demurrer to the petition in vacation, but the grounds of such demurrer could have been urged in the answer as a reason why the application should have been refused. But had the question been presented to the court, and the contention of plaintiffs in error been sustained, as it doubtless would have been, the defect complained of could readily have been cured by amendment. It is fair, from the record before us, to treat this technical defect as having been waived by the plaintiffs in error on the hearing below. It should at least have appeared that such a question was presented to the trial judge, before we would be authorized to reverse his judgment simply on account of an amendable defect in the plaintiff's pleadings, especially in view of the fact that the plaintiff presented and introduced in evidence a complete chain of title to the land; and no point was made on trial below that he failed to attach an abstract of the papers before the judge to his petition.

2. It appears from the record that all the lands involved in this litigation originally belonged to H. A. and H. P. Mattox. On September 27, 1881, they conveyed to one Reppard all the timber, logs, and growing trees suitable for sawmill purposes, and being manufactured into lumber, upon certain lots of land; describing the same by number, district and county. In this deed there was no limitation as to the time in which the grantee or his heirs and assigns should have a right to use the timber designated. On the same day a conveyance was made by H. A. and H. P. Mattox to Reppard of timber on certain other lots of land, and directly following this granting clause was this sentence: "This lease to expire ten years from the time said Reppard begins cutting said timber." On January 23, 1883, there was a like conveyance between the same parties of timber on other lots of land, described in like manner; and following this granting clause was the statement: "And it is hereby covenanted, understood, and agreed by and between the parties to this indenture that the party of the second part, his heirs and assigns, are limited to the period of ten years' time in which to cut and remove the timber, logs, and trees suitable for sawmill purposes, or being manufactured into lumber, upon the lots aforesaid, from the time they commence to cut and remove the same therefrom." The injunction was refused as to the property described in the deed first mentioned above, but was granted as to that described in the last two deeds,

and to this granting of the injunction the plaintiffs in error except. It is insisted by counsel for plaintiffs in error that the clauses imposing limitations upon the right of the defendant to cut timber in the last two deeds referred to are repugnant to the operative words of the grant, and that, therefore, the former words should prevail, and the limitation clause should be treated as of no effect at all. Section 3607 of the Civil Code provides, "If two clauses in a deed be utterly inconsistent, the former must prevail, but the intention of the parties, from the whole instrument, should, if possible, be ascertained and carried into effect." Applying this cardinal rule of intention of the parties as indicated by the terms used in these instruments, we do not think there is any difficulty in arriving at their proper construction. The limitation clause was manifestly intended as an addendum or proviso to the granting clause that had just preceded it. There is no utter and irreconcilable inconsistency between the two clauses. Construing the first clause alone, and in the light of what follows, it was not a conveyance of a fee-simple title to land, but a mere grant of a license to use timber growing thereon for certain purposes. Even if there had been no limitation fixed as to how long this right should be exercised, from the nature of the grant it was obliged to terminate at some time, though indefinite; for it certainly would have ended when all the timber had been cut. Now the clause that follows limits and qualifies the granting clause, and expressly and definitely fixes the time, which would otherwise have been indefinite, as to when the lease was to expire. In the case of *Huls v. McDaniel* (decided at the last term) 81 S. E. 189, it appeared that the granting clause of a deed from a father to his daughter, construed and considered alone, and not in connection with the clauses that followed, conveyed an absolute, fee-simple estate to the daughter. In the habendum clause of that deed, following the granting clause, were included the names of the daughter's two children, as grantees. It was there decided that the whole instrument should be construed together, so as to give effect, if possible, to the entire deed, and ascertain from all its terms the real intention of the parties, that the granting clause was modified by the words in the habendum clause, and that an estate in common was conveyed to the daughter and the other two persons named. The authorities cited in the opinion rendered in that case apply, if possible, with much more force to the present case, for in this case there is much less reason to invoke the doctrine of repugnancy. Construing the entire instrument as a whole, there can be no question but that the real intention of the parties was to limit this lease to a period of 10 years from the time the lessee commenced to exercise his rights thereunder by cutting the

timber; and, this period having expired before the filing of this petition, the plaintiffs in error clearly had no interest in the property by virtue of their lease under which they claimed title.

3. It was further insisted by counsel for plaintiffs in error that, the lands being described severally, the license was several as to each lot, and the exercise of the license upon one lot could not be construed as extending to another, upon which the licensee had not in fact entered. The case of *Barber v. Shaffer*, 76 Ga. 285, was cited by counsel for plaintiffs in error, where it was held that when a deed did not convey or purport to convey one tract of land, but several distinct and separate lots, of 40 acres each, without any intimation of the sale of all as one tract, possession of one of the lots named did not by construction extend over the others, under the deed as color of title. We do not think the case in point. In the first place, the question there was one of prescription,—a matter regulated by the statute, and not in any wise dependent upon the contract or intention of the parties. The case at bar is one of intention, to be gathered from the terms of a written contract, and does not at all relate to a prescriptive title. In *Johnson v. Simerly*, 90 Ga. 612, 16 S. E. 951, it was ruled, even upon the subject of a prescriptive title, that where a deed conveyed five contiguous lots, describing them by their numbers, and naming the aggregate quantity of land conveyed, the whole, although called in the deed "five tracts or lots of land, containing 202½ acres each," may be considered as one entire tract, the boundaries of which are the original lines on the margins of the tract as established by the state when the lots were laid off in the original survey. On page 615, 90 Ga., and page 952, 16 S. E., *Simmons, J.* (now chief justice), in delivering the opinion of the court, distinguishes that case from the one cited in 76 Ga. above, and says: "That decision does not mean, however, that, where the land described is in fact one tract, it must, in so many words, be called one tract. In that case the lots were not adjacent, but some of them were separated from the others by intervening lots." It is not pretended in this case that these lots of land embraced in each deed do not lie in one body. The only apparent difference between these deeds and the one mentioned in 90 Ga. is that the latter designated the aggregate number of acres. But it will be seen that the decision of the court was based upon the idea that in point of fact the land lay in one body. In principle, it can make no difference whether the aggregate number of acres is given in the deed, or whether it mentions only the number of acres of each lot; the aggregate then being a matter of simple addition. In the absence of any words or intimation in the deed to the contrary, we think it was clearly the intention of these parties to treat the lands men-

tioned in each deed as one body; and the right to enter thereon and cut timber on any part of the same terminated, as to all of it, when the cutting commenced on the land conveyed, whether it commenced on every parcel thereof at the same time or not.

4. On February 22, 1895, as appears from the official report, H. A. and H. P. Mattox, who were then the owners of the land in question, subject to the lease of the timber they had previously made thereon, conveyed the land, under a power of sale contained in a mortgage thereon, to the Peacock & Hunt Naval-Stores Company. This mortgage was recorded March 13, 1895. By virtue of the power of conveyance the property passed from the mortgagee to one Baldwin by a deed dated September 12, 1895, and Baldwin conveyed the property to the plaintiff by a deed dated July 22, 1896. This constituted the chain of plaintiff's title. The defendants claimed ultimately from same source by virtue of the lease from H. A. and H. P. Mattox to Reppard, and by successive conveyances from his grantees down to the defendants. As before seen, that lease had expired upon the filing of the petition, and therefore, so far as the rights conveyed by the lease were concerned, the defendants had no title, and were mere trespassers. It is insisted, however, by counsel for plaintiffs in error, that, under successive conveyances from grantees under this lease, the property finally passed to D. B. Paxton and H. P. Mattox. H. P. Mattox was one of the original owners, and it is urged that inasmuch as there was a receiver's sale under a creditors' petition filed October 17, 1893, against D. B. Paxton and H. P. Mattox, all the interest of H. P. Mattox as a tenant in common to the land itself passed by virtue of that sale, and the defendants, holding under purchasers at that sale, acquired such interest of H. P. Mattox, and an absolute injunction was wrong, since they occupied the position, as to a certain interest in the land, of tenants in common. It is true, this creditors' petition was filed before the mortgage above mentioned, given by H. A. and H. P. Mattox; but it does not appear from the record when the receiver was appointed, or when he took charge of these lands, or whether he simply took charge of the timber under the lease or the land itself, including the interest of H. P. Mattox therein. The record, however, does disclose that a verdict and decree in the case finding in favor of a permanent injunction and receiver were not rendered until the April term, 1896, of Clinch superior court, which was after the mortgage by H. A. and H. P. Mattox was given and recorded. The conveyance under receiver's sale was not made until September 13, 1895, after the conveyance by the mortgagee from H. A. and H. P. Mattox under the power of sale. When this receiver's sale was had, in 1895, the lease of the timber on these lands had not expired, and it was then owned by the defend-

ants, Paxton, and Mattox. The presumption therefore is that it was only their interest in the timber which the receiver seized, and which was sold under the order of court. But, whether this was done or not, no greater interest could be conveyed, as H. P. Mattox had previously parted with all the remaining interest he ever had in the land. Our conclusion, therefore, is that the evidence clearly showed a perfect title in the defendant in error, and that the plaintiffs in error were mere trespassers upon the land as to which the injunction was granted.

5. As to the rights acquired by the grantee and his successors in title under the first deed from H. A. and H. P. Mattox, mentioned in the official report, the case is, however, quite different. This deed is without any limitation whatever as to the time for exercising the license and privileges thereby conveyed. Indeed, it stipulates in express terms that it conveys all "of the timber, wood, logs, and growing trees suitable for sawmill purposes, and being manufactured into lumber, now upon, or that may hereafter grow upon, all or any of the said lots of land," and also conveys to the grantee, his heirs and assigns, the right and privilege, "now and at any and all times hereafter," to enter upon the lands for the purpose of cutting such timber. If it be possible to convey such a license in perpetuity, it would be difficult to conceive how such an intention could be more clearly expressed than it is in this deed. The judge refused the injunction as to the timber on this land, and this is assigned as error by the plaintiff, in his cross bill of exceptions, "for the reason that the evidence shows that the privilege claimed by the defendants of cutting sawmill timber upon said lands has been already exercised by their grantors." If it is meant by this reason given for the assignment of error that the defendants' predecessors in title had exhausted from the land all the timber they were entitled to under the deed, the record utterly fails to sustain such a contention. There is nothing in the testimony to authorize a conclusion that the defendants intended to enter upon the land for any other purpose, save to cut and use just such timber thereon as is described in the above-mentioned deed. We hardly think the doctrine that licensees should be allowed only a reasonable time in which to enjoy their privileges would apply to the purchaser and his assigns in this case; for the deed conveys, not only timber of a certain description then growing on the land, but all that may hereafter grow thereon, without any limitation whatever as to time. The grantee and his assigns in this deed are not mere licensees. The deed evidences a sale to them of property, and it conveys to them an interest in real estate. It indicates an intention of the grantor to allow the exercise of the powers and privileges specified so long as timber suitable for sawmill purposes continued to exist or grow upon the land. It is perhaps true, as a general principle, that

where a right is conveyed to enter upon land, and cut or use trees or timber thereon of certain size or quality, if no time is specified in the conveyance within which the trees are to be cut and removed it must be done within a reasonable time, and this is usually a question of fact, depending upon the circumstances of each particular case; but the deed before us seems to convey an absolute title to certain timber upon the land, with the right to enjoy the same "now and at any and all times hereafter." From 1 Washb. Real Prop. p. 16, we quote the following: "But if the owner of land grants the trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure, forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor." This text is supported by decisions in the following cases: *Heflin v. Bingham*, 56 Ala. 566; *Clap v. Draper*, 4 Mass. 266; *Opinion of Cole, J., in Rich v. Zellsdorff*, 22 Wis. 548, and authorities therein cited. It follows from the above that the general rule of law, that a license is strictly confined to the original parties, and is not assignable, has no application here. Such a license has reference to purely a personal privilege, and is not coupled with an interest in the property. 13 Am. & Eng. Enc. Law, p. 545, and the numerous authorities cited in the notes. But even if, under any peculiar circumstances, the doctrine of reasonable time could be applied to the rights of a grantee under such a conveyance as we are now considering, there is nothing in the record before us to indicate that such time had expired in this particular case; and we conclude that, in any view of the law that may be taken upon the subject, the court did not err in refusing to enjoin the defendants from entering upon the lands described in this deed for the purpose of cutting timber for sawmill purposes. Judgment both on the main and cross bill of exceptions affirmed. All the justices concurring; LUMPKIN, P. J., dubitante as to the point decided in the first headnote.

McCULLOUGH v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. Dec. 20, 1898.)

NEW TRIAL—BRIEF OF EVIDENCE—EJECTMENT —VERDICT.

1. Where a brief of evidence was filed within the time prescribed, by an order duly granted, wherein it was provided that such brief might be approved at the hearing of the motion for a new trial to which this brief related, an approval at the hearing was in time.

2. That a brief thus approved merely referred to, and in this manner made a part thereof, a former brief of evidence, which had been filed, approved, and made a part of the record in the same case, without incorporating the old brief in the new, afforded no cause for dismissing the motion for a new trial.

3. A verdict in an ejectment case, whereby the jury undertake to find for the plaintiff a

portion only of the premises sued for, and the terms of which are so vague and indefinite that the land therein referred to cannot be located and identified by construing the verdict in the light of the pleadings, and the metes and bounds of which could be arrived at only by resorting to extrinsic evidence, is too uncertain to support a judgment.

• (Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by J. H. McCullough against the East Tennessee, Virginia & Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Crovatt & Whitfield, for plaintiff in error. Goodyear & Kay, for defendant in error.

SIMMONS, C. J. McCullough brought his complaint for land against the East Tennessee, Virginia & Georgia Railway Company. The petition alleged that the defendant was in possession of a certain strip of land 2,500 feet in length, and 17 feet more or less in width, and that this strip was a part of certain lands which had been leased by the mayor and council of the city of Brunswick to certain parties, who had assigned these leases to the plaintiff. The railway company defended under a lease from the same authorities made in June, 1868, and a license granted in March, 1871; the contention being that the defendant had gone into possession of the land, and built thereon its roadbed, and had been in continuous and adverse possession for more than 20 years before the plaintiff filed his action. Upon the trial of the case, the jury returned the following verdict: "We, the jury, find for the plaintiff for that portion of the land in dispute on which the defendant railroad company built their track in 1890, and we also find for the plaintiff in the sum of \$3,125, for rent up to date, January 25, 1897." A motion for a new trial, containing several grounds, was made by the railway company, and granted generally by the judge, being the second grant of a new trial. See *McCullough v. Railway Co.*, 97 Ga. 373, 23 S. E. 838.

1, 2. When the motion for a new trial came on to be heard, the respondent moved to dismiss it upon the ground that the motion was "not accompanied by any legal, and duly filed and approved or agreed, brief of evidence." This motion was overruled, and the respondent excepted. It appears from the record that on January 29, 1898, the judge granted an order giving the movants 30 days within which to prepare and file a brief of evidence in the case. In the same order, he allowed the movant to refer to in, and thus make a part of, this brief of evidence, a brief of evidence filed and approved in the first motion for a new trial, without incorporating it in the second brief. The brief of evidence was filed on February 23, 1898, and at the hearing, February 28, 1898, after some corrections had been made, the judge

approved it. Under these facts, it was not error for the judge to refuse to dismiss the motion. The brief of evidence in the first motion for new trial had become a record of the court, and had been agreed upon and approved, and we think the court could allow it to be made a part of the new brief merely by reference, without incorporating it therein; it appearing that the old brief was used in the second trial for the purpose of contradicting one of the witnesses for the plaintiff, and that it was agreed by the parties that the whole of it should go in evidence on this trial. What was the object of counsel in putting in the whole brief does not appear. It was a mere repetition, in many respects, of the oral evidence taken on the last trial. There was, in our opinion, no excuse for dumping the whole of the old brief into the case, when only a portion of it was needed for the purpose of contradicting the witness. The better practice would have been to use that part only which was necessary for the contradiction of the witness, and to include the part so used in the new brief. It is bad practice to incumber the records with voluminous documentary evidence, when it is totally immaterial and irrelevant to the case on trial. A great many records are brought here which contain what purport to be briefs of evidence, when such briefs could be easily reduced to a very much smaller size.

3. The motion for a new trial contained the general grounds that the verdict was contrary to law and the evidence, and that the verdict was void for uncertainty. It will be remembered that the plaintiff sued for a strip of land on which was situated the roadbed of the defendant, 2,500 feet in length and 17 feet in width. There was, so far as the record discloses, no amendment to the declaration. The jury returned the verdict above set out. Our opinion is that this verdict is so uncertain as to the amount of the strip found by the jury to be the property of the plaintiff that a writ of possession cannot be issued in his favor. Construing the verdict with the pleadings, it is clear that, if the writ of possession issued in accordance with the verdict, the sheriff could not know which part of the strip of land to take from the defendant to give into the possession of McCullough. There was nothing said in the declaration about that part of the strip on which the roadbed of the company was built, in 1890,—no allegation as to the length of the road built at that time. In the case of *Harwell v. Foster*, 97 Ga. 264, 22 S. E. 904, it was held: "If the premises sued for be described as a certain number of acres embraced in a larger tract, which latter tract is accurately described, but there is no further description of the particular premises sued for, such description is too indefinite to be made the basis of a recovery; and if, upon the trial, the evidence for the plaintiff be as uncertain as the description laid, a nonsuit should be awarded; and even greater

certainly in the evidence would not prevent a nonsuit, unless the declaration be amended so as to conform to the evidence. If this is true of the declaration, it is also true of a verdict which finds only a part of the land claimed in the declaration, when the verdict does not with certainty describe the land found. We think that this verdict was not sufficiently certain, as to the premises found, to authorize the court, from it and the pleadings, to issue a writ of possession which would with certainty point out to the sheriff the particular tract of which to put the plaintiff in possession. It is claimed that the court had a right to look, not only to the verdict and the pleadings, but also to the evidence, in rendering judgment on the verdict, and that, by taking the evidence adduced on the trial, it could be determined what particular piece of land the jury intended to find for the plaintiff. The motion for a new trial claims that the judge had no right to do this in entering up his judgment. We cannot consider the ground of the motion complaining of the judgment entered up. That a judgment has been erroneously entered up is no ground for a motion for a new trial, but should be excepted to directly. As far as the record discloses, no legal exceptions were taken to the judgment in the present case. We must, therefore, consider the verdict itself, to determine whether it is void for uncertainty. There is no doubt that a verdict may be amended in form when this is done at the proper time, and there is no doubt that the judge had the right, in the present case, upon the application of counsel for either party, or upon his own motion, to order the jury to return to their room, and so amend their verdict as to make it specify, plainly and clearly, what part of the premises they intended to find for the plaintiff. But nothing of the sort was done. While there are some cases in our Reports holding that the judge may amend or construe a verdict by the pleadings and the evidence, yet in a case in ejectment, like this, where great particularity must be required in the description of the premises, both in the declaration and in the finding of the jury, we think that the judge should not form the judgment by interpolating into the verdict, from the evidence, descriptions of the property which do not appear in the verdict or the pleadings. If a plaintiff should sue for three lots of land, describing each accurately, and the jury should find for him one lot without describing or locating it, or stating which of the three lots was intended, certainly the judge, in construing the verdict, could not designate in his judgment a particular one of the lots, and order a writ of possession to issue therefor. We are of the opinion that when one brings an action for an entire tract of land, and the jury find for him only a portion of such tract, unless the declaration is so framed or amended as to describe that portion with sufficient partic-

ularity, the verdict should specify with certainty such portion as is found to be the property of the plaintiff. In such a case, the description in the verdict should be as accurate and certain as is required in the declaration in a suit of ejectment. We are aware that the old rule was that the jury could return a general verdict where the plaintiff proved his title to a portion only of the premises sued for; it being said, in sustaining the rule, that the plaintiff could enter upon the other part of the premises—that to which he had shown no title—at his peril, and be subject to an action of trespass; but that rule has long ago been abandoned, the true one being that stated above. 'By that method,' as was said by Ruffin, C. J., in the case of *Pierce v. Wannett*, 32 N. C. 446, 452, 'questions are settled at once which might otherwise produce troublesome controversy in other forms.' See, also, *Hicks v. Brinson*, 100 Ga. 595, 28 S. E. 380; *McArthur v. Porter*, 6 Pet. 205; *Hitchcox v. Rawson*, 14 Grat. 526; *Kyser v. Cannon*, 29 Ohio St. 359; *Smith v. Jenks*, 10 Serg. & R. 153; *Crommelin v. Minter*, 9 Ala. 594; *Bennett v. Morris*, 9 Port. 171; *Gregory v. Jacksons*, 6 Munf. 25. Judgment affirmed. All the justices concurring.

PAULK v. TANNER, Sheriff.

(Supreme Court of Georgia. Dec. 16, 1898.)

DEMURRER—MOTION TO DISMISS—NONSUIT—APPEAL—CERTIORARI—COSTS.

1. After the defendant has demurred to the plaintiff's petition, upon the ground that it sets forth no cause of action, and such demurrer has been overruled, it is too late to move to dismiss the suit for the want of service or for any defect in the process.

2. There was no error in overruling the motion for a nonsuit in this case.

3. While the testimony was conflicting, there was ample evidence to support the judgment rendered in the city court, except as to the rate of interest.

4. It is erroneous to require the plaintiff in certiorari to pay the costs in the superior court when the judgment rendered by that court corrects, in his favor, a material error in the judgment of the court below.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Action by W. M. Tanner, to the use, etc., against H. L. Paulk. Judgment for plaintiff, and defendant brings error. Affirmed in part and reversed in part.

E. P. Padgett & Son, for plaintiff in error. Quincey & McDonald, for defendant in error.

FISH, J. 1. It is alleged in the petition for certiorari that the city court erred in overruling the motion of the defendant's counsel to dismiss the suit, "because there was no service upon the defendant of the petition and process, or waiver of the same, or any such appearance or pleadings as would in law amount to a waiver of the same, and

because the process was not properly directed." It appears from the answer of the judge of the city court to the certiorari, which answer was not traversed, that, "at the appearance term of said case, said defendant filed a general demurrer, alleging that no cause of action was set out in the plaintiff's petition, and also demurring to the jurisdiction generally." Demurring generally to a petition, upon the ground that it sets forth no cause of action, is pleading to the merits of the case. After the defendant had, at the appearance term, by his general demurrer, invoked the judgment of the court on the plaintiff's cause of action, it was too late, at the trial term, to move to dismiss the suit for want of service or for any defect in the process. *Lyons v. Bank*, 86 Ga. 485, 12 S. E. 882; *Railway Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010.

2. It is alleged in the petition for certiorari that the city court erred in overruling the defendant's motion for a nonsuit upon the ground that plaintiff's evidence did not show "that the sheriff had ever requested the defendant to pay the amount of his bid before the filing of his suit." The answer of the judge of the city court shows that the sheriff testified that, after the defendant had paid him \$127.50 on the bid, he saw the defendant several times, and "told him that the balance due on said bid would have to be paid, as the plaintiff had informed witness that said balance would have to be collected from [defendant], or that they would have to collect the same from him as sheriff; that, notwithstanding this, defendant, Paulk, had never paid anything more upon his said bid; that the demand he made upon said Paulk for payment of said balance was just as stated, but that he had endeavored several times to collect same from him." We think this evidence was sufficient to show "that the sheriff had * * * requested the defendant to pay the amount of his bid" before the suit was instituted.

3. While the testimony was conflicting, there was ample evidence to support the judgment rendered by the city court, except as to the rate of interest, and the judge of the superior court rightly so held.

4. The court erred, however, in requiring the plaintiff in certiorari to pay the costs in the superior court. He was entitled to have the error in the judgment of the city court, in reference to the rate of interest thereon, corrected, and, the judgment of the superior court being in his favor on this point, the certiorari, to this extent, was sustained, and therefore the costs incurred in this proceeding should have been adjudged against the defendant in certiorari. The judgment of the trial court is affirmed, except as to the matter of costs. It is in this respect reversed, and direction is given that the judge of the superior court render a final judgment in favor of the plaintiff in the original case against the defendant therein for the amount

of the principal sum stated in the judgment of the city court, with interest thereon from the date of that judgment at 7 per cent. per annum, and for the costs of the case in the city court, and in favor of the plaintiff in certiorari against the defendant in certiorari for the costs in the superior court. We have also adjudged that the costs of this writ of error must be borne by the defendant in error. Judgment affirmed in part, and in part reversed, with directions. All the justices concurring.

NATIONAL FIRE INS. CO. OF HARTFORD v. GRACE.

(Supreme Court of Georgia. Dec. 17, 1898.)

INSURANCE POLICY—ASSIGNMENT.

In order to transfer the legal title to a policy of fire insurance from the person to whom the policy was issued to another, the assignment thereof must be in writing, and one other than the person to whom it was issued cannot, in his own name, maintain an action thereon, unless the policy has been duly assigned to him in writing.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by W. M. Grace against the National Fire Insurance Company of Hartford, Conn. Judgment for plaintiff. Defendant brings error. Reversed.

Toomer & Reynolds and Spencer R. Atkinson, for plaintiff in error. Hitch & Myers and L. A. Wilson, for defendant in error.

FISH, J. At the close of the plaintiff's evidence, the defendant moved for a nonsuit upon several grounds. The first ground was "because it appears from the evidence that the plaintiff seeks to recover upon a policy of insurance issued to, and now in the name of, A. M. Knight, which policy, or right to recover thereon, is not connected with the plaintiff in the case." The second ground was "because it appears from the evidence that the title to, and the right to recover upon, said policy, if it exists at all, is out of the plaintiff in this case." We think the court should have sustained this motion. The action was upon a fire insurance policy, for loss alleged to have been sustained by the plaintiff in consequence of the destruction by fire of the house insured, during the term covered by the policy. The petition alleged, and the evidence showed, that the policy had been issued by the insurance company to A. M. Knight, through Knight & Youmans, agents for said company in Waycross, Ga., of which firm A. M. Knight was a member. While the petition averred that the plaintiff had bought a certain house and lot from Knight (the house being the property upon which the policy was issued), and that the plaintiff bought the same "upon the representation of said A. M. Knight, agent of said company, that

the dwelling house upon said property was insured for the sum of \$500, that he had the policy, and that he, as agent of said company, would transfer the said policy properly for the protection of the plaintiff, no evidence was introduced which showed that the policy had ever been assigned in writing to the plaintiff. On the contrary, the policy was introduced in evidence by the plaintiff, and no written assignment whatever of the same appeared thereon. So that the plaintiff's own evidence showed that the legal title to the insurance policy was still in Knight. Whatever equitable interest, if any, the plaintiff may have acquired in the policy by reason of the transaction with Knight, it is clear that, in the absence of a written assignment to him from Knight, or from some one else, to whom Knight had, in writing, assigned it, he could not maintain an action thereon in his own name. *Insurance Co. v. Amos*, 98 Ga. 533, 25 S. E. 575, and authorities there cited. For this reason, if for no other, the court should have granted a nonsuit. Judgment reversed. All the justices concurring.

A. P. BRANTLEY CO. v. LEE et al.

(Supreme Court of Georgia. Dec. 21, 1898.)

PLEA—DEMURRER—ACCORD AND SATISFACTION—EVIDENCE—DIRECTING VERDICT.

1. Where a plea substantially, and in general terms, sets forth a defense of accord and satisfaction, and is especially demurred to on the ground that it does not, with sufficient fullness, set forth the defense relied upon, there is no error in overruling the demurrer, when it appears that the same was not filed within the time required by law.

2. A plea of accord and satisfaction may be supported by parol evidence that promissory notes were delivered and accepted in settlement, without producing such notes or accounting for their nonproduction. It is error, however, to allow the witness in such a case to go into the contents of the notes by testifying to the amount for which they were given.

3. The evidence in this case was not sufficient to demand a verdict for the defendants, and the court, therefore, erred in directing a verdict in their favor.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Action by the A. P. Brantley Company against W. P. Lee and others. From a judgment overruling a demurrer to the plea, and directing judgment for defendants, plaintiff brings error. Reversed.

Hitch & Myers, for plaintiff in error. Toomer & Reynolds, for defendants in error.

LEWIS, J. 1. Civ. Code, § 5047, provides that all demurrers and pleas shall be filed and determined at the first term, unless continued by the court or by consent of parties. It does not appear from the record in this case when the plaintiff's demurrer to the plea was filed, or whether it was filed at all. It does

appear, however, that the judgment overruling the demurrer was rendered nearly a year after the plea was filed, and we are authorized to infer from this fact, and from the statement made by the judge in his order, that the demurrer was not filed within the time required by the statute, or even at the term of the court next succeeding the filing of the plea. The demurrer only going to the defect in the plea that it was not sufficiently full and explicit,—a defect which is clearly amendable,—we do not think there was any error in overruling the same, although its special grounds may have been well taken. The policy of the law seems to be to settle all these questions with reference to the sufficiency of the pleadings at the first term of the court, which is a wise provision to prevent pleas of surprise growing out of amendments, and continuances of cases at the trial term.

2. In *Fisher v. George S. Jones Co.*, 93 Ga. 717, 21 S. E. 152, it was decided that a plea of payment may be supported by parol evidence that promissory notes were delivered and accepted in payment, without producing such notes or accounting for their nonproduction. It was, therefore, not error for the court to permit the defendant Lee to testify in this case that the defendants had executed their notes and delivered them to the plaintiff in satisfaction of this demand. The witness, however, went further, and testified that the notes were given for \$125. This was necessarily going into the contents of the notes, and the notes themselves were the best evidence of the fact as to the amount named therein. We do not mean to say, however, that such an error alone would require a reversal of the judgment; for the material fact was whether or not the matter had been settled by the giving of notes. If it had been, the amount of the notes was perhaps an immaterial matter to be considered.

3. The defense relied on in this case was a settlement had by the defendants with the alleged agent of the plaintiff. The only testimony tending to show the agency was that of the defendant Lee, who stated that Benton said he was the agent of the Brantley Company, and witness traded in other instances with Benton as the agent of the Brantley Company. While the cashier of the bank testified that the "notes were sent to the bank for collection, or some member of the Brantley Company spoke to the witness about the matter," yet he further testified that he had no positive recollection of ever seeing any notes signed by the defendants and payable to the Brantley Company, and also said that, if they were sent to the bank for collection, they were rendered to the Brantley Company. There is no evidence, then, in the record, showing any express authority given by the company to Benton to make a compromise or settlement of their claim for the property in dispute, and we think the evidence offered is entirely too indefinite and uncertain to authorize the judge to conclude that it demanded a

finding that the plaintiff subsequently ratified the settlement made by Benton with the defendants. The court erred, therefore, in directing a verdict for the defendants, and for this reason the judgment is reversed, and a new trial ordered. Judgment reversed. All the justices concurring.

VICKERS et al. v. SANDERS.

(Supreme Court of Georgia. Dec. 17, 1898.)

BILL OF EXCEPTIONS—SERVICE AND FILING.

Unless it affirmatively appears that a bill of exceptions was served within 10 days, and filed in the office of the clerk of the trial court within 15 days, after having been certified by the judge, the writ of error will be dismissed. (Syllabus by the Court.)

Error from city court of Douglas; F. W. Dart, Judge.

Action by L. R. Sanders against Vickers & Burkhalter. Judgment for plaintiff. Defendants bring error. Dismissed.

E. P. Padgett & Son and R. A. Hendricks, for plaintiffs in error. Perry & Tifton and Hitch & Myers, for defendant in error.

LUMPKIN, P. J. On the 31st day of May, 1898, a motion for a new trial, which had been filed by Vickers & Burkhalter, and in which they complained of a verdict rendered against them in favor of the administratrix of J. R. Sanders, deceased, was heard and overruled. They thereupon presented to the judge a bill of exceptions, which was certified in the usual form, but the certificate was not dated. It appears that this bill of exceptions was filed in the office of the clerk of the trial court on the 27th day of June, 1898, and on the next day he certified upon it that it was the true, original bill of exceptions in the case stated. On July 4, 1898, counsel for the defendant in error acknowledged service of this bill of exceptions, but the record discloses affirmatively that they declined to acknowledge that this service was "due and legal." When the case was called here, a motion was made to dismiss the writ of error, because, among other reasons, it did not appear that the bill of exceptions was served within 10 days after having been certified by the judge, or that it was filed within 15 days from that time. Section 5547 of the Civil Code requires service of every bill of exceptions within 10 days after the same shall have been signed and certified, and section 5554 provides that within 15 days from the date of the certificate of the judge the bill of exceptions shall be filed in the office of the clerk of the court where the case was tried. Compliance with these requirements is essential to the validity of a bill of exceptions, and it must in every case affirmatively appear. It does not in the present case appear either that the bill of exceptions was duly served or that it was filed within the prescribed time. It is

impossible to ascertain from the record before us upon what day the judge signed the certificate. He may have done so on any day between the 31st of May and the 27th of June. If, for instance, he signed on the 1st day of June, more than 10 days elapsed before the service, and more than 15 days before the filing. The writ of error must be dismissed. All the justices concurring.

DU BIGNON v. MAYOR, ETC., OF CITY OF BRUNSWICK et al.

(Supreme Court of Georgia. Dec. 21, 1898.)

MUNICIPAL TAXATION—SALE—EXECUTION—OBLIGATION OF CONTRACTS—RETROACTIVE STATUTES—CITY CLERKS.

1. "Ignorance by both parties of a fact does not justify the interference of the court."

2. The clerk of the city council of Brunswick has authority to issue executions for municipal taxes due the city on assessments regularly made for previous years, where there has been a failure on the part of the clerk to issue such executions during the years for which the assessments were made.

3. The general assembly has the power to amend the charter of a city so as to change its laws touching the advertisement for sale of property for taxes, and such act is not unconstitutional because it applies to taxes due at the time of its passage.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by John E. Du Bignon against the mayor, etc., of Brunswick and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Goodyear & Kay, for plaintiff in error. Owens Johnson, for defendants in error.

SIMMONS, C. J. 1, 2. Our learned brother in the court below, in refusing an injunction in the present case, rendered a written opinion, giving the reasons why the injunction should not be granted. That opinion so well expresses our views of the law, that we adopt it as our own, except in reference to the question ruled on in the third headnote, with which the judge did not deal. The opinion is as follows:

"Briefly stated, it appears that the Oglethorpe Hotel property, in the city of Brunswick, was by contract released from municipal taxation for the term of seven years, which expired December 31, 1893. The plaintiff, John E. Du Bignon, purchased and became owner of said property in February, 1894. Under the charter of the city of Brunswick, provision is made for the appointment and qualification of three assessors, whose duty it is to assess and value annually all real estate in said city liable for taxation, at a true and just valuation, and to enter their assessment of the same in a book to be kept for that purpose; to return the same to the mayor and aldermen of the city, and file it with the clerk of council of the city, on or before the 1st day of March of each and every

year. After said return is made and filed, on or before the 1st day of March in each and every year, every person claiming real estate so assessed shall return his name to the clerk of council of said city, and write the same opposite the property claimed and owned by him. If any assessment shall be deemed erroneous, the owner who may be dissatisfied with any such assessment shall have the privilege of making complaint within twenty days after the date of the report of the assessors; and, upon such complaint being made, the assessment complained of shall be immediately referred to three arbiters, to be chosen as provided, whose award in the matter shall be made within ten days, and shall be conclusive and final. If, on the 1st day of May of any year, there is any real estate in the city which has not been so returned by the owner or claimant thereof, it shall be the duty of the clerk of council to issue an execution against such real estate which has not been so returned by the owner thereof, as nonreturned property, describing the same, and directed to the marshal of the city, requiring him by levy and sale of the property to make the amount of taxes due on said property for that year. It appears that in the year 1894, and for each year thereafter, including the years 1895, 1896, 1897, and 1898, said Oglethorpe Hotel property was duly and regularly assessed for taxes according to the tax rate fixed for each of said years by the mayor and aldermen of the city; that John E. Du Bignon, the owner thereof, laboring, he claims, under the impression that the term for which said property had been released from taxes had not expired, failed to make return of the same, and to appeal from the valuation fixed by the board of assessors to a board of arbiters, as provided for; and that during said years, up to 1898, the clerk of council, laboring under a like impression, failed to issue executions against said property for the taxes due thereon annually. In 1898 the present mayor and council of the city of Brunswick, ascertaining that said property was in arrears for the taxes due thereon for said years, had the clerk of council to issue executions therefor, and caused the same to be placed in the hands of the marshal for collection, and said property levied on and advertised for sale, whereupon the plaintiff filed his petition as aforesaid, claiming, among other things, that for each of said years said property had been assessed largely in excess of its true and just valuation, and that by reason of a mutual mistake of fact, as claimed, existing both upon his part and that of the mayor and council, as to the term for which the property had been released from taxes having not yet expired, he should be allowed to make return thereof, and appeal to a board of arbitration, with a view of having the value fixed thereon by the assessors reduced, and the taxes to be paid thereon proportionately reduced. And the claim is also made upon the

part of the plaintiff that the power to issue executions for back taxes, due in preceding years, is not vested in, and cannot be legally exercised by, the clerk of council, but that such taxes, due in preceding years, and for which executions were not issued in those years, become debts, the collection of which must be enforced by an action at law.

"There are but two questions arising in this case which I deem it necessary to consider and pass upon, and these are: First, whether the failure of the plaintiff to make his return for said Oglethorpe Hotel property, and enter an appeal from the valuation fixed thereon by the assessors, within the time prescribed, during each of the years aforesaid, was caused by such mistake of fact as would authorize a court of equity to grant the relief prayed for; second, whether the tax executions issued by the clerk of council for the back taxes due on said property in each of the preceding years, as stated, were issued without any power to do so, and therefore illegally issued.

"For the purposes of this case, I deem it wholly immaterial as to whether the contract releasing or exempting said Oglethorpe Hotel property from taxes was legal or illegal, inasmuch as the time for which it was made had expired, and no claim is made for taxes accruing during the period of exemption. It is conceded that easy reference to the contract could at any time have been had by the plaintiff, or by either of said parties. Section 3984 of the Civil Code is in these words: 'If the party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve; nor will the ignorance of a fact, known to the opposite party, justify an interference, if there has been no misplaced confidence, nor misrepresentation, nor other fraudulent act.' And again, in section 8985, it is stated, 'Ignorance by both parties of a fact does not justify the interference of the court.' Under these plain provisions of our Code, it would appear that there had been no such mistake of fact upon the part of the parties as would be relievable in a court of equity. It should be remembered that property owners are limited in each year to a period of twenty days, after the date the assessors make their returns, in which to appeal to arbitrators, and, upon failure so to appeal within that period, they are thereafter barred from said right. In the case of *Adams v. Guerard*, 29 Ga. 651, Stephens, J., delivering the opinion of the court, said: 'It was said that equity will relieve from a mistake of law as well as from a mistake of fact, and that the statute [of limitations] does not begin to run till the discovery of the mistake. It is too late to deny in this court that there are mistakes of law as well as mistakes of fact which will be relieved in equity, but I apprehend relief was never granted from such a mistake as this. Those mistakes from which relief has been granted were mistakes which occurred

in doing something, not in doing nothing; they were mistakes of action, not of mere inaction. When one has contracted or acted on a false assumption of fact or of law, equity may relieve him from the effects of the action, and will not begin to count time against him until the discovery of the mistake; but where he has simply lain still, under a mistaken assumption of either fact or law, without having ever acted at all, it is not a question when time will begin to be counted against his relief, but it is a case where no relief will be granted at any time from the effects of his inaction. * * * Still, the question remains whether it is such a mistake as will put a court of equity in motion. When once in motion, it will relieve, and will count time only from the discovery of the mistake; but it is only a mistake on which there has been action that will put it in motion. Mere inaction, in a case where the statute makes it a bar, is a bar in equity as well as at common law.' Again, in the case of *Bohler v. Verdery*, 92 Ga. 715, 19 S. E. 36, it appears that the defendants in error made returns of their property for state and county taxes for the year 1891 to the tax collector of Richmond county, and that he accepted the same without objection; that afterwards a board of assessors, under an act then in force for Richmond county, assessed the property of the defendants in error, and increased the valuation beyond that given in the returns. Executions for taxes based on these assessments were issued, and the defendants in error filed their petition to enjoin the tax collector and the sheriff from further proceeding to enforce the executions, upon the ground that the act referred to was unconstitutional. The invalidity of the act was conceded, and was regarded as settled, under the decision in the case of *Stewart v. Collier*, 91 Ga. 117, 17 S. E. 279. It was claimed, however, that the tax collector acted under a mistake of law; that he was dissatisfied with the returns, and, but for his belief that the returns had to be passed upon by a board of assessors under the act in question, he would have insisted upon the appointment of arbitrators according to section 840 of the Political Code. The defendants prayed that the petitioners be required to do equity, and to submit their returns to three disinterested persons, under the provisions of the section referred to, who should fix an assessment upon the property, and that the petitioners be required to pay a tax for the year 1891 upon the assessment so made. Mr. Justice Simmons, delivering the opinion of the court, said: 'The authority of the tax receiver to assess property where a return has been made is derived from section 839 of the Political Code, and is limited to the time prescribed in that section. The language of the section is as follows: "Each return shall be scrutinized carefully by the tax receiver, and if, in his judgment, he shall find the property embraced in the return, or any portion of it,

returned below its value, he shall assess the value at once or within thirty days thereafter." The courts cannot enlarge or extend the scope of the statute by granting further time, if the tax receiver fails to act within the time prescribed; nor can they, at his instance, require the taxpayer to submit to an assessment by arbitrators, under section 840 of the Political Code. Certainly the fact that the tax receiver believed, or relied upon the belief of others, that an invalid local statute was valid and superseded the law above referred to, so far as the particular county was concerned, and that his failure to act was due to this cause, could not give the court any power in the matter. The principles which authorize a court of equity to relieve against mistake have no application to the case. The tax collector is bound to know the law regulating his official duty; and for his error of judgment in reference thereto, no responsibility can attach to the taxpayer. [Authorities cited.] Moreover, mistake implies action, and here there was no action at all.' Then follows citation of authorities, including the case of *Adams v. Guerard*, supra, from which quotation is made, with approval, of a part of the decision hereinbefore stated. Clearly, to my mind, under the rulings of our supreme court, this court is powerless, upon this question, to grant any relief to plaintiff.

'Now, upon the other question the principal authority relied upon for plaintiff is the case of *D'Antignac v. City Council*, 31 Ga. 700, wherein *Jenkins, J.*, delivering the opinion, holds that, in proceedings under statute authority whereby a man may be deprived of his property, the statute must be strictly pursued, and compliance with all its prerequisites must be shown, and, speaking of the Augusta ordinance, says: 'Clearly, then, the ordinance contemplates that execution shall issue against defaulters before the expiration of the term of office of the collector within which the default was made, or, in other words, within the same fiscal year (of the corporation) in which the default was made. But by the ordinance the issue of execution must be preceded by a return of the defaulter; ergo such return must be made before the expiration of the collector's term of office,—before the expiration of the fiscal year within which default was made.' And again: 'This construction is strengthened by consideration of the nature of this corporation, and the object for which it assesses taxes. It is a corporation created for municipal government, and it is permitted to assess and collect taxes annually to defray the annual expenses of that government. It should assess no higher taxes than are necessary for that purpose, and, keeping within this rule, there rests upon it both a duty and a necessity to collect within the year the taxes assessed in and for that year. If we have correctly construed this ordinance, and correctly stated the general law

governing *ex parte* summary, statutory proceedings, of which this is one, shall it be said that after ten years of nonaction the defendant in error may cause a demand for taxes to be made, then a return of the taxpayer as a defaulter, then the issue of execution *ex parte* against him, whereby his property may be sold, and his title thereto devested, without a hearing—a day in court—allowed him? We think not. We hold that the defendant in error, by refraining so long from any attempt to enforce payment of these taxes, or to place the taxpayer in the predicament of a defaulter, has lost this summary *ex parte* remedy against him, and must resort to suit at law or in equity, as in other cases between debtor and creditor.' Very much of this should doubtless be considered merely obiter dicta upon the part of the learned judge delivering the opinion, for it will be found upon an examination of the case in question that the Augusta ordinance, among other things, provided that 'it shall be the duty of the collector and treasurer to give notice in one or more of the gazettes of the city and to call at least once at the house of each person taxed, to demand the taxes; and unless said taxes be paid within two months from the date of said notice, it shall be his duty to make a return of such defaulters to the city council, and thereupon executions shall issue against the goods or persons of such defaulters.' So that, in each year, before persons or property could be considered as being in default, in order to authorize the issuing of executions against them, these prerequisites had to be complied with, which was not done for ten years, when the city authorities then undertook to comply with said prerequisites, issue the executions, and collect the taxes by levy and sale. The judgment of the court was in these words: 'Whereupon, it is adjudged by the court that the judgment of the court below, dissolving the injunction, be reversed, and the injunction be reinstated, on the ground that the tax executions exhibited with the bill were illegally issued, the prerequisites of the ordinance authorizing the issue of tax executions not having been complied with.' In the case of *Bacon v. City of Savannah*, 91 Ga. 500, 17 S. E. 749, the case of *D'Antignac v. City Council*, supra, is cited in support of the proposition that, 'for a municipality to take the property of a citizen under a power conferred by the legislature to tax by local assessment, it must in all matters of substance follow the power strictly.' While a municipal corporation is permitted to assess and collect taxes annually to defray the annual expenses of the government, as stated by Judge Jenkins in *D'Antignac v. City Council*, yet it must be borne in mind that there are many municipalities which are in the condition of Brunswick, as stated in the fifth paragraph of plaintiff's petition, wherein it is averred 'that for a long time past the mayor and council of Brunswick have been more or less

in constant need of money, having since 1893 had a large floating debt, and also a bonded indebtedness of \$300,000, or other large sum, and being a continuous borrower of money up to the full legal limit which they could borrow without an election, under the constitutional provisions of the state of Georgia,' so that the necessity for the collection of back taxes continually exists. And let it be borne in mind that the only mode provided in the charter of the city of Brunswick for the collection of taxes is by the summary, *ex parte* proceeding of having the clerk of council issue executions, and there is no statute in Georgia affording a common-law remedy for such purpose, as in the case of an ordinary debt; and especially would it be true, where property is not returned, and remains in default, that in such cases there would be no person against whom a proceeding at law could be instituted. In *Richards v. Commissioners*, 40 Neb. 45, 58 N. W. 594, 42 Am. St. Rep. 650, it was held: 'A tax is not a debt capable of enforcement generally by a civil action. If an action is permitted, it is only because the statute expressly provides therefor, or, by failing to provide any method, necessarily implies a right of action. A method prescribed by statute of enforcing and collecting taxes is exclusive; and, if the statute embraces a right of action, the conditions and manner of the action, as specified by the statute, must be strictly observed, or the action will not lie.' In this case the question seems to have been thoroughly well considered, and the opinion of the court is supported by an exhaustive citation of authorities from most of the states of the Union. Judge Cooley, in his work on *Taxation* (2d Ed. p. 16), states that in general the conclusion reached by the courts has been that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the taxes as a debt will not lie; and numerous authorities are cited in support of that doctrine. The law is further announced in the same work (page 435) as follows: 'Sometimes a right to bring suit is expressly given, and, where it is, the statute must be closely followed, and any conditions which are named must be observed.' In 25 Am. & Eng. Enc. Law, p. 312, the statement is made: 'Taxes are not debts, and therefore, as a general rule, the common-law action of debt does not lie for their collection where another remedy is given. The right to proceed by action is, however, frequently conferred by statute.'

'The assessment of property in the city of Brunswick for taxes, and the fixing of the tax rate thereon for each particular year, fix a lien thereon, and, in a sense, constitute a judgment for the taxes, and stand in lieu thereof; and on the first day of May all property in default is then subject to be proceeded against by execution, levy, and sale. This is the remedy provided by the charter of the

city, and, as has already been observed, no other remedy for the collection of taxes therein has been provided by statute. And it should be observed that no time is fixed, from and after the 1st day of May of each year, within the limit of which this power can be exercised. Surely it will not be seriously contended that where there is a failure in any one fiscal year to exercise this power to issue executions, and levy and sell thereunder, for the purpose of collecting back taxes, not only is the right to do so lost, but, there being no other remedy provided by statute therefor which can be legally pursued, that therefore the city must lose all back taxes due and unpaid for preceding years. And yet that would be the logical result, if the contentions of the plaintiff upon this question were upheld. But the court is overwhelmingly convinced, and constrained to hold, that such is not the law, and that the executions as issued have been legally issued by the clerk of council, and levied by the marshal, and that the court is without discretion in the premises, and therefore powerless, under the law, to legally enjoin the defendants from the sale of the Oglethorpe Hotel property for the taxes for which it appears to be in default. The plaintiff, by his own laches, has, of course, lost the right to appeal from the assessed valuation made of his property, and possibly to have the same reduced; but the failure to collect these taxes annually cannot properly be claimed to have worked injury and injustice to him, inasmuch as the delay has resulted in an extension of time for the payment of the taxes, and without any accruing interest thereon,—the city alone, by its laches, being the loser in that respect. Whereupon, it is considered, ordered, and adjudged by the court that the injunction prayed for be denied and refused."

8. One of the points made, with which the learned judge below did not deal, is that, if the clerk had the right to issue executions for back taxes, the law existing at the time such taxes became due should have applied in all particulars, including the time of advertisement; the fact being that the act of 1897 (page 157), passed after a portion of the taxes here involved had become due, changed the length of time of advertising unreturned property from 12 to 4 weeks. We believe that this question is controlled by the Code of the state and the decisions of this court. While the constitution of this state (article 1, § 3, par. 2) provides that no retroactive law, or law impairing the obligation of contracts, shall be passed, remedial statutes are held not to be included. In the language of the Code: "Laws prescribe only for the future; they cannot impair the obligation of contracts, nor generally have a retrospective operation. Laws looking only to the remedy or mode of trial, may apply to contracts, rights and offenses entered into or accrued or committed prior to their passage; but in every case a reasonable time subsequent to the passage of

the statute should be allowed for the citizen to enforce his contract, or to protect his right." Pol. Code, § 6. The statute now under consideration did not impair or affect any right of the plaintiff in error, but only changed the remedy provided the defendants in error for the purpose of enforcing their rights. No change was made in anything in which the taxpayer had or could have acquired any right, and the amendment to the city's charter was not in violation of the provisions of the constitution. See, in this connection, *Hall v. Carey*, 5 Ga. 239; *Searcy v. Stubbs*, 12 Ga. 437; *Cox v. Berry*, 13 Ga. 306; *Lockett v. Usry*, 28 Ga. 345; *George v. Gardner*, 49 Ga. 441; *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967; *Bacon v. Mayor*, etc. (decided last term) 31 S. E. 127. Judgment affirmed. All the justices concurring.

EASON v. MAYOR, ETC., OF AMERICUS. (Supreme Court of Georgia. Dec. 14, 1898.)

NEW TRIAL—BRIEF OF EVIDENCE—FAILURE TO FILE.

The terms of an order granting time to file in vacation a brief of the evidence must be strictly complied with. Noncompliance is not excused because of failure on the part of a stenographer who took down the testimony to write out his report thereof in time for use in preparing the brief within the period limited by such order.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by the mayor and common council of Americus against Ann Eason. Judgment for plaintiff. Defendant brings error. Affirmed.

C. R. Winchester and J. R. Williams, for plaintiff in error. James Taylor, for defendant in error.

LUMPKIN, P. J. This case was tried November 27, 1897, during a regular term of Sumter superior court. A motion for a new trial was duly filed, and an order passed setting the same for a hearing on the 1st day of January, 1898, and allowing the movant until December 27, 1897, in vacation, to file a brief of the evidence. No brief was filed within the time thus limited. On January 1, 1898, the court passed an order continuing the hearing of the motion until February 5, 1898, and allowing the movant until January 17th to file a brief of the evidence. In this order, however, the right of the respondents to move to dismiss the motion for failure to comply with the terms of the original order as to the filing of a brief of the evidence was expressly reserved. On February 5, 1898, the hearing of the motion was again continued to the ensuing May term of the court, and at that term the motion was dismissed on the ground that the movant had not filed a brief of the evidence within the time specified in the order first above mentioned. The reason assigned for

failure to comply with this order was that the court stenographer of the circuit, who by agreement had taken down the testimony in the case, had not written out his notes in time to enable the movant to prepare from his report a brief of the evidence by the 27th of December. The only error complained of here is the dismissal of the motion. We have no doubt at all that the court below was right in dismissing it. In *Baker v. Johnson*, 99 Ga. 874, 27 S. E. 708, this court, following previous adjudications, held that: "Where one dissatisfied with a verdict files during the term a motion for a new trial, and, instead of pursuing the strict law in such cases provided, obtains an order allowing him until a future time in vacation to prepare and file a brief of the evidence in the case, and to amend the motion, he must abide by the terms of the order thus obtained; and consequently, if no brief of evidence is prepared and presented, the motion for a new trial is not made either in the manner required by law or in that pointed out by the order, and therefore is subject to be dismissed on motion." In the present case the movant was not helped by the order of January 1, 1898, because it expressly reserved to the respondents the right to move to dismiss the motion for a new trial because of noncompliance with the terms of the original order. As to the failure of the court stenographer to write out his notes in time for the movant to use the same in preparing a brief of the evidence, see *Boatwright v. State*, 91 Ga. 18, 18 S. E. 101, holding that such an omission on the part of a stenographer constituted no legal reason for delaying the filing of a brief of the evidence beyond the time granted for this purpose. Judgment affirmed. All the justices concurring.

PUTNEY v. BRIGHT.

(Supreme Court of Georgia. Dec. 15, 1898.)

INJUNCTION—RESTRAINING TRESPASS.

Equity will not interfere in behalf of an owner of land to restrain the seller from entering upon the premises, or from committing any other acts of trespass thereon, when it appears that the vendor is solvent, and that the injury sustained by the vendee is reparable in damages.

(Syllabus by the Court.)

Error from superior court, Dougherty county; W. N. Spence, Judge.

Bill by Oldham Bright against F. F. Putney. Decree for plaintiff. Defendant brings error. Reversed.

D. H. Pope & Son, for plaintiff in error.
Walters & Wallace, for defendant in error.

SIMMONS, C. J. It is a well-settled rule that equity will not enjoin a trespass unless the damages are irreparable, or the trespasser is insolvent, or there are other circum-

stances which render the writ necessary or proper. Civ. Code, § 4916. None of these circumstances are alleged in the petition for injunction in the present case. Indeed, it was admitted that the defendant, Putney, was abundantly able to respond to any damages which might be awarded against him. It seems that Putney organized a company for the purpose of selling a portion of his land to immigrants. The town was laid off into lots and streets. Four of these lots were sold to Bright, who also purchased 50 acres outside of the town. Bright paid the purchase money, and received deeds thereto, which were recorded, but alleged that Putney delayed putting him in possession, and was cultivating a portion of the land thus sold him, and was cultivating also some of the streets marked out on the map of the town. It seems that Bright was the only person who purchased lands in the proposed new town, and, further, that the scheme had been abandoned. Putney, owning the land, cultivated the land he had purposed laying off into a town. By mistake, he claims, his servants entered on a portion of the land sold to Bright. In his answer, Putney offers payment for this trespass, and tenders the lots and land to Bright, and alleges that Bright could have taken possession before, and can now take possession, whenever he may desire to do so.

These facts, we think, were not sufficient to authorize an injunction. They do not show that the damages were irreparable, or that Putney was insolvent, or any other circumstances which would render an injunction proper or necessary. It was claimed in the argument here that the cultivation of the streets was a nuisance. Under the facts disclosed by the record, we think that the cultivation of a street which Putney had intended to dedicate to the public in case he sold his town lots was not a nuisance to the plaintiff, especially as no person other than Bright owned any of the lots, and no one, not even Bright himself, was living in the "town." We think, therefore, that the trial judge abused his discretion in granting the injunction. All the justices concurring. Judgment reversed.

PHILLIPS et al. v. RENTZ et al.

(Supreme Court of Georgia. Dec. 17, 1898.)

DIRECTING VERDICT.

Where the plaintiff in a suit to recover for damages to realty relies upon his right as an heir at law, and upon the trial it appears from the evidence of the defendant that the ancestor of the plaintiff died testate, and that the land which is claimed to have been damaged was devised, but the record does not disclose who was the devisee, it was not error to direct a verdict in favor of the defendant.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Action by W. M. Phillips and others against Rentz Bros. & Roberts. Verdict for defendants, and plaintiffs bring error. Affirmed.

Isaac Beasley and A. C. Pate, for plaintiffs in error. A. C. Wright, Williams & Williams, and J. H. Martin, for defendants in error.

COBB, J. This was a suit by W. M. Phillips and others to enjoin Rentz Bros. & Roberts from cutting timber on certain land, and for damages for timber already cut. The suit was brought in January, 1895. It appears from the petition and the abstract of title relied on by the plaintiffs, and which is attached thereto, that the plaintiffs are some of the heirs at law of Micajah Phillips, and that their title is derived in part by descent from their ancestor, and in part by conveyances from the other heirs. The defendants filed an answer, denying that the plaintiffs were the owners of the land, and setting up title in themselves. At the trial the plaintiffs introduced evidence showing a grant from the state to Micajah Phillips, covering the land, title to which is in dispute. It was shown by the plaintiffs that Micajah Phillips was dead, and that the plaintiffs were some of the heirs at law of the deceased, and conveyances were introduced in evidence from the other heirs at law conveying to the plaintiff W. M. Phillips all their interest in the property. There was also evidence as to the amount of damages claimed to have been sustained. Evidence was introduced by the defendants tending to establish that the property, title to which is in controversy in this suit, had been sold at sheriff's sale as the property of Micajah Phillips, and that the defendants derived title from the successors in title to the purchaser at this sale. The execution under which the sale was alleged to have been had could not be found, and the sheriff's deed was neither introduced in evidence nor accounted for in any way. The brief of evidence contains the following: "The defendants introduced and put in evidence certified copy of the will of Micajah Phillips' deed [?], from the record of the court of ordinary of Montgomery county, under the — and seal of said ordinary, dated March 17, 1867, regularly admitted to probate March 1, 1861, which will shows that said Wm. Salter was duly nominated and appointed as executor therein, and in which will is embodied the following clause: 'The residue of my property, both real and personal, to be sold, and the proceeds to be equally divided among the above-mentioned persons,'—which clause of said will, it is admitted, includes the land in dispute. The will is silent as to who shall make the sale." Nothing further in reference to the will of Micajah Phillips appears in the record. The court directed a verdict for the defendants. Plaintiffs made a motion for a new trial, which was overruled, and they excepted.

Construing the petition in the light of the abstract of title attached thereto, and which is to be treated as a part of the petition, the plaintiffs claimed the right to sue, upon the ground that they and those from whom they derived title were all the heirs at law of Micajah Phillips, and, as such, were entitled to the possession of the property, and therefore entitled to bring an action for damages against those who were wrongfully in possession and committing acts which were in their nature calculated to diminish the value of the property. It was admitted that the above-quoted item of the will of Micajah Phillips included the land involved in the present litigation. From that item it appears that the property therein embraced was devised to certain persons, whose names had appeared in a previous part of the will. Who these persons were the record does not disclose. The item of the will, together with the admission that it embraced the property in controversy, establishes conclusively that Micajah Phillips did not die intestate as to the property which is the subject of the present litigation, and that, therefore, no person was entitled to any interest therein as his heir at law. *Avery v. Sims*, 69 Ga. 314. This being true, the present suit fails, because any right of action that may exist for the wrongs complained of is either in the devisees under the will or some person representing them. In no way are the heirs at law, as such, interested in the matter. The undisputed evidence showing that there was no right of action in the plaintiffs, a verdict for the defendants was the only proper result that could have been reached in the case, and there was no error in directing the jury so to find. Judgment affirmed. All the justices concurring.

H. B. CLAFLIN CO. et al. v. DE VAUGHN et al.

(Supreme Court of Georgia. Dec. 21, 1898.)

RES JUDICATA—SCOPE OF DECISION—SEQUESTRATION—BOND.

1. A decree in equity is conclusive upon the parties to the case on all questions raised, or which could have been raised, relating to the property to be affected by the decree.

2. When personal property has been seized by a court of equity, and one of the parties to the case has been allowed to take possession of the same upon giving bond to answer the decree to be rendered, such bond is to be treated as representing the property which was delivered to the obligor; and any party showing an interest in the property should be given a corresponding remedy upon the bond.

3. In such a case, where there are numerous parties, each claiming an interest in the property, and a decree is rendered in favor of some of them only, and in accordance therewith judgments in their favor are entered against the principal and securities on the bond, though such decree does not in express terms declare that the other parties are not entitled to judgments on the bond, yet where it is clearly inferable from the decree, as a whole, that such was the intention of the judge who framed it, the decree would

preclude such parties from raising the question as to their interest in the property on a money rule brought by them against the sheriff, who had collected the money on an execution issued on the decree in the name of the parties in whose favor the decree had been rendered.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Petition by J. E. De Vaughn and others against Henrietta Herz and others, in which the H. B. Claflin Company and others intervened. There was a judgment for petitioners, and the H. B. Claflin Company and others bring error. Reversed.

Hardeman, Davis & Turner and R. L. Greer, for plaintiffs in error. J. W. Haygood, John I. Hall, and Guerry & Hall, for defendants in error.

COBB, J. On September 20, 1893, Frank & Adler, and other creditors of Louis Herz, brought their petition against Louis Herz, J. E. De Vaughn, John F. Lewis & Son, Gabe Lippman, J. R. Fried & Co., and Joe Berckhardt, alleging that Louis Herz had sold out his stock of goods to Henrietta Herz just prior to the filing of the petition, and that before selling out the stock he had executed mortgages on the same to the other defendants. It is alleged that the sale was fraudulent, and also that the mortgages were fraudulent, and executed for the purpose of hindering and delaying creditors. Subsequently interventions by other creditors were filed. In the intervention filed by the H. B. Claflin Company and others, an attack was made upon the bill of sale made by Louis Herz to Henrietta Herz, upon the ground that it was, in effect, an attempted assignment, and void because not executed as required by law. On this petition a temporary receiver was appointed, and the mortgagees were restrained from proceeding with their mortgages. In each of the answers filed by the mortgagees to the original petition and the interventions, it is admitted that the mortgages had been foreclosed; and it is alleged that executions issued upon the foreclosure of the mortgages had been levied upon the stock of goods, and that the same was in the custody and control of the sheriff. After this, by consent of all parties, the following order was passed by the court: "It is ordered by the court that the order of this court heretofore granted in the above-stated case, granting a temporary injunction and appointing a temporary receiver, shall be revoked and set aside when said Henrietta Herz shall execute a bond, with good and sufficient security, payable to the clerk of the superior court of said county of Macon, conditioned to pay into court the value of the stock of goods now in the hands of the receiver, as appears from the inventory of the same as made by said receiver, and the additional sum of five hundred dollars to cover the notes and accounts in the hands of said receiver. It is ordered that nothing herein

contained shall prevent the defendants in said bill from asserting their mortgage liens upon the fund arising from said bond, instead of the said goods; it being the intention of this order that, as to all creditors who are parties to this litigation, said bond shall stand in place, and be taken in lieu, of said stock of goods, and that none of the parties to said litigation, either plaintiffs or defendants, shall lose any lien upon said property, or shall suffer any change of their present status, by reason of this order, but their rights shall remain the same as if this order had not been passed, and said bond given. It is further ordered, upon consent of all parties, that, in event of recovery by one or any or all the creditors in said suit against the assets for which the bond provided is to be a substitute, then at the final trial it is consented that judgment may be entered for amount of such recovery against the principal and securities of said bond, as in cases of appeal bonds; the judgment entered not to exceed liability under said injunction bond." By amendment to the order it was provided that the bond should be increased "to cover and include sixty-two dollars of money now in the hands of the temporary receiver, which said sum he is authorized to surrender to Henrietta Herz upon the approval of said bond as provided in the foregoing order." Upon the passage of this order, Mrs. Herz gave the bond required, the material parts of which were as follows: "The condition of the above bond is such that should the said Henrietta Herz, principal, Gabe Lippman and E. B. Lewis, securities, pay into Macon superior court, to the clerk of said superior court, the value of the stock of goods now in the hands of the receiver, as appears from the inventory of the same as made by said receiver, and the additional sum of five hundred dollars to cover the notes and accounts in the hands of the receiver, and the additional sum of sixty-two dollars in cash now in the hands of said receiver, M. B. Gilmore, provided that upon the trial of said case above stated the said several creditors, to wit, Frank & Adler [and others], shall succeed in securing judgment against said stock of goods, or on said bond given in lieu of said stock of goods, or said assets for which said bond is given, which condition, if complied with and performed, said principal and securities shall be discharged, otherwise this bond shall be of full force and virtue; the true intention of this bond being that, as to all creditors who are parties to this litigation, said bond shall stand in place, and be taken in lieu, of said stock of goods, and that none of the parties to said litigation, either plaintiff or defendant, shall lose any lien upon said property, or shall suffer any change of their status, by reason of the aforesaid order and this bond, but their rights shall remain as if the order had not been granted, and this bond had not been given. It is further contracted and agreed that should any of the creditors in said litigation, whether plaintiff or defendant, recover

judgment, upon the final trial of said case, according to the terms and conditions of this bond order, then judgment may be entered for the amount of said recovery against the principals and securities on this bond, as in cases of appeal bonds; judgment to be entered not to exceed liability under this injunction bond." Upon the execution of the bond the stock of goods and assets went into the hands of Mrs. Herz, pursuant to the order. The assets were valued by the receiver at \$10,733.37, which included: Amount of stock, \$7,467.14; accounts on books, \$2,571.55; notes, \$4,245.90; cash on hand, \$127. Subsequently Mrs. Herz sold the stock of goods in the usual course of trade, and deposited the sums of money thus realized in a bank. The case went to trial, and, after evidence submitted, a verdict was returned by the jury in answer to questions propounded by the court. The verdict is divided into six parts, each relating to the issues between the defendants and one of the plaintiffs who had identified goods. The following is a copy of that part of the verdict relating to one of the plaintiffs: "(1) Did Claflin & Co., in selling the goods to Louis Herz, and which they are now claiming, rely on any statements made by Herz, either to them directly, or to a commercial agency? Answer. To a commercial agency. (2) Were said statements true or untrue? Answer. Untrue. (3) Was Herz solvent or insolvent at the time he purchased said goods? Answer. Insolvent. (3a) Had his conduct been such as to create special confidence in him on the part of Claflin & Co.? Answer. It had. (3b) Did he disclose his condition to Claflin & Co. at the time he purchased said goods from them? Answer. He did not. (3c) Did he conceal his financial condition? Answer. He did. (4) Did Herz buy said goods from Claflin & Co., intending not to pay for them at the time he purchased them? Answer. He did not. (5) At the time Mrs. Henrietta Herz claims to have purchased the stock of goods and other assets of Louis Herz, did she at that time pay him any valuable consideration therefor, and what did she pay? Answer. She paid the trust money and wages due her by L. Herz. (7) In said purchase, did Mrs. Herz agree to assume and pay the mortgages which were upon said stock? Answer. She did. (8) Had she paid off said other mortgages before the proceedings were filed on this case, attacking said mortgages? Answer. She had not. (9) Had she paid any part of the purchase price of said stock and assets before she had notice that the mortgages which she assumed were pre-existing debts? Answer. She had not. (10) Did she pay any consideration for said stock and assets before the proceedings were filed in this case to set aside her bill of sale? If so, what consideration did she pay? Answer. She paid the trust money and the amount of wages due by her to L. Herz. (12a) Did Mrs. Herz agree to pay the mortgages which she assumed out of the proceeds of the property covered by her bill of sale, when she should sell the same?

Answer. She did. (12b) Or did she agree to pay off said mortgages out of her own means, and not out of the property in her bill of sale, or its proceeds?"

Upon this verdict a decree was entered by the court. The decree recites that it was admitted by counsel for petitioners and defendants that the goods identified by various petitioning creditors, and which were in the stock of Louis Herz at the time that the petition and the various interventions were filed, were of values aggregating in amount the sum of \$4,418.81. It further recites that it was admitted that the debts to secure which Louis Herz gave to the defendants certain mortgages were pre-existing debts, and that counsel for petitioners also admitted that Mrs. Herz had given to Louis Herz her promissory note for \$800, which note was not paid by her until after the commencement of the proceedings to set aside the bill of sale from Louis Herz to her. The decree further recites: "The jury having found, also, that Mrs. Herz agreed to assume and pay the mortgages given by the said Louis Herz out of the proceeds of the property covered by said bill of sale from said Louis Herz to her, when she should sell said property, and that she had not paid off said other mortgages before the proceedings were filed in this case attacking the same, and that she had paid no part of the purchase price of said stock and other assets conveyed to her in said bill of sale before she had notice that said mortgages, which she had assumed, were given to secure pre-existing debts, and that said Henrietta Herz having given her bond, with Gabe Lippman and E. B. Lewis as sureties, under the order of this court, on the 4th day of October, 1898, in order that the said Henrietta Herz might repossess herself of the said stock of goods and other assets conveyed to her in said bill of sale, and to prevent the appointment of a receiver therefor, payable to the clerk of this court, for the benefit of said creditors, in the event they should recover in said cause, and conditioned that, in the event the plaintiffs should recover in said cause, they should enter judgment at once against the said Henrietta Herz and her sureties for such sums as they might eventually recover in their effort to reclaim said goods, and to subject the same to the payment of their debts, it is ordered," etc. It then provides that the plaintiffs recover of the defendants Louis Herz, Henrietta Herz, Gabe Lippman, and E. B. Lewis the respective sums agreed by counsel to be the value of the goods identified by the plaintiffs. The decree recites further that the defendant Louis Herz "having admitted in open court that the balance of his indebtedness to said named creditors is as hereinafter set out, and the evidence showing this fact, and he confessing that he is indebted to said several parties to said petition in the sums hereinafter set opposite their respective names, and the jury having returned a verdict finding that Mrs. Herz has agreed to pay to said other

mortgagees hereinabove named the amounts of their debts, out of the proceeds of the property which was conveyed to her in said bill of sale, it is ordered, adjudged, and decreed by the court that said bill of sale is void, for the reason that the same, together with the finding of the jury, constitutes an assignment, and is not properly executed under the laws of this state." Then follows a judgment that the plaintiffs recover of L. Herz, Henrietta Herz, Gabe Lippman, and E. B. Lewis certain amounts, respectively, in addition to the sums already decreed them. The aggregate of the amounts thus decreed in favor of the plaintiffs is \$2,487.56; making the entire aggregate in their favor, under the decree, \$6,906.37. It was further ordered that the clerk of the court issue one execution, to specify in separate amounts the several sums due to each of the plaintiffs. The defendants made a motion for a new trial, which being overruled, they excepted, and entered into a supersedeas bond in order to carry the case to the supreme court. This bond was made payable to the clerk of the superior court of Macon county, for the use and benefit of the plaintiffs, and was conditioned to pay the said clerk, for the use and benefit of the plaintiffs, the eventual condemnation money, and all subsequent costs, in the event that the obligors in the bond should fail to prosecute their writ of error to the supreme court with effect. The case came to this court, and it was held that "the special questions submitted to the jury were framed in accordance with, and authorized by, the pleadings and evidence in the case," and also that "there was sufficient evidence to support the verdict." *Herz v. H. B. Claflin Co.*, 101 Ga. 615, 29 S. E. 33. After the affirmance of the judgment by this court, the defendants in the case brought their petition to set aside and correct the decree rendered in the original case, upon the ground, among others, that the court had no authority, under the issues made in the case, and the verdict of the jury, to decree in favor of the plaintiffs in that case any sums for goods not identified. This petition was dismissed on demurrer. To the decision of the court dismissing the petition, the petitioners excepted, and brought the case to this court, when the judgment was again affirmed; the court, however, declining to pass upon the merits of the petition. *Herz v. Frank* (Ga.) 30 S. E. 797. Execution was issued upon the decree of the court in the original case, and also upon the supersedeas bond given by the defendants; and Henrietta Herz paid on the execution first mentioned the sum of \$7,713.12, the same being in full satisfaction thereof. The sheriff, by agreement of all parties, paid over to counsel for the petitioning creditors the sum of \$4,910.30, which was the amount decreed to them as the value of the goods identified by them as their own. The mortgagees then brought their petition, alleging that their mortgages were prior liens upon the stock of goods bought by Mrs. Herz from

Louis Herz, and were prior liens upon the fund remaining in court. They alleged further that their mortgages have been foreclosed, and executions issued, and prayed that the sheriff be directed to pay over to them the amounts due on their mortgages, and prayed further that the sheriff be directed to hold the money in his hands until the further order of the court. To this petition the H. B. Claflin Company, and the other creditors of Louis Herz who had obtained judgments in the decree above referred to, made themselves parties, and moved the court to award the fund to them. The sheriff answered that he had received from Henrietta Herz \$7,713.12 on May 30, 1898, in full satisfaction of an execution for principal and interest amounting to that sum, which execution was issued on a decree rendered by the judge of the superior court of Macon county on July 15, 1896, on a verdict rendered by a jury in that court during the May term of the court; that on June 24, 1898, by agreement of all parties, he had paid to the attorneys for the creditors of Louis Herz the sum of \$4,910.30; and that he has on hand, subject to the order of the court, the balance of the fund paid on the execution, to wit, \$2,802.82, less the costs of this proceeding. He further answered that he had in his possession executions issued upon the foreclosure of mortgages in favor of the original plaintiffs in the rule, the names of the mortgagees and the amounts of each mortgage being set forth. All of the mortgage *fi. fas.* are against Louis Herz, and issued upon the foreclosure of mortgages given by Louis Herz upon the stock of goods which went into the hands of Henrietta Herz. After considering all of the evidence submitted, and which is set forth above, the court awarded the fund—First, to the payment of costs in the rule; second, to J. E. De Vaughn, until his mortgage *fi. fa.* should be satisfied, it being of older date than the other mortgage *fi. fas.*, and the surplus to be distributed pro rata to the mortgages in favor of Joe Berckhardt, John F. Lewis & Son, and J. R. Fried & Co. To this judgment the creditors who had made themselves parties to the rule excepted.

In order to determine whether or not the judgment complained of in this case was erroneous, it becomes necessary at the outset to ascertain what effect the decree rendered on July 15, 1896, had upon the rights of the various persons who were parties to the case. If those now claiming the fund in court under executions issued upon the foreclosure of mortgages executed by Louis Herz are estopped by the decree from contesting the right of the plaintiffs in error to this fund, the decision awarding such mortgagees the fund was, of course, erroneous. If they are not so estopped, then the determination of other questions presented in the record becomes necessary. We are of opinion that the mortgagees are concluded by the decree from claiming any interest in the fund which was brought into court for distribution, and there-

fore many questions presented in the record are unnecessary to be decided. We shall therefore confine ourselves to stating the reasons which have brought us to this conclusion. Louis Herz was the owner of a stock of goods. Upon this stock he executed mortgages to certain of his creditors. After the execution of these mortgages, he executed a bill of sale on the entire stock to Henrietta Herz; she taking the property, and agreeing to assume the payment of the mortgage liens thereon, to the extent of the value of the goods. These mortgages were foreclosed, and executions issued upon such foreclosures were levied upon the goods. Pending these levies certain unsecured creditors of Louis Herz brought their petition, attacking the mortgages which had been given, as well as the bill of sale, as being fraudulent, and made for the purpose of hindering and delaying creditors; some of them alleging that the goods were sold to Louis Herz upon false representations. They alleged further that the goods so sold were still in the stock in the hands of the sheriff, and prayed that they might be allowed to identify the same, and at the final hearing recover as their own the goods so identified. A receiver was appointed to take charge of the goods, the books of account, and the money on hand. The order which is set forth in the foregoing statement of facts was passed at this stage of the proceedings, and the material parts of the bond which was provided for in that order are also set forth above. Only a casual reading of the order and the bond is necessary to show with certainty that it was the intention of the judge who granted the order that the bond should, in the future progress of the litigation, stand in all respects as representing the property which was delivered up when the bond was given. No party, either plaintiff or defendant, was to be prejudiced in any way by the fact that what was once property had become, by virtue of the order, a chose in action. If any party to this litigation had any right to any interest whatever in the property in possession of Louis Herz, that right was preserved carefully in the order authorizing the execution of the bond, and was to be recognized whenever properly asserted in the court which had control of the property which had been seized under the order appointing the receiver. It was necessary, however, that those interested in the property, and whose rights were protected by the bond, should assert their interests at the proper time and in the proper way, or else forfeit the same. The bond was conditioned to answer a decree. It was therefore contemplated that the rights of the parties would be fixed by a decree to be rendered in the case. When the case came on for a final hearing, the creditors who claimed to have identified goods, the creditors who had no claim for identified goods, as well as the mortgagees, had a right to be heard on their respective claims; and this was the

time in which they should have asserted their rights, as the decree which was to determine for all time their interest in the property now represented by the bond was about to be rendered. They would then have been heard, and, if the rights asserted were recognized, a proper decree protecting them in their remedies upon the bond would have been rendered. If at this time they failed to assert their interests which had existed in the property, they would lose all right to any remedy upon the bond. If they asserted their rights in the property, and these rights were not recognized by the trial judge, as long as the decree rendered against them stood unreversed they would be barred from any remedy upon the bond. This result would follow whether the decree in terms declared against their rights, or whether from the decree as a whole it was evident that it was the intention of the judge that they should not be recognized. In determining the extent and scope of the decree, it is to be kept in mind that, wherever the decree deals in any way with the bond, we must consider it as dealing with the property which the bond represented. Whenever the judge gave any person a right to proceed upon the bond, it was equivalent to recognizing an existing right in the property. If the decree failed to give any plaintiff or defendant any remedy upon the bond, it would be, in effect, a judgment that that plaintiff or defendant had no right in the property. The decree, in terms, gives to those creditors who had identified goods judgments against the sureties on the bond for amounts aggregating the value of the identified goods. This was equivalent to a decree that these creditors, to the extent of the identified goods, had rights in the stock of goods which were superior to the rights of all the other parties to the litigation. Up to this point there is no dispute as to the meaning of the decree, or the propriety of its terms. The contest is over the balance of the fund which was realized on the execution issued against the principal and sureties on the bond, and therefore, in contemplation of law, the residue of the property after the identified goods had been withdrawn. The decree does not in terms say that the mortgagees had no lien upon the property, or a lien inferior to the other creditors, and does not in terms deny to such mortgagees a remedy upon the bond. It does, however, provide that those creditors who had not recovered anything on account of identified goods, and who were simply unsecured creditors, were entitled to a judgment against the principal and sureties on the bond, and therefore, in effect, declares that they were interested in the property to the extent of these judgments. While, as has been said, the decree does not in terms declare that these unsecured creditors have rights superior to the mortgagees, still, construing it as a whole, this conclusion is inevitable. The bill of sale to Mrs. Herz was by the decree declared void; it being

recited in this connection that the debts due by mortgage were assumed by Mrs. Herz when she took the bill of sale, from which it might be inferred that the mortgages should share the same fate. That such was the case is evident when it is noted that the decree in terms provides that the unsecured creditors shall have judgments against the sureties on the bond, that the only amounts decreed against the principal and sureties on the bond are those in favor of the plaintiffs, that no amounts are decreed in favor of the mortgagees, and that the amounts decreed against the principal and sureties are apparently in full satisfaction of all liability on the bond. From all this but one conclusion can be reached, and that is that it was the intention of the judge to so frame the decree that it would be manifest that the unsecured creditors were to be protected to the extent of the bond; thus, in effect, deciding that the mortgagees had no rights which they could assert against the property, or the bond which stood in its place. This being true, the fund should have been awarded to the creditors in whose favor the decree was rendered, and not to the mortgagees, who, if they ever had any interest in the property, have lost the same by the rendition of the decree, which to-day stands unreversed. If this decree was erroneous, it is now too late to attack it. The rights of the parties to this litigation must stand or fall by the record as made. Judgment reversed. All the justices concurring.

BLOUNT et al. v. EDISON GENERAL ELECTRIC CO.

(Supreme Court of Georgia. Dec. 15, 1898.)

SALE—WAIVER OF DEFECTS—ACTION FOR PRICE.

This case is controlled by the decision of this court in the case of Atlanta City St. Ry. Co. v. American Car Co., 29 S. E. 925, 103 Ga. 254.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by the Edison General Electric Company against W. M. Blount and W. A. Dickenson. Judgment for plaintiff. Defendants bring error. Reversed.

Donalson & Hawes and Harrison & Bryan, for plaintiffs in error. D. A. Russell and B. B. Bower, for defendant in error.

COBB, J. The Edison General Electric Company brought suit against W. M. Blount and W. A. Dickenson upon a promissory note. The defendants filed pleas that the note sued on was given in part consideration of an electric light plant which the plaintiff had agreed to erect for defendants; that the plant erected was so defective that the consideration of the note had failed; and that the amount of money already paid on the contract was more than the full value of the machinery. The alleged defects in the machinery were fully

set forth in the pleas. Upon the trial it appeared that, if the plant was in fact defective, the defendants had the fullest possible knowledge of its defects before the note sued on was given. The jury returned a verdict for the defendants, which verdict the trial judge refused to set aside at the instance of the plaintiff. The case came to this court (96 Ga. 272, 23 S. E. 306); and it was held that, by giving the note, the defendants "waived the defects in question, and could not set up the same in defense to an action on the notes." At the next trial of the case, an amended plea was offered, which the court refused to allow; and the only question now presented for decision is whether or not the court erred in holding that this amended plea was without merit. It alleged, in substance, that the defendants knew, at the time of the making of the note, that the plant was improperly and defectively constructed, and would not furnish lights as required by the contract; that, at the time the notes were given, it was distinctly understood, agreed, and contracted by the parties that, if the defendants would execute the note sued on to cover the balance due on the property, the plaintiff would repair the defects in the construction of the plant, and furnish whatever machinery would be necessary to the operation of the plant so as to make the same conform to the terms of the contract; that, in consideration of this promise, the defendants executed the note; that the plaintiff, after obtaining the note, did fail and refuse to comply with its promise to repair the plant and furnish the machinery necessary for its operation in the manner provided in the contract; that for that reason the consideration of the note has wholly and totally failed; and that the failure of the plaintiff to carry out and perform its agreement has damaged defendants in the full amount of the note sued on. This case is controlled by the decision of this court in Atlanta City St. Ry. Co. v. American Car Co., 103 Ga. 254, 29 S. E. 925, where it was held that a plea similar to the one under consideration in the present case was meritorious. It is unnecessary to add anything to what is said in the opinion of Presiding Justice Lumpkin in that case. Judgment reversed. All the justices concurring.

WHITLEY GROCERY CO. v. McCAW MFG. CO.

(Supreme Court of Georgia. Dec. 15, 1898.)

IMITATION OF TRADE-MARKS—INJUNCTION—REVIEW ON APPEAL.

1. Equity will grant relief against a person who commits an act of encroachment upon the business of a trader by the use of similar trade-marks, names, or devices, with the intention of deceiving and misleading the public,—especially when such imitation of another's trade-mark or device is calculated to injure his business, and to enable the wrongdoer to sell goods on the reputation of the goods of the injured party. Where the injury likely to result in such a case is ir-

reparable in damages, injunction is the proper remedy.

2. The issue in this case was almost entirely one of fact. The testimony was conflicting, and, that introduced on the hearing in behalf of the defendant in error being sufficient to authorize the conclusion that it had sustained the legal wrong above indicated, this court will not interfere with the discretion of the judge below in granting the application for temporary injunction until the case can finally be heard on its merits.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Bill by the McCaw Manufacturing Company against the Whitley Grocery Company. From an order granting an injunction, defendant brings error. Affirmed.

J. F. Watson and Allen Fort, for plaintiff in error. Smith & Jones and Hardeman, Davis & Turner, for defendant in error.

PER CURIAM. Judgment affirmed.

GODWIN v. MAXWELL.

(Supreme Court of Georgia. Dec. 15, 1898.)

WARRANTY DEED—LIABILITY ON COVENANT—INSTRUCTIONS.

1. Where one, by warranty deed, conveys to another all of a certain lot of land in this state, particularly designating the same by number and district, the vendor is liable on his warranty for any fatal defect in his title to any portion of such lot; and this is true notwithstanding the line between such vendor and a coterminous landowner may have previously been so established or agreed upon as to locate the line in such a way that there was cut off to the adjacent landowner a portion of the lot embraced in the warranty deed.

2. Under the facts in this case, there was no error in giving in charge to the jury sections 3614 and 3615 of the Civil Code.

(Syllabus by the Court.)

Error from superior court, Mitchell county; D. H. Pope, Judge pro hac.

Action by J. H. Maxwell against A. Godwin. Judgment for plaintiff. Defendant brings error. Affirmed.

J. H. Scalfe, Donalson & Hawes, and Harrison & Bryan, for plaintiff in error. Sam. S. Bennet, for defendant in error.

SIMMONS, C. J. Godwin sold to Maxwell lot of land No. 143 of the Eleventh district of Mitchell county, containing 250 acres, more or less. The agreement was that Maxwell should borrow from Chason the money necessary to pay for the land, and that the deed was to be made by Godwin to Chason, who would quitclaim to Maxwell upon the repayment of this money. Godwin made to Chason a warranty deed to the land. Maxwell repaid Chason, and the latter gave Maxwell a quitclaim deed. Maxwell went into possession, and ascertained that some 20 acres of the land were in the possession of Mrs. McElvin. Processioners were appointed to run the line between Maxwell and Mrs.

McElvin; and it appeared from their report that Maxwell was entitled to the 20 acres. This report was objected to by Mrs. McElvin, and, on the trial of the objections, the jury found that a new line had been agreed upon by the prior coterminous proprietors, Godwin and McElvin, and established as the true line between the two tracts of land. This line was so established by the jury, or the judgment of the court upon their verdict, and Maxwell's land was thereby diminished by 20 acres. Godwin had knowledge of this proceeding. Maxwell brought his suit against Godwin for a breach of warranty. On the trial of the case, there was a dispute between Maxwell and Godwin as to the line pointed out to Maxwell by Godwin, pending negotiations for the purchase of the land by the former. The jury, under the evidence and the charge of the court, found that there was a breach of the warranty, and assessed damages against Godwin. He made a motion for a new trial. This the court overruled, and Godwin excepted.

The main contention of counsel for the plaintiff in error was that the trial judge erred in giving in charge to the jury sections 3614 and 3615 of the Civil Code, which are as follows: "A general warranty of title against the claims of all persons, includes in itself covenants of a right to sell, and of quiet enjoyment and of freedom from incumbrances." "A general warranty of title in a deed against the claims of all persons, covers defects in the title though known to the purchaser at the time of taking the deed." In the present case it was not error to give these sections in charge to the jury. Godwin made to Maxwell's grantor a deed containing a general warranty of all of lot 143, in a certain district of Mitchell county; and, under these sections, and the decisions of this court from which they were taken, that warranty included the whole of the original lot No. 143. If Godwin had, prior to the giving of the warranty, agreed with the coterminous proprietor that the line of this particular lot should be so changed as to diminish the lot by 20 acres, he should have excepted these 20 acres from the warranty. It was immaterial, under this warranty deed, what line was pointed out to Maxwell. He may have known at the time he purchased that these 20 acres of the land had been already disposed of by Godwin, and still been protected by the warranty. In the case of *Smith v. Eason*, 46 Ga. 316, which was a suit upon a promissory note, the defense was based on a breach of a written contract, by which the plaintiff had agreed to make titles to a certain tract of land within certain specified boundaries. The plaintiff replied that the contract had failed; that, before the bond was made, he had, with the knowledge of the defendant, sold a part of the land to another person. The amount of the land so sold was in dispute, but was small:

and the plaintiff contended that it was covered by the words "more or less." McCay, J., said: "Were the deficit merely a deficit of land within the boundaries, this might be true. If it were an error in estimate, if the number of acres could be treated as mere description, this rule might apply. But here is a failure of title to a certain fixed area within the boundaries. The land is there; there are acres a plenty; but the vendor does not own them. We do not think the flexibility of the words 'more or less' can cover such a case. Nor can parol evidence contradict the deed. The fact that the defendant knew the land had been sold is not, of itself, a reply to the express words of the bond. Men often take warranties knowing of the defects in the title. The very object of the warranty is often to meet known defects." This decision was approved in the case of *Miller v. Desverges*, 75 Ga. 407, where Hall, J., in discussing the law now embraced in section 3614 of the Civil Code, said: "There is no express exception here to the effect that such a warranty will not cover liens or defects of title known to the vendee, unless it is shown that the parties intended it should do so. Nor can such intention be established by parol proof contradicting the plain words of the deed." The law now embraced in section 3615 has been added since that time. In the present case it was shown that the 20 acres adjudged to be the property of Mrs. McElvin had belonged originally to lot No. 143, and that the vendor had given a general warranty embracing the whole of that lot. The court therefore did not err in refusing to grant a new trial. Judgment affirmed. All the justices concurring.

COFFEY v. PACE.

(Supreme Court of Georgia. Dec. 21, 1898.)

EJECTION OF INTRUDERS ON REALTY.

When a warrant to eject an intruder is sued out, and is met by the counter affidavit prescribed, the bona fides of the original possession is a material and vital question on the trial of the issue thus raised. When, therefore, in a given case, the evidence for the movant warrants the conclusion that he was, before the defendant's entry, lawfully in possession of the land, and raises inferences that such entry was not bona fide and under a claim of right, a nonsuit should not be granted.

(Syllabus by the Court.)

Error from superior court, Dougherty county; A. H. Hansell, Judge.

Action by C. Coffey against W. W. Pace. From a judgment of nonsuit, plaintiff brings error. Reversed.

D. H. Pope & Son, for plaintiff in error. Walters & Wallace, for defendant in error.

LITTLE, J. The issue tried in the court below arose upon an affidavit to remove defendant in error as an intruder on certain

land claimed by the plaintiff in error. To this affidavit a counter affidavit was filed, in terms of the law. On the trial of the issue below, it appeared that the land on which the intrusion was claimed to have been made was a strip which, by agreement between two prior owners of adjacent lots, was used as a passageway for the convenience of both, and that, while this strip was on part of one of the lots, under said agreement it was placed within the inclosure of the other. A subsequent vendee of one lot removed the original fence so as to add this strip of land to his own lot, against the will of the other; and there is some evidence indicating that the place to which the fence was removed was the proper dividing line of the two lots.

On the trial of the issue raised by the warrant and counter affidavit, after the conclusion of the evidence for the movant, the court granted a nonsuit. This, we think, was error. It may be that the fence, as it now stands, represents the original line which divided the two lots; but, under the evidence for the movant, it does not follow conclusively that he is not entitled to the continued occupancy of the strip of land in question. His immediate predecessor in title testified that, notwithstanding he did not have the amount of land described in his deed, he, nevertheless, did not claim any title to this strip of land, but that he had an agreement with the adjoining lot owner that he might move the fence about six feet on her lot, so as to inclose the strip of land with his own, and that it should be jointly used as a passageway for the two owners; that this agreement was put into execution, and he had thus been in the possession and enjoyment of the land for quite a number of years. Without regard, then, as to where the original line between the two lots was located, it was neither proper nor legal that he should be divested of possession by the sudden and quick removal of the fence by the adjoining lot owner, so as to include the land in question within the inclosure of the latter. Under the agreement to which he testified, and the acquiescence of the then owner in its terms for so long a period of time, this, at least, entitled him to continued possession, until he voluntarily surrendered it, or had been lawfully dispossessed. Especially is this true when the other party to the agreement appeared, and testified that her vendee entered, under his contract with her, only into possession of that part of his lot then under fence. It may be that the defendant in error may show that he is entitled, under the law, to possession of this strip of land. Of this we cannot and do not undertake to say. The principle upon which our law in relation to the ejection of intruders is based is that of good faith; and where one bona fide claims the right to possession of land which is in the hands of another person, and the latter does not claim a

right to such possession, but refuses to abandon it, and makes affidavit to these facts, it is sufficient for the warrant to issue. The operation of the warrant may be suspended by a counter affidavit from the person then in possession that he does in good faith claim a legal right to the possession. Civ. Code, § 4808. When a defendant is in possession of land under a deed, claiming the legal right of possession in good faith, he cannot be ejected as an intruder. *Russell v. Chambers*, 43 Ga. 478; *Nichols v. Chandler*, 46 Ga. 479. As to whether this is true, and applies to the defendant in error, in this case, we have no means of ascertaining from the record; for, upon the conclusion of the testimony of the movant, the court granted a nonsuit. If the testimony introduced on the part of the plaintiff in error on the trial of the issue is true, he was certainly in legal possession of the strip of land at the time he was deprived of it; and this evidence, of itself, does not put a superior right of possession in the defendant in error. We therefore think that the court erred in granting a nonsuit, and that, in order to ascertain the respective rights of the parties to this litigation, a further investigation should be had; and the judgment of the court below is reversed. All the justices concurring.

REGISTER v. AULTMAN & TAYLOR CO.
(Supreme Court of Georgia. Dec. 23, 1898.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DEBENT—DIRECTING VERDICT.

1. On the trial of a suit instituted by a corporation to foreclose a mortgage, the defendant is not a competent witness to testify in his own behalf of transactions or communications solely with the deceased agent of the corporation.

2. The court erred in directing verdicts in these cases for the full amount sued for, it appearing that the evidence did not demand such a finding by the jury.

(Syllabus by the Court.)

Error from superior court, Worth county; W. N. Spence, Judge.

Action by Aultman & Taylor Company against J. T. Register. Judgment for plaintiff. Defendant brings error. Reversed.

T. R. Perry and D. H. Pope, for plaintiff in error. J. W. Walters and C. W. Fulwood, for defendant in error.

LEWIS, J. The Aultman & Taylor Company sued Register for \$1,529 principal, besides interest, upon eight promissory notes signed by the defendant and by J. S. Graves, and instituted proceedings for the foreclosure of a mortgage given by Register as security for the payment of the notes. The cases were, by consent, consolidated and tried together. The defendant answered that he was not indebted to the plaintiff; that there was another principal to the notes, who was neither sued nor accounted for; and that, therefore, the suit could not be maintained in its

present shape; and that one J. S. Graves, after the making of the notes sued on, became the agent of the plaintiff, and as such agent, by the consent of defendant, took charge of the engine and other property for which the notes sued on were given, and sold the same to other purchasers; and plaintiff accepted the consideration received from such other purchasers, ratified said sale, and thereby released the defendant from any and all liability on account of the same.

On the trial of the case, the defendant admitted the genuineness of the notes and mortgage, and that the plaintiff was the owner of them. He then proposed to testify that J. S. Graves—whom the defendant claimed was agent for the plaintiff in all the transactions involved in these cases up to the time of his (Graves') death, which occurred just prior to the filing of the suits, and who was a partner of the defendant at the time of and in the making of the debts sued on—told him (defendant) that the plaintiff had agreed "to take the engine and sawmill back, and cancel the trade"; and that, in pursuance of this statement and agreement, the defendant delivered said property to Graves, as the agent of plaintiff, who sold it to C. Rigger; and that Graves, as agent for the plaintiff, agreed to deliver up to the defendant all the papers here sued on, but died before doing so. The court refused to allow this testimony, because Graves was dead; and to this defendant excepted. At the conclusion of the evidence, the court directed the jury to render a verdict for the plaintiff for the amount sued for, which was done, and to this direction of the court the defendant assigned error in his bill of exceptions. There was no motion for a new trial made in the case.

1. The court was clearly right in excluding the testimony of the defendant in relation to transactions or communications which were had solely with the deceased agent of the plaintiff corporation. To have admitted such testimony would have been directly in the teeth of the statute. See Civ. Code, § 5263, subd. 3; *Bank v. Demere*, 92 Ga. 735, 736, 19 S. E. 38 (Syl. point 4).

2. The only other assignment of error in the bill of exceptions is that the court erred in directing the jury to return a verdict for the plaintiff. It appears from the record in the case that there were eight notes sued on, aggregating in amount \$2,325 principal, but there was only claimed in the declaration on the notes the sum of \$1,529 principal, besides interest. The verdict of the jury was for the sum sued for, to wit, \$1,529, "with interest and costs of suit," without stating the amount of interest. In the petition, however, for the foreclosure of the mortgage given to secure these identical notes, there is no specific amount alleged as being due upon them. The notes are accurately described, and the aggregate amount of their principal stated in the petition for foreclosure. The verdict in that case was as follows: "We,

the jury, find in favor of the plaintiff, and that the mortgage be foreclosed." Construing this verdict in the light of the pleadings, we think it was a finding for the entire amount appearing due on the face of the notes, without allowing any credits thereon. Such was evidently the construction given by the judge who entered up judgment for \$3,119.16, besides costs, not even separating the principal from the interest, or specifying what portion of the sum mentioned was principal, and what portion was interest. It does not appear from the record that the notes actually contained any entries of credit thereon, but it does appear from the testimony introduced in behalf of the plaintiff below that money had been paid on them, the witness itemizing such payments and the credits, aggregating over \$700. Manifestly, therefore, the verdict of the jury in the foreclosure proceeding was not authorized by the testimony in the case, and, of course, there was error in directing such a verdict against the defendant. This error, if it were not the only one, might be corrected by direction of this court that a portion of the verdict in the foreclosure proceedings be written off.

The main defense, however, relied upon by the plaintiff in error, is under his plea of a settlement made with Graves, as the agent of the Aultman & Taylor Company, whereby it was agreed between the defendant and this agent that the latter should take charge of the engine and other property for which the notes sued on were given, and sell the same to other purchasers; that this agreement was carried out, and Graves did sell the property to another purchaser; and that the company ratified the transaction. The evidence on this point is very meager for both sides. The plaintiff in error sought to prove the contract made with Graves, and the transactions had with him, by his own testimony, which, as above ruled, was properly excluded by the judge; Graves being dead, and it being claimed that he was dealt with in these transactions as agent of the company. There is testimony enough, however, in the record, to authorize the jury to conclude that the following facts were established: That the notes sued upon were given for the purchase of a certain engine and sawmill, which were afterwards delivered by plaintiff in error to Graves, and which were sold by Graves to one Rigger, and that Rigger gave a mortgage on this property to the Aultman & Taylor Company, which mortgage was accepted by the company, and actually foreclosed by it for the purpose of enforcing payment of the debt. It further appears that, after Graves had so received the engine from plaintiff in error, Graves sent Register a message to the effect that the matter would soon be arranged, and the papers delivered up, evidently referring to the note sued on in this case. In behalf of the company there was testimony to the effect that this engine and other property, embraced in the mortgage given by Rigger, had been

destroyed by fire before foreclosure, and no money was realized from the sale; that the company had empowered Graves to sell this property, with the understanding that the proceeds of the sale should be applied to the notes sued on in this case. The witness who testified to these facts about this understanding between Graves and the company stated in conclusion that he got this information from the Aultman & Taylor Company, whom he represented in the transaction. It does not appear that any member of that company was introduced, nor does it appear that the nature of this transaction testified to in behalf of the company was ever made known to the plaintiff in error, or that he ever assented to a sale of the engine he had bought, with the understanding that his notes should simply be credited with the proceeds. There was also testimony tending to show that Graves was the agent of the company for the purpose of selling engines.

It is true that the power in an agent to sell property of his principal does not carry with it a power to rescind the contract of sale; and the power to collect a debt does not, of itself, also include authority to compromise the claim. The theory of the company in this case on the trial seems to have been that it simply gave Graves permission to sell this machinery, with the understanding that the proceeds of the sale, when paid to it, would be credited on the notes sued. But the jury might have inferred from the facts testified to that machinery was really delivered by Register, the plaintiff in error, to Graves, as agent of the company; that, as such agent, Graves sold the property in the name of his principal, and took from the purchaser a mortgage made directly to the company, to secure the purchase money; and that, while this might have exceeded the authority of Graves, yet the company ratified the transaction by an acceptance of the mortgage, and a foreclosure of the same to enforce its payment. If such were the case, then this was tantamount to a delivery of the property by plaintiff in error to the company, and a resale of it by the latter to another. Without more, this, we think, would have the effect of rescinding the contract of sale, and of releasing plaintiff in error from his obligation thereunder. The only testimony that tends to sustain the theory of defendant in error above mentioned is that of its agent Fulwood, who qualified his testimony on the subject with the following statement: "I was familiar with the whole transaction. I got my information from the Aultman & Taylor Company, whom I represented in this transaction." True, his testimony was not objected to, but, it apparently being mere hearsay, in determining whether or not it was sufficient to demand a verdict it is proper to consider its inherent weakness; and as the jury might have inferred that the theory insisted on by plaintiff was overcome by other facts and circumstances in the case touching the subse-

quent conduct of the company's agent Graves, as well as the action of the company in ratifying the sale made by him in the name of the company, we think the issue as to whether or not there had really been a rescission of this contract of sale, so far as the plaintiff in error was concerned, should have been submitted to a jury under proper instructions from the court.

There was some testimony in the case relating to payments made by plaintiff in error on this machinery which were not admitted as credits by the company's agent. It appears from the record that the original pleas filed by the defendant were lost after the trial, and copies established. Certified copies of these established copies appear in the record, and these contained pleas of payment not admitted as credits by the plaintiff below. It appears, however, that since copies of the pleas were established below, the original plea was found by the clerk, and he also sent up a certified copy of that original, which contains no plea of credits. We cannot say, therefore, under the pleadings as they stood on the trial, that this issue should have been submitted to the jury. Considering, however, the defense that seems to have been relied on in the case, and the testimony bearing thereon, while very meager, as above indicated, yet it did not demand a verdict for the plaintiff for the full amount sued for; and, in view of this fact, we think the court erred in directing a verdict. Judgment reversed. All the justices concurring, except COBB, J., absent on account of sickness in his family.

JOSEY v. SHEORN.

(Supreme Court of Georgia. Dec. 15, 1898.)

APPEAL IN FORMA PAUPERIS—AFFIDAVIT—AMENDMENT.

1. An affidavit made for the purpose of entering an appeal in forma pauperis, before the passage of the act of 1897 amending section 4465 of the Civil Code, was insufficient if it omitted to state the appellant's inability from poverty to pay the costs.

2. Such an affidavit is amendable, but, under section 5124 of the Civil Code, a motion to amend is not good unless it appears that the omitted words were left out "by accident or mistake."

(Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

Action by J. A. Sheorn against W. J. Josey. From an order dismissing an appeal from a justice, Josey brings error. Affirmed.

W. F. Way and Jay & Henderson, for plaintiff in error. L. Kennedy and E. W. Ryman, for defendant in error.

LUMPKIN, P. J. The court below dismissed an appeal from a justice's court which had, before the passage of the act of 1897 amending section 4465 of the Civil Code (Acts 1897, p. 32), been entered in forma pauperis.

The ground of the dismissal was that the affidavit was insufficient because, though it was therein stated that the appellant, on account of poverty, was unable "to give the security required by law in cases of appeal," there was no allegation that he was unable by reason of poverty "to pay the costs." Undoubtedly, as matters thus stood, the motion to dismiss was good. *Cheshire v. Williams*, 101 Ga. 814, 29 S. E. 191. The appellant, however, "proposed to amend the affidavit," so as to make the same conform to the legal requirements. The court rejected the amendment, and did so rightly, because it was not shown that the omission in the affidavit as originally filed was by accident or mistake, and it was, under section 5124 of the Civil Code, essential to do this in order to render such an affidavit amendable. See the cases cited under this section. Judgment affirmed. All the justices concurring.

GRAHAM v. CAMPBELL.

(Supreme Court of Georgia. Dec. 15, 1898.)

ACTION ON NOTE—DEFENSES—FAILURE OF CONSIDERATION.

Where a mortgagee consented to the sale of the mortgaged property by the mortgagor, with the understanding between the mortgagee, the mortgagor, and the purchaser that the purchaser should give his note to the mortgagor, with a given person thereon as surety, for the purchase price of the property; that the mortgagor should indorse the note to the mortgagee, and that upon its payment it should be credited on the mortgage; and the sale was made, the note given, and indorsed by the mortgagor to the mortgagee, in pursuance of such arrangement, the mortgagee taking the note before maturity, and without notice of any defects in the property sold,—held that, in a suit brought by the mortgagee on the note against the maker and the surety, failure of consideration could not be set up as a defense.

(Syllabus by the Court.)

Error from superior court, Telfair county; J. F. De Lacy, Judge pro hac.

Action by L. L. Campbell against D. B. Graham. Judgment for plaintiff. Defendant brings error. Affirmed.

E. D. Graham, for plaintiff in error. Eason & McRae, for defendant in error.

PER CURIAM. Judgment affirmed.

McLENNAN v. GRAHAM.

(Supreme Court of Georgia. Dec. 16, 1898.)

EXECUTION SALE—RIGHTS OF CLAIMANT.

The claim laws, as a remedy for the true owner, are cumulative, not exclusive. It follows, therefore, that a failure to file a claim will not prevent the true owner from asserting his title against the purchaser at a sheriff's sale, when such owner does nothing that is calculated to mislead the purchaser as to the owner's relation to the property and the title.

(Syllabus by the Court.)

Error from superior court, Telfair county; C. C. Smith, Judge.

Action by William Graham against D. C. McLennan. Judgment for plaintiff. Defendant brings error. Affirmed.

D. C. McLennan, in pro. per. E. D. Graham, for defendant in error.

COBB, J. It appears from the record that the present case was tried as one in which both plaintiff and defendant derived title from a common grantor, who was the person who had conveyed the property to Mitchell Guerry. Without holding that this was the correct theory of the case, we deal with it as presented. From this point the plaintiff's chain of title consists of a deed from Aaron Graham, as administrator of Mitchell Guerry, to Samuel Graham, and a deed from Samuel Graham to William Graham; the plaintiff in the present case. The defendant relies upon a deed founded upon a sheriff's sale of the property under an execution against Aaron Graham individually. There is evidence that Aaron Graham was in possession of the property, exercising acts of ownership over the same, but there is no evidence that he ever had title to the land. While his possession continued for a number of years, it was, until February 7, 1893, the date of the deed from him as administrator to Samuel Graham, in his right as administrator, and, even though it might be inferred that he remained in possession thereafter, such possession was not of sufficient duration, even if adverse, to constitute a prescriptive title. Upon the case thus made, it is clear that William Graham, who claims under title derived through the administrator's sale, has a superior right to the defendant, who claims under the sheriff's deed, founded upon an execution against a person who never had title of any character to the property. It is contended, however, that the plaintiff should have interposed a claim, and not have allowed the property to be sold by the sheriff, and that his failure to interpose a claim when he knew that the levy had been made was such a fraud upon the defendant that the plaintiff would be now estopped from setting up his title against the alleged title of the defendant under the sheriff's deed. In the case of *Whittington v. Wright*, 9 Ga. 23, it was held that the claim laws were cumulative only: Judge Lumpkin, in the opinion, uses this language: "Our claim laws are cumulative, permissive, and not mandatory. They do not take from the owners of property their right to assert their title by trover or ejectment or trespass against the sheriff, as at common law, and a sale by the sheriff cannot divest the owner of his title, unless he does or omits to do something, and thereby entraps the purchaser." See, also, *Cox v. Mayor, etc.*, 17 Ga. 249; *Bodega v. Perkerson*, 60 Ga. 516. If William Graham was the owner of the property, his failure to file a claim, notwithstanding he may have been apprised of the fact of the levy and of the day fixed for the

sale, would not interfere with his right to assert his title against the purchaser at the sale, unless he did something that would mislead the purchaser, and entrap him into buying under the belief that the property sold was really the property of the defendant in execution. There is nothing in this case which will bring the plaintiff within the rule laid down in Civ. Code, § 3823, where it is declared that "one who silently stands by and permits another to purchase his property without disclosing his title is guilty of such a fraud as estops him from subsequently setting up such title against the purchaser." There is no evidence of any statement by William Graham that would mislead the defendant, nor is there any evidence from which a jury would be authorized to find that he had been guilty of conduct which would be calculated to deceive the defendant in any way, and create the impression that he was not claiming the property in his own right, but was acquiescing in its being treated as the property of Aaron Graham. The plaintiff not being precluded by the failure to file a claim from setting up his title against the defendant, and having been guilty of nothing which would amount to a fraud upon the defendant, and thereby estop him from claiming the property, the judge did not err in directing the jury to find in his favor. Judgment affirmed. All the justices concurring.

McNEEL v. SMITH.

(Supreme Court of Georgia. Dec. 16, 1896.)

ACTION ON NOTE—DIRECTING VERDICT.

In the trial of a suit upon a promissory note which was given for the purchase money of a mule, and which stipulated that the seller did not warrant the health, life, and soundness of the mule, but only the title thereto, and that in case of death the maker of the note should sustain the loss, where the only defense offered was failure of consideration, growing out of the unsoundness of the mule at the time of the sale, there was no error in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Telfair county; C. C. Smith, Judge.

Action by J. D. Smith against J. M. McNeel. Judgment for plaintiff. Defendant brings error. Affirmed.

D. C. McLennan, for plaintiff in error. Eason & McRae, for defendant in error.

LEWIS, J. We do not think there was any ambiguity whatever as to the meaning of the contract sued on in this case. The notes, by stipulating that the seller did not warrant the health, life, and soundness of the mules, expressly excepted such warranty from the contract; and the parties manifestly intended that the vendor should be relieved from any implied warranty which the law might otherwise have imposed upon him on account of

any defects growing out of unsoundness of the mule at the time of the sale. To have allowed, therefore, a defense based upon a verbal agreement between the parties to the effect that the vendor contracted to deliver the mules to the defendant safe and well, would have permitted the defendant to contradict by parol evidence the express and unambiguous provisions in his written contract. Section 3555 of the Civil Code declares that: "If there is no express covenant of warranty, the purchaser must exercise caution in detecting defects; the seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants—(1) That he has a valid title and right to sell. (2) That the article sold is merchantable, and reasonably suited to the use intended. (3) That he knows of no latent defects undisclosed." It is obvious from the language used in the statute that the parties to the contract can expressly except either one or all of these implied warranties. In this case the first was not excepted, but any defense founded either upon the second or third, growing out of unsoundness in the mules, is expressly provided against. The plea in this case, therefore, setting up an agreement and condition not only not contained in the notes, but in direct contradiction of the written contract, there was no error in refusing to admit testimony thereunder, and in directing a verdict for the plaintiff. *Goodman v. Fleming*, 57 Ga. 350; *Jackson v. Langston*, 61 Ga. 392, 393; *Martin v. Moore*, 63 Ga. 531. Judgment affirmed. All the justices concurring.

LUCAS et al. v. CORDELE GUANO CO.

(Supreme Court of Georgia. Dec. 15, 1898.)

APPEAL—REVIEW—MOTION FOR NEW TRIAL—DISMISSAL—BRIEF OF EVIDENCE.

A judgment dismissing a motion for a new trial for want of an approved brief of evidence will not be reversed by this court, when it appears that the brief was not presented to the judge for approval until the hearing of the motion, which was had several months after the trial; and when it further appears that evidence was omitted from the brief tendered which the judge recalled as material, but the substance of which he was unable to remember, on account of long lapse of time which had expired since the trial. This is true, notwithstanding the fact that movant's counsel were allowed until the date of the hearing to prepare and file a brief of the evidence.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by Cordele Guano Company against B. F. Lucas and others. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

At the September term, 1897, of the superior court, a verdict was rendered against the defendants in this case, and they filed a motion for a new trial within the time required

by law. The court passed an order providing for the hearing of the case in vacation, at such time and place as the judge should fix, on 10 days' notice to each party, and that the movants have "until and including the day of said hearing, and from continuance to continuance of said hearing, until the same is finally adjudicated by the court, to make out, have approved, and file a brief of testimony, without prejudice." In accordance with this order, notice was given counsel that the motion would be heard on February 3, 1898. On that day the motion was called for hearing, and counsel for the movants presented a narrative brief of evidence, as prepared by them, on the back of which was an entry of filing by the clerk, dated February 1, 1898. Counsel for the respondent stated that he had not time in which to examine this brief. In order that counsel "might have an opportunity to endeavor to agree on the brief," it was agreed that the hearing should be deferred until later on the same day. The motion was again called on that day, and counsel for the respondent declined to agree to the brief of evidence, saying he did not think it contained all the material parts of the testimony of one of the plaintiff's witnesses named Mann, and also that a certain contract between the plaintiff and one Hall (the consignee of the fertilizer involved in the suit) did not appear in the brief. Counsel for the movants stated that they were not in the case at the time of the trial before the jury, but were employed immediately afterwards to move for a new trial, and that the official stenographer's report of the trial did not show that any contract between the plaintiff and Hall was put in evidence, but that they were willing to put in the brief whatever were claimed to be material parts of such contract; that, as they understood plaintiff's theory, the only materiality of such contract was to show that plaintiff was obligated to deliver the fertilizer in question at Staves' Landing, on the Ocmulgee river; and they accordingly inserted in the brief a statement of that part of the contract. As to the other objection to the brief, counsel for the movants stated that the official stenographer's report showed that, at the time of the trial, the interrogatories of the witness Mann had been lost, and that, by consent, a copy of them had been used on the trial; that they (the present counsel) had received the papers in the case from the clerk, and some from the counsel who represented defendants on the trial, and there were no interrogatories of the witness Mann, nor any copy or memorandum thereof, among the papers; that they had been unable to find these interrogatories, and the clerk had reported that the papers delivered to them were all that had been in his office; and, in preparing the narrative brief of evidence, they had stated Mann's testimony according to the best information they could get. They also called the attention of the court and of respondent

ent's counsel to the fact that the witness Mann was then in the judge's room, and counsel for the movants offered to take the statement or testimony of Mann as to what his testimony had been on the trial. Counsel for the respondent would not consent to supply Mann's testimony in this way. Counsel for the movants then stated that they would accept and put in their narrative brief, as the testimony of Mann, anything that the counsel for the respondent would state as his recollection of what Mann had testified. Counsel for the respondent would not accede to this proposition, and stated that he did not think it was his duty to prepare a brief for the movants, and that he could not remember what the evidence was. Counsel for the movants thereupon requested that court either to require counsel for the respondent to state what he desired to have put in the brief, or to approve the brief as it then stood. This the court would not do. At this stage of the hearing, the court took a recess until later in the evening of the same day, and, upon reconvening that evening, there were present at the judge's office the judge, the witness Mann, and the counsel for the movants. The attorney who had appeared in behalf of the respondent was not present. Counsel for the movants read over to the witness Mann, in the presence of the court, the statement of his testimony on the trial as contained in the narrative brief of evidence offered by counsel for the movants; and Mann stated, in the presence of the court, that this statement of his testimony was correct, to the best of his recollection. After waiting for some time, and respondent's counsel not appearing, the court passed an order refusing to approve the brief of evidence offered. To this order, and to the action of the court in refusing to require respondent's counsel to state what additional evidence he desired put in the brief, the movants excepted. The order here referred to is as follows: "There are several material parts of the evidence introduced on the trial in the foregoing case that are left out in the brief of evidence offered by movants; and counsel for respondent, for that reason, refusing to agree to said brief of evidence, claiming that he cannot, for the reason that the same is incomplete and incorrect, [and] he cannot remember sufficiently to supply the defects and the incompleteness of the same; * * * and the court being unable to remember just what the evidence was, some of the missing parts being documentary and some being interrogatory, * * * and the court knowing the same to be material; * * * and the counsel who tried the case in the court below for the movants having abandoned the same, and the counsel who now represents movants not having been engaged in the case on the trial, and not being in a situation to aid the court and counsel for the respondent, —it is impossible for the court to approve the brief of evidence offered by the movants. I

therefore * * * decline to approve said brief of evidence." After having made this order, the court passed an order dismissing the motion for a new trial, and to this the movants excepted. The bill of exceptions states that, before counsel for the respondent left the judge's office, he moved the court to dismiss the motion, on the ground that there was no brief of evidence agreed upon and approved by the court, and said positively that "he could not agree."

Cutts & Lawson, D. M. Roberts, and E. H. Williams, for plaintiffs in error. Thomson & Whipple, for defendant in error.

LEWIS, J. From the facts stated in the official report, it will be seen that counsel for movants did not have a complete brief of evidence prepared on the date of the hearing, for the reason that there was entirely omitted therefrom material portions of the testimony. It is true, under the order of court, he had until and during the final hearing of his motion to prepare his brief; but, when counsel procures such an order of court, he must necessarily take upon himself the risk, when he omits to prepare and present a brief until the final day, that the court may fail to remember the evidence, and for this reason may not be able to approve the brief. It is insisted in this case that the court erred in not imposing terms on the counsel for respondent either to agree to the brief or state what he wanted therein. While it does seem from the record that movants' counsel was fair in his proposition to the respondent touching an agreement upon the brief of evidence, yet we know of no law which compels respondent's counsel in such a case to aid in the preparation of a brief of evidence or to supply evident omissions therefrom. It is the usual practice for counsel to agree upon the brief of evidence before the same is submitted for approval by the judge, but there is no law requiring such a course, and we know of no remedy provided by any rule of practice which would compel such an agreement by counsel. In principle there is nothing to distinguish this case from previous adjudications of this court on the same subject. *Williams v. Johnston*, 94 Ga. 722, 19 S. E. 888; *Thomas v. State*, 96 Ga. 484, 22 S. E. 315; *Heller v. De Leon*, 96 Ga. 805, 22 S. E. 578; *Baldwin Co. v. Crawford*, 101 Ga. 185, 28 S. E. 621. Judgment affirmed. All the justices concurring.

BUCHANNON et al v. DE LOACH MILL MFG. CO.

(Supreme Court of Georgia. Dec. 17, 1898.)

APPEAL—AFFIRMANCE—DAMAGES.

There having been no appearance for plaintiff in error when this case was called in its order, and the defendant in error having moved the court to open the record, and prayed for an affirmance of the judgment of the trial court, and damages for delay, under section 5621 of the

Civil Code, and it clearly appearing from an examination of the record that there is no merit in the exceptions of plaintiff in error, it is ordered that the judgment of the court below be affirmed, and that 10 per cent. on the amount of the judgment in the court below be awarded against the plaintiff in error, in favor of the defendant in error, as damages for bringing the case here for delay only. *Craton v. Hackney*, 17 S. E. 124, 91 Ga. 192.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by the De Loach Mill Manufacturing Company against R. F. Buchannon and others. Judgment for plaintiff. Defendants bring error. Affirmed.

W. M. Clements, for plaintiffs in error. De Lacy & Bishop, for defendant in error.

PER CURIAM. Judgment affirmed.

ETHERIDGE v. WOODARD.

(Supreme Court of Georgia. Dec. 17, 1898.)

SPECIFIC PERFORMANCE—PAROL CONTRACT.

A court of equity will not decree the specific performance of a parol contract between the purchaser of land at a tax sale and the owner of the land, by which it was, in effect, agreed that the owner should have a right to redeem the land after the expiration of the time allowed by law for its redemption; it not appearing that there had been any part performance of the contract.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Bill by S. T. Etheridge against L. M. Woodard. Decree dismissing bill, and plaintiff brings error. Affirmed.

Roberts & Milner, for plaintiff in error. W. M. Clements, for defendant in error.

SIMMONS, C. J. Under the facts of the present case, as they are disclosed by the record, there was no error in sustaining the motion for nonsuit. The contract set up by the plaintiff was in parol, and for the sale of land. There was no evidence to show performance or part performance on the part of either party. Even if plaintiff made a sufficient tender, it was after the legal right to redeem had expired. The defendant does not admit the contract alleged by the plaintiff, but denies it, and is therefore entitled to the protection afforded by the statute of frauds. There were no facts alleged or proved by the plaintiff which would, under any circumstances, have authorized the jury to find in his favor, and the court properly sustained the motion for the grant of a nonsuit. Judgment affirmed. All the justices concurring.

PAULK v. HAWKINS.

(Supreme Court of Georgia. Dec. 15, 1898.)

CERTIORARI—VERIFICATION OF PETITION.

This court will not reverse a judgment refusing to sanction a petition for certiorari when

it affirmatively appears from the bill of exceptions that the petition was not verified.

(Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

Petition of D. Paulk, Sr., for a writ of certiorari against Phillis Hawkins. From an order refusing the same, he brings error. Affirmed.

R. A. Hendricks, for plaintiff in error. Quincey & McDonald, for defendant in error.

LUMPKIN, P. J. It appears in this case that a petition for certiorari, alleging the commission of errors in a justice's court, was presented to the judge of the superior court. His refusal to sanction the same is here assigned as error. The bill of exceptions recites that the petition was not sworn to. Section 4638 of the Civil Code expressly provides that no writ of certiorari shall be granted or issued in such a case unless the applicant shall make the affidavit therein provided for. The making of this affidavit is therefore an indispensable prerequisite to a sanction by the judge. Judgment affirmed. All the justices concurring.

DANIELS v. LEONARD.

(Supreme Court of Georgia. Dec. 21, 1898.)

APPEAL—REVIEW—GRANT OF SECOND NEW TRIAL.

When it is palpably apparent from the entire evidence in the record that the verdict was strongly and decidedly against the weight of the same, and manifestly wrong, this court will not reverse a judgment granting a second new trial, although there may have been some evidence tending to support the verdict. *Taylor v. Railroad Co.*, 5 S. E. 114, 79 Ga. 330; *Wood v. Lane*, 29 S. E. 180, 102 Ga. 199; *Davis v. Chaplin*, 27 S. E. 726, 102 Ga. 587.

(Syllabus by the Court.)

Error from superior court, Pulaski county; W. N. Spence, Judge.

Action between D. C. Daniels and D. B. Leonard. From an order granting a new trial, Daniels brings error. Affirmed.

J. H. Martin, for plaintiff in error. W. L. & Warren Grice, for defendant in error.

PER CURIAM. Judgment affirmed.

JOHNSON et al. v. COLEMAN et al.

(Supreme Court of Georgia. Dec. 15, 1898.)

CERTIORARI—FINAL JUDGMENT—DISPUTED FACTS.

A superior court cannot lawfully render a final judgment upon a certiorari, when it appears that at the trial thereby brought under review there were disputed issues of fact, and the case was not one the determination of which necessarily depended upon a controlling question of law.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by Johnson & Co. against Coleman & Birch. Judgment for plaintiff was re-

versed on certiorari, and plaintiffs bring error. Reversed.

Herrman & Milner, for plaintiffs in error.
D. M. Roberts, B. R. Calhoun, and J. E. Wooten, for defendants in error.

LUMPKIN, P. J. A distress warrant was sued out by Johnson & Co. against Coleman & Burch, who filed a counter affidavit. The case was tried, on appeal, before a jury in a justice's court, and resulted in a verdict in favor of the plaintiffs. There were disputed issues of fact, and the determination of the case did not depend upon a controlling legal question. The defendants took the case by certiorari to the superior court, which rendered a final judgment in their favor. The petition for certiorari complains of certain rulings made by the magistrate, which are, apparently, of minor importance. It also alleges that the verdict was contrary to law and the evidence. The record before us does not disclose whether the judgment sustaining the certiorari was predicated upon the idea that the magistrate committed error, or upon the ground that the verdict was unwarranted by the evidence. Whatever may be the truth in this regard, it was not a case for a final judgment. Civ. Code, § 4652; *Rogers v. Railroad Co.*, 100 Ga. 699, 28 S. E. 457; *Pinkston v. White* (Ga.) 27 S. E. 665; *Almond v. Banking Co.* (Ga.) 29 S. E. 159. Upon the strength of these authorities, the judgment below must be reversed. If, when the certiorari comes up for another hearing, the judge entertains the opinion that the verdict was contrary to the evidence, he may, in the exercise of the discretion vested in him, again sustain the certiorari; but, in that event, he should remand the case to the magistrate's court for a new trial. Judgment reversed. All the justices concurring.

KAISER et al. v. HANCOCK.

(Supreme Court of Georgia. Dec. 16, 1898.)

AUTHORITY OF ATTORNEY—SETTLEMENT OF CLAIM
—BURDEN OF PROOF—COMPROMISE.

Without special authority, an attorney cannot accept anything in discharge of his client's claim but the full amount thereof in cash. And where a plaintiff introduces evidence which makes out a prima facie case in his favor for the full amount for which he sues, proof by the defendant, in support of a plea filed by him that he has paid to the attorney of record for the plaintiff a sum less than the amount sued for, as a full settlement of the plaintiff's demand against him, raises no presumption that the attorney was authorized by the plaintiff to make such a settlement. Consequently, under such circumstances, the burden is upon the defendant to show the authority of the plaintiff's attorney to make the settlement which he sets up as a satisfaction of the plaintiff's claim.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. O. Smith, Judge.

Action by A. Kaiser & Bro. against W. H. Hancock. Judgment for defendant, and plaintiffs bring error. Reversed.

J. B. Geiger, for plaintiffs in error. W. L. Clarke, for defendant in error.

FISH, J. In 1891, Kaiser & Bro., through their attorney, J. T. Neeson, brought suit in Montgomery superior court against W. H. Hancock on an open account for \$449.22. The case was tried at the April term, 1898, when the defendant filed an amended plea, in which he set up that "on the 10th day of March, 1894, he paid to J. T. Neeson, the attorney of record for the plaintiff, * * * the sum of \$350 as a full settlement of the account, the subject-matter of the suit." On the trial both members of the firm of Kaiser & Bro. and one of the firm's employes testified that the goods represented by the account were sold and delivered by the plaintiffs to the defendant, and that the account was correct and true, and one of these witnesses testified that the defendant had admitted the account sued on to be correct; so that, in the absence of evidence to the contrary, the plaintiffs would have been entitled to recover the full amount of their claim. In support of his plea, the defendant testified that he had paid the account sued on to Neeson, the attorney at law who had the claim for collection, and took his receipt at the time that he made the payment. The defendant produced the following receipt, which he testified Neeson signed and delivered to him when the payment was made: "Received of W. H. Hancock the sum of \$350.00 as a settlement of the claim of A. Kaiser & Bro. vs. W. H. Hancock. This 10th day of March, 1894. [Signed] J. T. Neeson, Attorney for A. Kaiser & Bro." This receipt was then introduced in evidence. Upon cross-examination the defendant testified that he did not remember the exact amount that he paid Neeson, but it lacked some \$15.00, possibly more, of being the amount stated in this receipt, and was paid as a full settlement, and the attorney for the plaintiffs agreed to so accept it. Upon this testimony the court directed a verdict for the defendant. The plaintiffs made a motion for a new trial, in which they alleged that the verdict was contrary to evidence, and without evidence to support it, and that it was contrary to law. The court overruled the motion, and the plaintiffs excepted. A copy of the order directing a verdict is contained in the record, from which it appears that the court was of opinion that, under sections 4417 and 4423 of the Civil Code, upon the proof submitted by the defendant, the presumption arose that the attorney of record for the plaintiffs had special authority from them to accept from the defendant, as a full settlement of their claim, the amount which the defendant paid to him, and which he accepted, for this purpose, and that this presumption became conclusive in the absence of testimony from the plaintiffs to the contrary. This opinion of the court was erroneous. The law is that, "without special authority attorneys cannot receive anything in discharge of

a client's claim but the full amount in cash." Civ. Code, § 4418. "An attorney at law charged with the collection of a claim being a special agent for this purpose, and being expressly forbidden by law from receiving anything in discharge of a client's claim but the full amount in cash, one who undertakes to settle with an attorney an account in his hands for collection for a sum less than is due thereon must, at his peril, ascertain that the attorney is authorized to make such a compromise." *Sonnebom v. Moore* (Ga.) 30 S. E. 947. That proof of the fact that the attorney for the plaintiffs accepted from the defendant a sum less than the amount of the plaintiffs' claim raised no presumption in favor of the defendant that the attorney had special authority from his client to do so is settled by the decision of this court from which we have just quoted, for it was held in that case that, while the court, in rejecting pertinent testimony offered by the plaintiffs for the purpose of showing expressly that their former attorneys were not authorized to accept in satisfaction of the account now sued on less than its face value, even upon the evidence actually admitted the verdict for the defendants was contrary to law, there being no proof whatever that these attorneys had authority to make the compromise and settlement set up by the defendants in their answer. This is decisive of the present case. It follows that the court erred in directing a verdict for the defendant, and, consequently, a new trial should have been granted. Of course, if an attorney for a plaintiff has accepted from the defendant a sum less than the amount of the plaintiff's claim, as a full settlement thereof, without authority from his client to make such a compromise, the defendant, upon proper pleading and proof, would be entitled to a credit for the amount actually paid by him to the attorney. Judgment reversed. All the justices concurring.

UNDERWOOD v. HARVEY.

(Supreme Court of Georgia. Dec. 20, 1898.)

CRIMINAL LAW—COSTS—JUDGMENT AGAINST PROSECUTOR.

When a prosecution is abandoned before trial, "the officer who issued the warrant" is authorized to "enter a judgment against the prosecutor for all the costs, and enforce it by an execution in the name of the state." An execution on such a judgment, issued in the name of the accused in the warrant, is void.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Prosecution against Giles Harvey was dismissed, and order entered that Andrew Underwood, the prosecutor, pay costs. On levy of execution, defendant interposed affidavit of illegality. From an order overruling certiorari to judgment of justice, Underwood brings error. Reversed.

Roberts & Milner, for plaintiff in error. B. R. Calhoun, for defendant in error.

COBB, J. A warrant against Giles Harvey, for a violation of the criminal law, was dismissed by the justice of the peace before whom the accused was brought for trial, the prosecutor having failed to appear and prosecute the case. The order of dismissal recited that the prosecution had been abandoned, and directed that Andrew Underwood, the prosecutor, "pay all costs" in the case. The amount of costs was not stated in the order. An execution was thereupon issued against Underwood for \$4.15, which sum, the execution stated, "Giles Harvey recovered against Andrew Underwood, prosecutor in" the "justice's court * * * in the case of State against Giles Harvey, for the costs." The execution was levied, and the defendant interposed an affidavit of illegality, upon the sole ground that "there is no authority of law for the issue of such an execution." The illegality was tried before a justice of the peace, and at the trial the plaintiff introduced in evidence the judgment above mentioned, and a witness, who testified that Underwood had sworn out a warrant against Harvey, and had failed and refused to appear against him. The plaintiff was allowed by the court, over the objection of the defendant, to amend the execution by inserting therein, after the name of Giles Harvey, the words, "for the use of the officers of court," so that it should read, "which Giles Harvey, for the use of the officers of court, recovered," etc. The court rendered a judgment sustaining the execution and the levy, and the defendant carried the case to the superior court by certiorari, alleging that the justice erred in sustaining the execution, for the reason that "no execution could issue in the name of Giles Harvey personally, or for the use of the officers of the court, or any one else; the law providing that an execution of this kind can only issue or proceed in the name of the state." The certiorari was overruled, and to this Underwood excepted. The Penal Code declares that, when a prosecution is abandoned before trial, "the officer who issued the warrant shall enter a judgment against the prosecutor for all the costs and enforce it by an execution in the name of the state." Pen. Code, § 1082. The officer has no authority to issue an execution in any other way, and especially is there lack of authority to issue it in the name of the accused in the warrant, as he has no interest whatever in the matter and is not authorized to collect the costs for the officers of court. The execution is to proceed in the name of the state, for the benefit of the officers of court, and must be so issued. The amendment to the execution did not relieve the defect. It was still in the name of the wrong party. There "is no authority of law for the issue of such an execution," either as it stood originally or as amended, and the issue on the affidavit of illegality should have

been decided in favor of the defendant in the execution. The court erred in not sustaining the certiorari. Judgment reversed. All the justices concurring.

HILTON & DODGE LUMBER CO. v. BROWNING.

(Supreme Court of Georgia. Dec. 17, 1898.)

APPEAL—REVIEW—OVERRULING CERTIORARI.

Where the sole complaint in a petition for certiorari is that the verdict is contrary to the evidence, this court will not interfere with the discretion of the trial judge in overruling the certiorari, when the evidence was conflicting on material issues in the case.

(Syllabus by the Court.)

Error from superior court, Montgomery county; O. C. Smith, Judge.

Action between the Hilton & Dodge Lumber Company and S. P. Browning. From the judgment the lumber company brought error. Affirmed.

J. B. Gelger, for plaintiff in error. Wooten & Wooten, for defendant in error.

PER CURIAM. Judgment affirmed.

ROARK v. STATE

(Supreme Court of Georgia. Nov. 18, 1898.)

CRIMINAL LAW—INSTRUCTIONS—HOMICIDE—MUTUAL COMBAT—SELF-DEFENSE.

1. The judge having stated, in the presence and hearing of the jury, at the time certain testimony was being offered in evidence by the state, the particular purpose for which it was admitted, the fact that he, in his charge to the jury, omitted to again make the same statement in regard to this testimony, is not sufficient ground for a new trial.

2. The evidence warranted the charge complained of on the subject of mutual combat between the defendant and the deceased, and there was no error in the charge upon the subject of voluntary manslaughter, or of justifiable homicide, of which the accused can complain. The entire charge fully and fairly presented to the jury the law governing the issues in the case, and there was sufficient evidence to sustain the verdict of guilty.

(Syllabus by the Court.)

Error from superior court, Hall county; W. H. Felton, Jr., Judge.

Henry Roark was convicted of murder, and brings error. Affirmed.

Estes & Boone, for plaintiff in error. Howard Thompson, Sol. Gen., J. M. Terrell, Atty. Gen., and H. H. Dean, for the State.

LEWIS, J. Henry Roark was indicted by the grand jury of Hall county for the murder of Ernest Findley on the 18th of July, 1898. The material portions of the evidence relied upon by the state for a conviction were substantially as follows: On the day of the homicide, a party, consisting of a few men, a lewd woman from Atlanta, and a girl of doubtful virtue from Gainesville, had been

made for the purpose of taking a trip from Gainesville to the river, in Hall county, in the country. In this party was the deceased. Another party, consisting of the defendant and two or three other men, manifested a purpose of also accompanying the other men and women to the river. The men who were with the women sought to elude the defendant and his crowd, and did not desire their company. This purpose was not successful, and the whole party went to the appointed place in the country; the accused going out in a buggy with the girl Annie Bird, in company with another man. After reaching the point of destination, both the accused and the deceased began drinking, and they became somewhat under the influence of intoxicants. The deceased had in his possession a pistol, which he carried openly in his hand most of the time while the parties were assembled at the river, but did not attempt to use it or make any threats against any one. Both defendant and deceased manifested a purpose of returning home with Annie Bird. They were evidently jealous of each other on account of this woman. The defendant threatened that, if the deceased entered a certain house at the place, he would hurt or kill him; the defendant being at the time in the house with the woman. He further threatened in the course of the day, that he was going to kill the man who carried Annie to town, it did not matter who he was. After the first threat against the deceased, he and the defendant apparently made friends. The defendant tried to borrow a pistol from two or three persons, and finally succeeded in procuring one. Annie Bird, who lived in Gainesville, had indicated a purpose to return home with defendant. As the party were getting ready to return home, the deceased indicated a purpose to accompany Annie Bird, and the defendant appeared upon the scene with his pistol. Being under the impression that Makenson, who was the main witness for the state, intended to return with Annie, he turned upon him, leveled his pistol at him, used towards him the vilest of epithets, and stated a purpose to kill him, when Annie Bird ran in between the two, and pushed aside the defendant's pistol; whereupon the defendant turned on Ernest Findley, the deceased, and remarked, "You bloody son of a bitch, I will kill you," and then shot him. The deceased at the time was not attempting to use his pistol, although he had it in his hand, but did not have it lifted or pointed towards the defendant. The effect of the wound was almost immediate death. After the shooting, defendant went to the deceased, and undertook to administer to his wounds, and render him some assistance, before he died. On the trial it was shown that letters were written by the defendant, after the homicide, to Annie Bird, who was then probably in Atlanta, in effect telling her to aid him on his trial; promising her that, if released from the trouble, he would marry her, and that his uncle would provide him with

ample money, and that they would go off and live happily together. On the contrary, there was evidence in behalf of the defendant that several days before the homicide there had been a difficulty between the defendant and the deceased, resulting in a fight, and that afterwards the deceased threatened to take the life of the defendant. There was also testimony that, at one time just previous to the homicide, the deceased had his pistol presented to the defendant, when he was commanded by the defendant to put it down, which was accordingly done. Annie Bird, the main witness for the defendant, corroborated the state's witness as to an effort to shoot him by the defendant; but further swore that, when the defendant turned upon the deceased, the latter had his pistol up and presented towards the defendant, and that thereupon the defendant shot and killed him.

There is quite a voluminous record of testimony in this case, but the above condensed statement is quite sufficient to a clear understanding of the errors complained of. The defendant was convicted, with recommendation to life imprisonment in the penitentiary. Upon the overruling of his motion for a new trial, he excepted.

One assignment of error in the motion for a new trial is that "the court having admitted in evidence, over the objection of defendant's counsel, the contents of certain letters purporting to have been written by defendant to Annie Bird, after the homicide, and while he was in jail, the court, holding, in the presence of this jury, that said testimony was admissible only for the purpose of showing the relations existing between defendant and said Annie Bird, erred in not limiting this testimony to the sole purpose for which it was admitted, and in not mentioning it nor referring to it in his charge to the jury, thus leaving the jury to consider it for all purposes." No error is assigned upon the admissibility of this evidence over the objection of defendant's counsel. Even if there had been, the testimony was clearly admissible; proof of the destruction of the original letters having been made. The sole error assigned, however, is that the court did not mention in his charge to the jury the only purpose for which the testimony was admitted. There was nothing whatever in the charge of the court that could possibly have led the jury to infer that the testimony could be considered by them for all purposes, and, no special request having been made of the judge again to call the jury's attention to what he had already previously said in their hearing, his omission to do so in his charge constituted no ground for a new trial. The evident idea of the court was that the testimony could be considered for the purpose of showing the relations between the parties, with the view of furnishing the jury some data upon which they could pass upon the credibility of the witness, and upon her interest or want of interest in the case.

Manifestly, the testimony was admissible for this purpose, and we cannot conceive for what other purpose the jury could possibly have considered the evidence, to the injury of the accused.

2. Error is assigned in the motion upon the following charge: "If the jury believe that the evidence establishes beyond a reasonable doubt that the defendant and the deceased bore malice to each other, and that there had been mutual threats to kill against the other, known to each of them, and that each, with the knowledge of the other, had deliberately procured pistols for the purpose of fighting with them, and had thereupon deliberately fought with their pistols, and under those circumstances the defendant, being quicker than the deceased, fired and killed the deceased, the jury would be authorized to find the defendant guilty of the crime of murder." It is admitted by counsel for plaintiff in error that this proposition, as an abstract principle of law, is correct, but it is insisted that the evidence does not warrant the charge; that there was no evidence of a mutual intention to fight, no previous preparation, and no evidence that the parties deliberately fought with their pistols. The brief recital of facts contained above we think is a sufficient answer to this contention. From all the facts sworn to in the case, both in behalf of the state and accused, the jury might, with reason, have inferred that it was really the purpose of the parties to engage in a deadly struggle whenever the issue was squarely presented as to which one should accompany Annie Bird home; that they had armed themselves for the purpose of this contest; and that, at the time when the fatal shooting occurred, each had made up his mind to kill the other. If this determination had been reached, and when the killing occurred the deceased was attempting to use his pistol on the defendant, but was prevented therefrom by the fatal wound he had received, this would constitute a deliberate fighting with their pistols, whether the deceased actually shot or not. We think, therefore, the evidence fully authorized the charge of the court on this subject, and that the law of mutual combat was applicable to this case.

Another assignment of error in the motion is the following charge of the court: "If the jury believe that the evidence establishes beyond a reasonable doubt that the defendant and the deceased had a quarrel with each other about the woman Annie Bird, and that the defendant and deceased had pistols in their hands at that time, and that, in consequence of controversy about the woman, there arose at that time great heat of blood between the parties, and the mutual combat intent to fight, and that both, being in a sudden heat of passion, then and there fought with their pistols, and the defendant, being quicker than the deceased, fired and killed the deceased, the jury would be authorized

to find the defendant guilty of the crime of voluntary manslaughter." Exception is taken to this charge on the ground that it assumed that defendant and deceased "fought with their pistols"; counsel for plaintiff in error contending that the evidence nowhere showed that deceased fought with his pistol, and that the charge excluded from the mind of the jury the whole consideration of voluntary manslaughter, except in case the defendant and deceased actually "fought with their pistols." This contention of counsel seems to be based upon the idea that, as the deceased did not actually shoot his pistol, he was not engaged in a fight with the pistol. Evidence was introduced in behalf of the defendant himself tending to show that deceased was attempting to use his pistol when he was shot, and manifestly, from his own evidence, if true, there was a fighting between the two with pistols. If two parties should engage in a duel, and one should be killed before he had opportunity of firing, he would no less be a participant in the duel fighting. We think the charge given quite as favorable to the defendant as the law allows. It was not objected that the charge was given on the subject of voluntary manslaughter, but that the charge excluded from the jury every other theory of voluntary manslaughter except that specified. We can conceive of no other possible theory, under the facts of the case, upon which the crime of voluntary manslaughter could have been based. In addition to this special charge complained of, the court also gave in charge the law in the Code upon the subject of voluntary manslaughter. If there is any question at all about the correctness of this charge, it is whether or not there could have been a correct finding of voluntary manslaughter in the case. If the theory of the state was right, it was murder; if that of the defense was right, it was justifiable homicide. The defendant was convicted of murder, and therefore the charge on the subject of voluntary manslaughter could not possibly have affected his case. There can certainly be no complaint of the charge when it presented the only theory upon which the crime of manslaughter could possibly have been predicated, and when, from the argument of counsel, it was really contended that, if any crime was committed at all, it was of a grade less than murder.

Error is further assigned on the following charge: "If the jury believe that the evidence established, beyond a reasonable doubt, that the defendant shot and killed the deceased, and that the reason for that killing on the part of the defendant was because the deceased was seeking to commit a serious personal injury upon the defendant with a pistol, and that the deceased was the assailant, or if the jury believe that the defendant was the assailant, and that the defendant had really and in good faith endeavored to decline any further struggle be-

fore the fatal shot was fired, and that the circumstances were sufficient to excite the fears of the defendant, as a reasonable man, that his life was in danger, or that some great bodily harm would come to him, from the assault of the deceased, and under the influence of those fears, and not in a spirit of revenge, he shot and killed the deceased, that would be a killing in self-defense, and the defendant would be justifiable, and it would be the duty of the jury to acquit the defendant." This is substantially giving in charge to the jury the law of justifiable homicide as embodied in certain sections of the Penal Code. It was not contended that the charge was incorrect as an abstract legal principle, but it is urged that the charge, given in the words used by the court, was calculated to mislead the jury, and was not applicable to the case, in which there was no evidence that the deceased had assailed or assaulted defendant; the court failing to explain what it takes to make an assault. It was further contended that the charge ignored the theory of the defense that all previous differences between the parties had been bona fide settled, and that upon a certain outbreak of passion upon the part of the deceased, which he manifested by presenting his pistol at defendant for the purpose of shooting him, the defendant shot in this emergency, not in a spirit of revenge, but in the conscientious belief of saving his own life. As before seen, under one theory of the defense, the deceased was the "assailant," and, in the absence of any special request of the court to define what is meant by the term, there was certainly no error in not going into details by a definition of the simple words used in the statute. Even if there was no evidence that deceased was the assailant, this would simply make the charge more favorable to the defendant than he was entitled to. Construing the charge as a whole, we think it fully covered the theory of the defense insisted upon by plaintiff in error. The evidence was amply sufficient to sustain the conclusion of the jury that this theory was not the truth of the case, but that, on the contrary, the defendant was guilty of the crime charged. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, P. J., absent on account of sickness.

SMITH v. STATE.

(Supreme Court of Georgia. Nov. 17, 1898.)

CRIMINAL LAW—FORMER ACQUITTAL—INTOXICATING LIQUORS—ILLEGAL SALE.

1. A former acquittal of the charge of retailing spirituous liquor without license is not a good plea in bar of a prosecution for keeping open a tipping house on the Sabbath day, although the evidence for the state be the same in both cases.

2. The evidence warranted the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from criminal court of Atlanta; J. D. Berry, Judge.

Mitchell Smith was convicted of violating the liquor law, and brings error. Affirmed.

The following is the official report:

On September 18, 1898, Smith was convicted in the criminal court of Atlanta upon an accusation charging him with keeping open a tippling house on the Sabbath day. Upon the trial, Dobbins, a policeman, testified that on Sunday, July 31, 1898, he gave Jessie Isaac a marked quarter, and that she went, under his instructions, to a high fence in rear of defendant's house, and called him out into the back yard, and asked him for whisky; that defendant went into his house, and soon came out with a half-pint bottle of corn whisky, and handed it to Jessie, and she gave the defendant the marked quarter, and she gave him a nickel; that witness was concealed, and heard and saw all this, and that it all occurred in Fulton county; that witness at once took the bottle from Jessie, entered defendant's house, and arrested him; that three men were found in the house; that defendant permitted witness to make a search of the house, and that he found some bottles and jugs with whisky in them in a dish cupboard, and also a bottle in a trunk. Jessie Isaac testified that she got the whisky from the defendant, as stated by Dobbins; that she told defendant that she was sick, and wanted to buy some whisky; that she bought whisky there from the defendant one week before, on a Saturday night. Rhodes testified that he was in defendant's house when he was arrested on Sunday, July 31, 1898, and took drinks there that day. Witness ordered four drinks. He took rye whisky; others took corn. Defendant poured it out of bottles. Witness had been there once or twice on Sunday. Was there when Jessie Isaac called defendant out, and saw defendant deliver a bottle to her. Witness went there only on Sunday. Peek testified: That he was at defendant's house on Sunday, July 31, 1898. That he got no whisky from defendant on that day. "We had not been there long enough. I got one drink there before on a Sunday." Defendant filed a plea of *autrefois acquit*. The record shows that on August 1, 1898, defendant was tried in the criminal court of Atlanta upon an accusation charging that on July 31, 1898, in Fulton county, this state, he retailed whisky and other spirituous liquors without license; that on this former trial the state introduced the same witnesses as in the last trial; that their testimony was identical in both trials, and that defendant was acquitted in the first trial.

John W. Cox and D. R. Keith, for plaintiff in error. Jas. F. O'Neill, for the State.

FISH, J. 1. One of the assignments of error in the motion for a new trial was that the court erred in failing to charge the jury upon the plea of former acquittal. We do

not think there is any merit in this exception. The offenses of retailing liquor without license, and keeping open a tippling house on the Sabbath day, are separate and distinct. Neither of them is a necessary element in, and an essential part of, the other. Either of them may be committed without perpetrating the other. A person prosecuted for either is in no jeopardy of being convicted of the other, or of any offense which is an essential part of the other. The case of *Blair v. State*, 81 Ga. 629, 7 S. E. 855, is exactly in point. It was there held that "a former conviction of selling liquor to a minor without the written consent of his parent or guardian, even if properly pleaded, would not be good in bar of a prosecution for selling liquor without license, though the act of selling were the same in both cases." See *Bell v. State* (Ga.) 30 S. E. 294. It may be noted that in *Minor v. State*, 63 Ga. 319, it appears that Minor was tried for keeping open a tippling house on the Sabbath day, and also for retailing liquor without license, and was convicted in both cases. The point that he could not be convicted of both offenses appears not to have been made.

2. Complaint was made that the verdict was contrary to the evidence. Whether defendant's house was a tippling house on Sunday, July 31, 1898, and was kept open on that day, were, of course, questions to be determined by the jury from all the facts and circumstances of the case. If it was really a tippling house at that time, although it may have just begun its existence as such, and if defendant kept it open on that day, he was guilty of a violation of the statute. The evidence was that on that Sunday the house was kept open, and that several persons were tippling therein. Rhodes testified: "I took drinks there that day. Ordered four drinks. I drank rye whisky; others drank corn. Defendant poured it out of a bottle." This testimony was uncontradicted. The defendant, in his statement, simply said: "I sold that whisky to Jessie Isaac on Sunday, July 31, 1898. She said she was sick and needed it. Those men witnesses were never there before Sunday, July 31, 1898. I did not run any tippling house." There were a number of jugs and bottles of whisky found in defendant's cupboard. Jessie Isaac bought some whisky there on Saturday night, a week before July 31, 1898, and a half-pint on the last-named day. Rhodes swore that he had been there once or twice on Sunday, and went there on Sunday only. It is true, he did not state the purpose of his visits, but he was tippling there July 31st. Peek testified: "I had got no whisky from defendant on July 31, 1898. We had not been there long enough. I got one drink there before on a Sunday." We think the jury could infer from the testimony of these witnesses and the surrounding circumstances that the house was a tippling house. The verdict, therefore, was not contrary to the evidence. Judgment affirmed.

All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, P. J., absent on account of sickness.

WILLIAMS v. STATE.

(Supreme Court of Georgia. Nov. 19, 1898.)

LARCENY—HOUSE—WHAT CONSTITUTES.

A structure which is stationary, which is eight feet tall, covered with shingles, and inclosed with wire, erected for the purpose of the safe-keeping of birds and fowls, is a house, within the meaning of our Code which defines the offense of larceny from the house; and there was no error in refusing to direct a verdict of not guilty on a trial for larceny from the house because the evidence did not establish that the structure so erected was a house.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Esau Williams was convicted of larceny from a house, and brings error. Affirmed.

C. J. Thornton and A. E. Thornton, for plaintiff in error. E. J. Wynn, for the State.

LITTLE, J. An accusation was preferred in the city court of Columbus against the plaintiff in error, charging him with the offense of larceny from the house. The specific details of the charge made are: That on the 15th day of August, 1898, Esau Williams unlawfully, and with force and arms, certain pigeons of the value of one dollar, the property of Frank Kirven, in the chicken house of one R. M. Kirven, feloniously and wrongfully, with intent to steal said pigeons, did take and carry them away, etc. The defendant entered a plea of not guilty, and at the trial one of the questions was whether or not the pigeons were taken from a house. The prosecutor testified that he had a large number of pigeons in a coop, from which a number were stolen. In describing the coop, he testified that it was a chicken house; that the house was made of wire, and was about eight feet tall, two stories, covered with shingles; that, while he called it a coop, it was really a chicken house; that it was nailed to the fence; it could not be moved about; that the posts that held it were not in the ground, but that the structure was stationary. That is all the testimony that related to the house from which it was alleged that the property was stolen. There was other evidence which tended to show that the plaintiff in error privately took the pigeons from this structure; and when the state closed its testimony the defendant moved the court to order a discharge of the prisoner upon the ground that the accusation charged the pigeons to have been stolen from a chicken house, and the proof showed that it was not a chicken house, but a chicken coop, and that the probata did not follow the allegata. The court refused the motion, and the plaintiff in error excepted. Assuming that the

judge has the right to direct a verdict at the close of the evidence introduced by the state whenever the same is plainly insufficient to sustain a verdict of guilty, then the only question which we are to decide is whether the evidence establishes the fact that the pigeons were stolen from a house. Section 179 of the Penal Code provides that "any person who shall, in any dwelling house, store, shop, ware-house, or any other building, privately steal any money or other thing under the value of fifty dollars, shall be punished as for a misdemeanor." The language of this section is very broad; and a punishment is not only prescribed for a larceny from the dwelling house, store, shop, or warehouse, but from any other building. A building is defined to be "an edifice for any use; that which is built,—as a dwelling house, barn," etc. Stand. Dict. The structure from which the pigeons were taken, as shown by the evidence in this case, was about eight feet high, stationary, inclosed with wire, and covered with shingles. The fact that it was inclosed with wire instead of other material, in our judgment, makes no difference; and it comes plainly under the definition of a house, as used in our statute. Speaking for myself, I am not aware of any law in this state which either requires or allows a trial judge, on motion, to order the discharge of the accused during trial, and before verdict, for the want of evidence to convict. It is the province of the jury to determine, under instructions from the court, whether the evidence sufficiently shows the guilt of the accused to authorize a conviction. If for any reason a conviction is had under insufficient evidence, the person convicted has his remedy under the provisions of law to have such verdict set aside. In the trial of a criminal case, as I understand the law of this state, the weight of the evidence, in the first instance, is to be passed upon by the jury exclusively, and the jury is the tribunal created by law to say whether the accused is or is not guilty of the crime. I cannot sanction the practice which has grown up in this state for judges who preside at the trial of criminal cases, in advance of a verdict, to pass upon the evidence in the case; and this without any regard to the practice which obtains in other jurisdictions. Section 5331 of the Civil Code, which authorizes the judge, in certain instances, to direct a verdict, applies exclusively to civil cases, and was codified from the opinion of this court rendered in the case of Hooks v. Frick, 75 Ga. 715; and while I fully recognize the rule there laid down as being the established law of this state, such rule, even in civil cases, ought not to be extended beyond the plain and literal meaning of the words used in the section. We are all of the opinion that no error was committed by the presiding judge in his ruling, and the judgment is affirmed. All the justices concurring, except SIMMONS, C. J., absent. LUMPKIN, P. J., absent on account of sickness.

DAVIS v. STATE.

(Supreme Court of Georgia. Nov. 18, 1898.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

Where one is indicted for an illegal sale of intoxicating liquors, the state may prove such sale at any time within two years previous to the finding of the indictment. When the state, on the trial, has entered into an investigation of more than one transaction touching such a sale, it is not permissible for the defendant to prove by the foreman of the grand jury who found the bill that the investigation of that body did not embrace the particular transaction which must be relied upon by the state for a conviction.

(Syllabus by the Court.)

Error from superior court, Glascock county; Seaborn Reese, Judge.

Mahala Davis was convicted of illegal sale of intoxicating liquors, and brings error. Affirmed.

Thomas E. Watson and B. F. Walker, for plaintiff in error. R. H. Lewis, Sol. Gen., and Harrison & Bryan, for the State.

LEWIS, J. Mahala Davis was indicted by the grand jury of Glascock county for the offense of a misdemeanor, the indictment charging that on the 15th day of December, 1896, she unlawfully sold in said county spirituous liquors, to wit, whisky, brandy, and other intoxicating liquors, to wit, one-half pint in quantity, and without license. There appear on the back of the indictment the names of two witnesses for the state, William Williford and Dock Wilcher. These witnesses were introduced in behalf of the state, and also another witness by the name of John Black. It is contended by counsel for plaintiff in error that no illegal sale of liquors was proved unless it was by the testimony of Black. No objection was made to Black's testimony, but counsel for the accused offered to prove by the foreman of the grand jury that this body did not investigate the transaction touching a sale of liquors by the accused to Black; that the indictment was not founded on that particular sale, but upon the sale to the two witnesses named on the back of the indictment. This testimony was excluded by the court, and this ruling of the judge, together with his charge to the jury to the effect that any illegal sale of liquors within two years prior to the finding of the bill would authorize a conviction are the only errors assigned which are relied upon or mentioned by counsel for plaintiff in error in his argument by brief. Under repeated rulings of this court, any other assignment of error that may appear in the record will be treated as having been abandoned by plaintiff in error. It is not disputed by counsel for the accused that under this indictment the state had a right to prove the illegal sale alleged in the indictment at any time within two years previous to the finding of the bill by the grand jury. Indeed, this is so clearly and established by previous adjudications of the court as to admit of no discussion. The

indictment does not allege a sale to any particular person or persons, and from its allegations, therefore, the state is not restricted in its proof to any particular sale, provided such sale occurred within the period of the statute of limitations. Hence the effect of the indictment is to put the accused on notice that she may be placed on trial for any violation of the offense charged, committed within the statutory period. It is contended, however, that while this may be true, yet if it can be clearly and satisfactorily shown by a member of the grand jury that the deliberations of that body were confined entirely to investigating a particular act of the defendant, the state will be forced to rely for a conviction solely upon the proof touching the particular transaction that was before the grand jury. It is earnestly insisted that in the case of *Bryant v. State*, 97 Ga. 103, 25 S. E. 450, there was a strong intimation by this court that it would not be competent for the state to prove a particular act done by the accused which would constitute the offense charged, if it affirmatively appeared that the grand jury had never indicted him for that act. We fail to find any intimation whatever, either in the headnotes or the opinion in that case, to this effect, but the question is left entirely open, and it was simply decided that such proof offered by a party not a member of the grand jury was not admissible. The exact question raised by this record, then, seems to be still an open one in this court. But we are very clear in our opinion that the court was right in excluding the testimony offered and in his charge to the jury complained of. The defendant was put upon trial for the offense charged in the indictment. No objection is made to that indictment for insufficiency, or for being too general in its allegations. As to whether or not proof of a certain criminal act is admissible on the trial of the case must necessarily depend upon the charge that has been preferred against the accused. It would, indeed, be a very anomalous rule of criminal procedure to hold that such a question might be determined by proof of matter occurring before another branch of the court entirely outside of the pleadings in the case. Such a rule might lead to endless confusion. It would permit members of a grand jury to explain by parol testimony what they meant by their indictment. It would permit parties in a criminal case on the final trial to go entirely outside of the issue presented by the pleadings, and enter into an investigation as to what occurred before the grand jury, and what was really determined by that body. In this case, for instance, it appeared on the trial that there were sales of liquors at different times to each one of the witnesses whose names appear on the indictment. Some of the grand jury might have founded their conclusion on a sale to one of these witnesses, others on a sale to the other witness, and still others on the testimony of both;

not as making out a strong case of guilt in either transaction, but as being sufficient to authorize a conclusion that the defendant should be put upon trial for a sale generally of liquors, and the state should be given the liberty of investigating thoroughly this question as to any transaction that might have occurred within the two years. It might have appeared upon the trial of such a collateral issue as to what the grand jury really determined that the requisite number to find a true bill was not in favor of indicting for any one act, and hence it would follow as a logical result of the contention of counsel for the accused that the indictment ought not to have been found at all, and the defendant should be discharged. As before indicated, no objection was made to the admission of any of the testimony in this case, nor did the accused ask on the trial that the state should elect what particular act it relied upon for a conviction, even if such right existed in the defendant. As stated by Justice Atkinson in his opinion in *Bryant v. State*, above cited: "In misdemeanor cases it is the constant practice to submit to the jury evidence of several misdemeanors of the same character, perpetrated by the same person. No harm can result from this practice. Inasmuch as the state is permitted to give in evidence before the jury testimony showing the commission of the alleged misdemeanor at any time within two years next before the finding of the indictment, the defendant must be prepared to answer for himself as to each occasion upon which the state may elect to prove his guilt, but with the resulting advantage that but one judgment can be given upon the same indictment, and, though he may have committed many misdemeanors of like character, a judgment of conviction as to one will protect him as to all, the indictment being general, and not specific, in its descriptive averments." We think the question in this case is necessarily controlled by the principle that pleadings in all cases, whether criminal or civil, must be determined as to their meaning, and as to what proof is admissible thereunder, by the written pleadings themselves, and no extraneous testimony is admissible to show the intention of the draftsman, or the purpose and scope of a written official record, which must always determine, and necessarily control, the real issue between the parties. Bishop, in his work on *Criminal Procedure*, § 872, says: "One on trial is not permitted to show that the offense proved is not the same which was before the grand jury." In *Spratt v. State*, 8 Mo. 247, this principle, as announced in the text of Bishop, is supported by the following decision: "Evidence that the offense proved before the jury [and of which the jury found the defendant guilty] is another and different offense from that which was proved before the grand jury who found the bill, is inadmissible." That case involved a charge of gaming. The accused offered to prove by competent evidence

that the case on trial before the jury was another and different one from that which was proved before the grand jury which found the bill against the defendant. This evidence was rejected by the court. *Tompkins, J.*, delivering the opinion, said: "It might very well happen that the defendant was guilty of betting many times within the time limited by law for prosecuting such offenses, and that any one of these offenses might have been proved before the jury under this indictment, for the only certainty required by the statute is as to time and place. And if the bill be found within the time, and after the commission of the offense, limited by law, and the offense be charged to have been committed within the county, it is enough. So that, if the defendant had been frequently guilty of betting the sum of twenty-five cents, as charged, he might have been found guilty under this indictment of any one of such offenses; and it ought to be imputed to his good fortune that he escaped indictment of the remaining part. No grand juror can be allowed to come into court to say that evidence given before the body of which he was one went to establish the fact of the betting on one day of the month rather than on another, or at one place in the county rather than at another; for these things are immaterial, unless it be to discredit a witness." To the same effect, see *State v. Skinner*, 34 Kan. 257, 8 Pac. 420 (Syl. point 5); *State v. Schmidt*, 34 Kan. 400, 8 Pac. 867 (Syl. point 7). Judgment affirmed. All the justices concurring, except *SIMMONS, C. J.*, absent. *LUMPKIN, P. J.*, absent on account of sickness.

CROOMS v. STATE.

(Supreme Court of Georgia. Dec. 15, 1898.)

CRIMINAL LAW—APPEAL.

There being no error of law complained of, and the evidence being sufficient to support the verdict, there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Macon; *J. P. Ross*, Judge.

Robert Crooms was convicted of crime, and brings error. Affirmed.

Nottingham & Polhill and John R. Cooper, for plaintiff in error. Robt. Hodges, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

WATKINS v. ELLIS.

(Supreme Court of Georgia. Nov. 18, 1898.)

CONTINUANCE—STATEMENTS OF JUDGE.

A magistrate, when not presiding in court, does not act judicially in answering questions put by parties as to whether or not a case will be tried at the term to which the same is returnable, or will be continued to a subsequent term, and a party shaping his conduct by such

answer must take the risk of the opposite party objecting to a postponement of the case, and insisting upon a trial of the same at the time fixed by law.

(Syllabus by the Court.)

Error from superior court, Butts county; M. W. Beck, Judge.

Action by J. T. Ellis against R. T. Watkins. Judgment for plaintiff. Defendant brings error. Affirmed.

B. P. Bailey, for plaintiff in error. M. M. Mills, for defendant in error.

COBB, J. On June 2, 1897, Ellis brought suit against Watkins in a justice's court on an account. The summons was returnable to a term of the court to be held on the 19th day of June. On June 12th the defendant filed a plea, in which he denied that he was indebted to the plaintiff on the account sued on. At the term of the court to which the summons was returnable, the case was called in its order for trial, and, the defendant not appearing, the plaintiff testified in his own behalf to facts which would make out his case, and thereupon the justice rendered judgment against the defendant for the amount sued for. On June 28th the defendant applied to the judge of the superior court for a writ of certiorari, alleging in the petition that "at the time he lodged his written plea under oath with said court, on the 12th day of June, 1897, the said E. C. Robinson, the justice of said court, told * * * petitioner that he need not attend the June term of said court, as that was the first term; the case would not be tried at the June term of said court, but would go over to the July term of said court for trial. Therefore * * * petitioner did not attend the June term of said court for the purpose of proving his defense to said suit"; and that, "but for the fact the court told him, at the time of filing his plea to said suit, that he need not attend the June term of said court, he would have been at the court at the time said case was called, and proved his defense to the same; that he did not know judgment had been rendered against him until after the time allowed by law for appeal had expired; that he has a good and valid defense to said suit, and is ready to prove the same on the trial of said case on its merits." The petition alleged that the court erred in allowing plaintiff to take judgment in the case and in rendering judgment at the June term, and in not continuing the case until the July term. The answer of the justice stated, in substance, that, about two weeks before the court was held at which the judgment was rendered, the defendant came to the office of respondent, and filed with him the written plea which is above referred to, and asked respondent if he (defendant) would have to attend court. Respondent asked him if he had a lawyer, and, upon his replying no, then asked him if he had any witnesses, to which he re-

plied that he had not. Thereupon respondent told him that he did not see that it would do any good for him to attend court. This was all that was said, and nothing was said about June or July term of the court. Defendant did not intimate that he wanted the case continued, nor did respondent intimate that the case would be continued. The defendant traversed that part of the answer of the justice above referred to, alleging in his traverse that the justice told him, at the time he filed his plea, that he need not attend the June term of the court; that, as that was the first term, the case would go over for trial to the July term; and that this statement was made at the office of the justice some days "before court." Upon demurrer to the traverse, the same was stricken, and the presiding judge, after hearing the certiorari upon the petition and answer, overruled the same. To the decision of the judge striking the traverse, and overruling the certiorari, the defendant excepted.

It is unnecessary to determine whether the traverse was properly stricken on demurrer, as we propose to deal with the case just as if the answer of the justice had contained what was contended by the defendant to be the truth of the case. Dealing thus with the case, we are clear that no other judgment than one overruling the certiorari should have been rendered. The Code declares that "all cases before a justice of the peace stand for trial at the time and place designated in the summons, and shall be then and there tried, unless continued according to law." Civ. Code, § 4133. It has been held that, even on a court day, a statement made by a magistrate when not actually presiding in court, as to whether or not a given case was that day called, was not such a judicial act on the part of the magistrate as to justify the person asking the question in shaping his conduct upon the answer, and that, if the answer misled the party, he, having acted at his own risk in relying upon such answer, must take the consequences. *Transfer Co. v. Clark*, 91 Ga. 234, 18 S. E. 138. See, also, *Bostain v. Morris*, 93 Ga. 224, 18 S. E. 649. It would seem, therefore, that, for a stronger reason, a statement made by a magistrate when not actually presiding in court, and not even on a court day, would not be such a judicial act as would authorize a party to absent himself from a term of the court thereafter held, and that, if he relied upon the statement made by the magistrate, he would do so at his peril. The plaintiff would have a right to insist upon the trial of his case at the term to which it was returnable, notwithstanding the statement by the justice, made out of court, on a day other than a court day, that a continuance would be allowed the defendant. There was no error in overruling the certiorari. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

BRUNDAGE et al. v. BIVENS et al.
(Supreme Court of Georgia. Nov. 19, 1898.)

EJECTMENT—DIRECTING VERDICT.

The proof in this case showing that both parties claimed under a common grantor, and further showing that the plaintiffs had a title to the premises in dispute paramount to that of the defendants, there was no error in directing a verdict for the plaintiffs.

(Syllabus by the Court.)

Error from superior court, Jones county; John C. Hart, Judge.

Action by J. T. Bivens and others against Elizabeth Brundage and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

Guerry & Hall, for plaintiffs in error.
Hardeman & Moore, for defendants in error.

SIMMONS, C. J. Assuming the burden of proof, the plaintiffs established by competent evidence their claim as remainder-men under the will of Stephen Bivens, who died in possession of the land in dispute. This was sufficient to make out a prima facie case in their favor. *Wolfe v. Baxter*, 86 Ga. 705, 13 S. E. 18. It was further shown that their father, John T. Bivens, took under the will as life tenant, and in 1866 or 1867 went into possession of the tract in dispute, presumably in that capacity, though at the date of his death, which occurred in May, 1897, he was not seised thereof. The present action of ejectment was commenced August 24th of the same year. The defendants introduced in evidence a deed from Stephen B. and James W. Stubbs to William M. Roberts, dated October 24, 1878, purporting to convey to the latter a fee-simple title to the premises in controversy, which were described therein as a tract, containing a designated number of acres, "known as the 'Stephen Bivens land.'" This deed also contained the following recital: "Said land also deeded to F. M. Walker, as guardian of said Stephen B. Stubbs and as trustee for said James W. Stubbs, from John T. Bivens; said deed recorded in Book 8 of Deeds in Jones superior court." By parol evidence it was shown that Roberts entered upon the land by virtue of this instrument, and remained in possession up to the date of his death, in 1886, since which time the defendants have held continuous possession, claiming under him as heirs at law. It further appeared that John T. Bivens, about the year 1867, "sold this land to the Stubbs boys, [whereupon] he went out of possession, and they took possession"; but no conveyance evidencing this sale was introduced in evidence.

From the plea filed by the defendants in resistance to the action, it would seem that they rested their defense solely upon a claim of title by prescription. That, under the evidence submitted, this claim was not sustained,

is evident. So long as John T. Bivens remained in life, no action for the recovery of the land could have been maintained by the plaintiffs. See *City Council v. Radcliffe*, 66 Ga. 469; *Frauke v. Berkner*, 67 Ga. 264; *Ford v. Cook*, 73 Ga. 221; *Bagley v. Kennedy*, 81 Ga. 721, 8 S. E. 742; *Taylor v. Kemp*, 86 Ga. 181, 12 S. E. 296; *McDonald v. McCall*, 91 Ga. 304, 18 S. E. 157; *Wallace v. Jones*, 93 Ga. 421, 21 S. E. 89; *Wells v. Dillard*, 93 Ga. 683, 20 S. E. 263; *Napier v. Anderson*, 95 Ga. 618, 628, 23 S. E. 191. "The life tenant being entitled to the possession of the property, no suit could be maintained therefor by the remainder-men, and no possession thereof could become adverse, so as to ripen into a prescriptive title as against the remainder-men, so long as the life tenant lived." *Bull v. Walker*, 71 Ga. 196.

Nor can it be said that the defendants in any other manner met the prima facie case made out by the plaintiffs. So far as was shown, John T. Bivens had no interest whatever in the land in controversy, save what he acquired under the will from Stephen Bivens, which was a mere life estate. No greater interest could, therefore, pass into the "Stubbs boys," to whom John T. Bivens sold, or be conveyed by them to Roberts, so as to descend to his heirs. In other words, the defendants appear to stand in the shoes of the life tenant, claiming adversely to the plaintiffs under a common grantor. If so, the fact that the life estate no longer exists would conclusively show the right of the remainder-men to enter. If not, then the defendants merely show that they claim under a title derived from a person in possession in 1866 or 1867; whereas the plaintiffs show a conveyance from Stephen Bivens, who was shown to have entered into possession some time prior to 1854, and remained seised of the premises up to his death, shortly before the probate of his will, in October, 1863. A better adverse title was, therefore, not shown. *Bagley v. Kennedy*, 85 Ga. 703, 707, 11 S. E. 1091.

Moreover so far as the record before us discloses, the subsequent possession of the party under whom the defendants claim was not adverse to, but apparently entirely consistent with, the title asserted by the prior occupant, Stephen Bivens. We accordingly hold that the trial judge properly directed a verdict in favor of the plaintiffs, which holding necessarily also disposes of the defendants' contention that the court, aside from the error committed in giving this direction to the case, erroneously overruled their motion that the jury be instructed to return a finding in their favor, upon the ground that no title had been shown in the plaintiffs upon which they could recover. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

BURKE v. NAPIER.

(Supreme Court of Georgia. Dec. 23, 1898.)

CONSIDERATION OF NOTE—PAROL EVIDENCE.

Although a promissory note appears, from a recital therein, to have been given for a particular consideration, in the trial of an action between the maker and payee thereof, parol evidence is admissible to show a different consideration.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; John C. Hart, Judge.

Action by E. C. Napier against John F. Burke. Judgment for plaintiff. Defendant brings error. Reversed.

F. Chambers, for plaintiff in error. Smith & Jones, for defendant in error.

FISH, J. Mrs. Napier, the landlord, sought, under sections 4813 and 4814 of the Civil Code, to dispossess Burke, the tenant, alleging that a certain amount of the rent was due, which he failed to pay, and that she had, after the rent became due, demanded possession of the rented premises from him, and he had refused to deliver the same to her. Burke filed a counter affidavit, denying that he was indebted to the plaintiff for rent of the premises described in her affidavit, and alleging that he had fully paid the rent that was due. On the trial of the case, the plaintiff introduced a note, signed by Burke, in which he promised to pay, on October 1, 1897, to her, or her order, \$100, as rent for a described tract of land. Burke testified that he had paid \$50 to the sheriff, and had offered to pay it to the plaintiff when the note became due, but she refused to accept it. He then offered to prove, by parol, that the note "embraced another and different consideration than rent," and "that the consideration of the note was \$50 for rent of the place described in the note, and \$50 indebtedness of his wife to plaintiff's sons." The court refused to allow him to introduce this evidence, "on the ground that the testimony would contradict and vary the terms of the note." The court then directed a verdict for the plaintiff "for \$100, the same being double the debt claimed to be due." The defendant made a motion for a new trial, which was overruled, and he excepted. One ground of the motion, and the only one that is material, as the whole case turns upon the question which it presents, is that the court erred in rejecting the parol testimony offered by the defendant for the purpose above indicated.

This case presents but a single question, and that is, if a promissory note recites a particular consideration, is parol evidence admissible to prove that it was given for a different consideration? Upon this question, the case of *Anderson v. Brown*, 72 Ga. 713, is directly in point. There it was decided that, "while parol testimony is inadmissible to alter the terms and conditions of a writ-

ten contract, it is admissible to show the circumstances under which a note was made, to explain the consideration, and to show that it was not, in fact, based on the consideration which appeared on its face, but what its true consideration was." The note in that case purported to have been given for the rent of the payee's farm. The court below admitted parol evidence, which showed that the note was given for an entirely different consideration, and, as seen from the above quotation, this court held that there was no error in such ruling. In the present case, the note in question purports to have been given for the rent of certain land, and the alleged error is that the court refused to admit parol testimony, offered for the purpose of showing that a part of the consideration for which the note was really given was something else. The consideration of an ordinary promissory note lies back of its terms and conditions. They spring out of it, but they form no part of it, nor does it form any part of them. Without mentioning any consideration whatever, its terms and conditions may be just as fully expressed as they possibly could be if the consideration were set out in full. If, after the terms and conditions have been expressed in the writing, a recital is added which sets forth the consideration upon which they are based, the terms and conditions are still unchanged. The recital of the consideration adds nothing to them, and takes nothing from them. Of course, in a written contract which carries on its face mutual promises, terms and conditions expressed on one side may be the consideration for terms and conditions expressed on the other. In such a case, proof of a consideration different from that expressed in the written instrument might alter its terms and conditions. But, ordinarily, the consideration is something apart from the stipulations of the contract. This is especially true with reference to promissory notes. In the present case, if the recital of the consideration contained in the note were entirely stricken therefrom, the language employed therein to express its terms and conditions would remain just the same. So, if to the consideration now recited in the note there were added the additional consideration upon which the defendant claims the note was partly based, no new term or condition would be added to those now expressed in the writing. The defendant claimed that he had fully paid all the rent due, and that the balance of the amount for which the note was given represented an indebtedness of his wife to the plaintiff's sons. The rejected testimony was, therefore, directly relevant: for, unless the defendant was indebted to the plaintiff for rent, her proceeding to dispossess him of the rented premises, for non-payment of rent, could not stand; and, even if he were indebted to her for rent, the amount of such indebtedness was material, as a basis for the judgment to be rendered

against him. Under the decision of this court which we have cited, the court erred in rejecting the parol testimony offered by the defendant. For other authorities to the same effect as *Anderson v. Brown*, supra, see 17 Am. & Eng. Enc. Law, 438; Whart. Ev. 1044; *Browne*, Par. Ev. pp. 44, 252; *Benj. Chalm. Dig.* p. 21; *Rand. Com. Paper*, § 565; and cases cited to support the text in these works. The decision in 72 Ga., supra, squarely involved the question under consideration, and is binding authority on this court.

In the case of *Powell v. Subers*, 67 Ga. 448, the question really was whether parol evidence was admissible to explain an ambiguity, with reference to consideration, appearing on the face of the note sued upon; and it was held that such evidence was admissible, it being really essential to apply the language used in the note as to consideration to the subject-matter thereof. In *Pitts v. Allen*, 72 Ga. 60, the note in question expressed no consideration, except that it was given "for value received"; and this court decided that parol evidence was admissible to explain the meaning of the expression "value received," upon the idea that it was a patent ambiguity. The two cases last mentioned are, therefore, not necessarily in conflict with what is now ruled, because the question with which we are at present dealing was not involved, and what was said upon it in those two cases was merely obiter. The same is true of the remark made by Presiding Justice Lumpkin at the beginning of his discussion of the case of *Hawkins v. Collier*, 101 Ga. 147, 148, 28 S. E. 632. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

**WILKINS, Sheriff, v. AMERICAN FREEHOLD LAND MORTGAGE CO.
OF LONDON, Limited.**

(Supreme Court of Georgia. Dec. 15, 1898.)

RULE AGAINST SHERIFF—LEVY—FAILURE TO SELL.

The actual injury sustained by the plaintiff in *fi. fa.* being the measure of the sheriff's liability for not selling the property levied upon, it was error, in a rule against him for a failure to sell, to make the rule absolute, for the full amount of the execution, when it was alleged in his sworn answer, which was not traversed, that designated parts of the property levied upon belonged, at the rendition of the judgment and at the time of the levy, to certain named parties other than the defendant in execution, and were not subject thereto, and that the value of the balance of such property was less than the amount of the *fi. fa.*

(Syllabus by the Court.)

Error from superior court, Miller county; H. C. Sheffield, Judge.

Rule by the American Freehold Land Mortgage Company of London, Limited, against J. S. Wilkins, sheriff, for failure to sell land on execution. Rule made absolute, and sheriff brings error. Reversed.

Donalson & Hawes, Harrison & Bryan, and A. G. Powell, for plaintiff in error. W. C. Worrill and Anderson, Felder & Davis, for defendant in error.

FISH, J. The defendant in error ruled Wilkins, sheriff, for not selling certain lands, mules, and cotton, which he had levied upon as the property of Clifton, by virtue of an execution proceeding for such company against Montgomery, Clifton, and others. The sheriff answered under oath, and, among other reasons for his not selling the lands and the mules, it was alleged in the answer that when the judgment was rendered upon which the execution was issued, and at the time of the levy, the lands and the mules were not of the property of Clifton, but that the lands were owned by the Bank of Thomasville, and the mules belonged to Ehrlich & Co., and that neither the lands nor the mules were subject to the execution. The answer alleged that the value of the cotton was \$331, and the only reason given for not selling it was that Clifton had presented an affidavit of illegality to the sheriff, which he accepted in good faith, believing it to be legally sufficient. It appears from the record that the illegality was insufficient in law, and that the court had so held. The sheriff's answer was not traversed. Upon the hearing the court made the rule absolute for \$1,238.30, as the principal, interest, and cost due upon the execution at the time the sheriff accepted the illegality, with interest on such amount at 20 per cent. per annum from date of the rule absolute. To the granting of such rule the sheriff excepted.

Under section 4770 of the Civil Code, a sheriff is liable to an attachment for contempt of court whenever it appears that he has injured a plaintiff in *fi. fa.* by neglecting to levy on the property of the defendant therein; and we think a failure to sell after a levy would, of course, be as much a breach of official duty as neglecting to levy, and the sheriff, under the statute, would be subject to the same penalties in the one instance as in the other. The measure of the sheriff's liability, however, is the actual injury sustained by the plaintiff in *fi. fa.* by reason of the sheriff's failure to sell the property levied on; and, to show that the plaintiff has not been injured by such failure, the sheriff may, in his defense, prove that the property was not subject to the execution. *Dobbs v. Justices*, 17 Ga. 624; *Taylor v. Johnson*, Id. 521; *Currell v. Phillips*, 18 Ga. 469; *Hackett v. Green*, 32 Ga. 512; *Pound v. Carr*, 40 Ga. 81; *Cowart v. Dunbar*, 56 Ga. 417; *Hunter v. Phillips*, Id. 634; *Wheeler v. Thomas*, 57 Ga. 161; *Wakefield v. Moore*, 65 Ga. 268. The sheriff, in the case under consideration, alleged in his sworn answer that the lands and mules, at the time the judgment was rendered and when the levy was made, did not belong to Clifton, the defendant in *fi. fa.*, but that they were the property of other named parties, and were not subject to the execution. These allegations of the answer,

in the absence of a traverse, should have been taken as true. Civ. Code, § 4775; *Hutchins v. Hullman*, 34 Ga. 846; *Pound v. Carr*, supra; *Haynes v. Perry*, 76 Ga. 33. If true, there could have been no legal sale of the lands and mules under the *fi. fa.*, and the plaintiff was not injured by a failure to sell them under the circumstances. The reason assigned in the answer for not selling the cotton levied upon was wholly insufficient, and the court would have been authorized to have granted a rule absolute against the sheriff for the value of the cotton; but, as the answer alleged it was worth only \$331, and as no traverse was filed, it was error to make the rule absolute for a larger sum. The plaintiff in execution was only injured to the extent of the value of the cotton. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

PATAPSCO GUANO CO. v. HURST et al.

(Supreme Court of Georgia. Dec. 15, 1898.)

MORTGAGE BY MARRIED WOMAN—RES JUDICATA— LIS PENDENS.

A married woman, who acquired, for value, title to property by deed from her husband, and executed a mortgage thereon to her creditor, cannot, when, subsequent to the date of the mortgage, the property is levied on as the property of the husband, under a judgment rendered on a cause of action arising after the date of the mortgage, by interposing a claim to the property, and submitting to a judgment finding the same subject, prejudice in any way the rights of her mortgage creditor, or of the purchaser at the sale had under a foreclosure of such mortgage, notwithstanding that such foreclosure and sale was had while the claim case was pending.

(Syllabus by the Court.)

Error from superior court, Randolph county; H. O. Sheffield, Judge.

Action by the Patapsco Guano Company against one Clark. Judgment for plaintiff. On a levy of execution, Hurst and others interpose claim. From judgment for claimants, plaintiff in execution brings error. Affirmed.

Arthur Hood, Harrison & Bryan, and J. M. Nealon, for plaintiff in error. W. C. Worrell, for defendants in error.

COBB, J. Clark, by a deed executed January 5, 1891, and recorded August 7, 1892, purporting to have been made for a valuable consideration, conveyed certain lands to his wife. On August 13, 1892, a mortgage by Mrs. Clark to Hammock & Rush upon the same property was executed and recorded. On October 17, 1893, the Patapsco Guano Company brought suit against Clark upon his promissory note, dated July 14, 1892, and on May 8, 1894, obtained judgment. On January 10, 1895, an execution from this judgment was levied on the property above mentioned, and on January 29, 1895, a claim was interposed by Mrs. Clark. A verdict finding the property subject was rendered in the

claim case on November 9, 1896. It does not appear from the record on what ground this verdict was rendered, nor upon what evidence it was based. A mortgage *fi. fa.* issued May 13, 1895, upon the foreclosure of Mrs. Clark's mortgage, in favor of Hammock & Rush, was levied, and the property sold thereunder, and a deed was, on October 1, 1895, made by the sheriff to the purchaser, Smith. Smith, on January 13, 1896, conveyed the property bought by him at the sheriff's sale to Hurst and others, who, relying upon the title thus acquired, interposed a claim to the levy of the execution in favor of the Patapsco Guano Company against Clark. The issue made by the claim last referred to was by consent submitted to the court without the intervention of a jury, and upon the trial the facts appeared as stated above. The court rendered a judgment finding the property not subject, and to this the plaintiff in execution excepted.

The sole contention of the plaintiff in error is that the claimants, who acquired title under the foreclosure of the mortgage dated August 13, 1892, are bound by the judgment in the case in which Mrs. Clark was claimant. We do not think that any one would contend that the lien of the judgment against Clark ever attached to the land, title to which was in Mrs. Clark at the date of the judgment, if Mrs. Clark had not interposed a claim. Does the fact that Mrs. Clark, after she had executed the mortgage, saw fit to litigate with the creditor of her husband on the question of title, affect the rights of her mortgage creditor, whose interest in the property accrued long before the beginning of the litigation? We think not. The doctrine of *lis pendens* is relied on to sustain the contention of the plaintiff in execution. This doctrine can have no application where there is no suit pending at the time the rights of the person sought to be charged attached to the property. It is clear that Hammock & Rush, the mortgagees, were not in any way affected by the litigation between Mrs. Clark and the creditor of her husband, the litigation having arisen after the mortgage was executed. This being the case, the claimants in the present case, who derived their title through a foreclosure sale founded on the mortgage, would stand in the shoes of the mortgagees, and would be unaffected by the judgment in the case in which Mrs. Clark was claimant, unless they, or their predecessors in title, have done something which would preclude them from setting up the rights they acquired as successors of the mortgagees. Nothing which would have such effect appears in the record. The case, therefore, must be decided as if Mrs. Clark had not interposed a claim.

This being true, but one conclusion can be reached from the present record, and that is that the property levied on, so far as the mortgagees and those who derived title through the foreclosure of the mortgage are

concerned, is the property of Mrs. Clark, and therefore not subject to a judgment lien against Clark growing out of a suit against him not only begun after he had parted with all interest in the property, and title to the same had become absolutely vested in her, but also founded on a cause of action against the husband accruing to the creditor after the husband had conveyed the property. And this is true, notwithstanding the foreclosure and sale, and conveyance by the purchaser at such sale to the present claimants, all took place while the case in which Mrs. Clark was claimant was still pending. There was no error in the judgment finding the property not subject. See *Ruker v. Womack*, 55 Ga. 399; *Ryan v. Mortgage Co.*, 96 Ga. 322, 23 S. E. 411; *Marshall v. Charland* (Ga.) 31 S. E. 791; *White v. Association* (Ga.) 82 S. E. 26. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

JONES v. MARTENS-TURNER CO.

(Supreme Court of Georgia. Dec. 20, 1898.)

WRIT OF ERROR—WHEN LIES—FINAL JUDGMENT
—FAST BILL OF EXCEPTIONS—ATTACHMENT
—SALE OF PERISHABLE PROPERTY.

1. A writ of error does not lie, under the general rule as embodied in section 5526 of the Civil Code, unless the decision or judgment complained of would have been a final disposition of the case, or final as to some material party thereto.

2. The provision for fast bills of exceptions, as prescribed in section 5540 of the Civil Code, is confined to the cases therein mentioned. There is no authority of law for suing out a writ of error to the refusal of a judge of the superior court to order a sale of property which had been levied on under an attachment, and application made, under section 5463 of the Civil Code, to have the same sold, because, as alleged, the property levied on was of a perishable nature, or liable to deteriorate from keeping, or there was expense attending the keeping of the same.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by D. C. Jones against Martens-Turner Company. From an order refusing to sell property attached, plaintiff brings error. Dismissed.

W. P. Wallis, for plaintiff in error. Allen Fort, for defendant in error.

LITTLE, J. An attachment was sued out and levied on certain lumber as the property of the defendant in attachment. Subsequently the plaintiff in attachment presented to the judge of the superior court a petition, in which it was alleged that the lumber levied upon was in the possession of the levying officer, unplevied; that there was expense in keeping the same; and that it was liable to deteriorate in value; and he prayed for an order directing the sheriff to sell the same. On the hearing, the order to sell was objected to. The judge refused the application to sell, and the plaintiff excepted. There were other is-

sues raised in the case, but, because of the fact that no writ of error lies to this court to review the judgment of the superior court refusing to grant an order for the sale of perishable property, we do not consider the case on its merits. By section 5526 of the Civil Code, which is the general rule established, it is declared that no cause shall be carried to the supreme court upon a bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause, or final as to some material party thereto. It cannot, of course, be claimed that, if the judge of the superior court had ordered a sale of the property as prayed, such order would have been a final disposition of the cause. The cause would still have been undetermined and pending, and the order of sale would have been merely an incident in the proceedings. Nor would a fast bill of exceptions lie, under the provisions of section 5540 of the Civil Code. That section provides that writs of error may be sued out to the grant of, or refusal to grant, an injunction, or the appointment of a receiver; for applications for discharge in bail trover; in contempt cases; granting or refusing application for alimony, mandamus, or other extraordinary remedy; to an order granting or refusing an application for attachment against fraudulent debtors; and in criminal cases. This section of the Code restricts bills of exception to the cases named, and the refusal by the judge of an order to sell perishable property pending the litigation does not come within its provision. The writ of error must be dismissed. Writ of error dismissed. All the justices concurring.

BERG v. NEW ENGLAND JEWELRY & SILVERWARE CO.

(Supreme Court of Georgia. Dec. 15, 1898.)

MOTION FOR NEW TRIAL—DISMISSAL—BRIEF OF EVIDENCE—FAILURE TO FILE.

On March 25, 1898, a rule nisi was granted on a motion for a new trial, returnable in vacation on April 9th. On March 26th an order was passed allowing the movant until April 8th to make and have approved, or agreed to, a complete brief of the testimony in the case. The term adjourned on March 28th. No approved or agreed brief was filed on April 8th. On April 9th a motion was made to dismiss the motion for a new trial on the ground that the order in reference to the brief of evidence had not been complied with. No brief was presented for approval on the day last mentioned. Held: (1) There was no error in dismissing the motion for a new trial; (2) that if, in such a case, the judge has any discretion in reference to the matter, the dismissal of the motion would not be an abuse of such discretion, where no reason whatever is assigned for the failure to comply with the terms of the order.

(Syllabus by the Court.)

Error from superior court, Dooly county; D. L. Henderson, Judge pro hac.

Action by the New England Jewelry & Silverware Company against Rosa Berg. Judgment for plaintiff. Defendant brings error. Affirmed.

Pearson Ellis and Harrison & Bryan, for plaintiff in error. Thomson & Whipple, for defendant in error.

COBB, J. This case was tried at the March term, 1898, of the superior court of Dooly county, which finally adjourned on March 28th. During the term the defendant filed a motion for a new trial, and on March 25th a rule nisi was granted on this motion, calling upon the plaintiff to show cause in vacation, on the 9th day of April, why the motion should not be granted. On March 26th the court passed an order of which the following is a copy: "The defendant having filed his motion for a new trial upon the several grounds therein named, and the court having reserved the right to finally and fully approve the same at the final hearing of the said motion, and it appearing that it is important [?] to make out and attach a brief of the evidence in this case during this term of the court, and before adjournment of the same, it is now, therefore, ordered by the court that the defendant be allowed until April 8, 1898, to make and attach, and have approved, a complete brief of the testimony, or have the same agreed to, without prejudice to this case. It is further ordered that he be allowed until date on April 8, 1898, to perfect his motion for a new trial in said case, without prejudice to his right. This March 26, 1898." On April 9th the motion came on for a hearing, and plaintiff moved to dismiss the same upon the ground that no brief of the testimony had been filed, agreed upon, or approved, within the time fixed by the order above quoted. The judge sustained this motion, and dismissed the motion for a new trial; the order of dismissal reciting "that no brief of evidence or charge of court has ever been approved or filed, and that none is now offered." The defendant filed her bill of exceptions, in which error is assigned upon the ruling dismissing the motion for a new trial; the bill of exceptions containing a recital that she asked "leave of the court to be permitted to file a brief of the evidence in said case, which was denied her, and to which she excepted." When the motion for a new trial was made on March 25th, the presiding judge made the rule granted thereon, returnable on the 9th day of April. Nothing was said in the rule in reference to the brief of evidence. On March 26th the order above quoted was passed, in which it is recited that it is "important" (probably an error in transcribing, and should be "impossible") to make out a brief of evidence during the term; and movants were allowed until the 8th day of April to make and have approved a complete brief of the testimony, or "have the same agreed to." For some reason satisfactory to the presiding judge, the brief was to have

been approved or agreed upon at least one day before the case came on for a hearing; it probably being his intention, in framing the order, that when the motion came on for a hearing the record should be complete, and that nothing more than a formal approval and the hearing should take place on the 9th. On the 8th of April no brief of the evidence had been agreed upon or approved.

In section 5495 of the Civil Code it is declared that, "where an order is taken to hear a motion for a new trial in vacation, the brief of evidence must be presented for approval within the time fixed by the order, or else the motion will be dismissed." It is contended that the judge had a discretion as to approving the brief of evidence on the 9th, and that his refusal to so approve it was an abuse of this discretion. It is true that the bill of exceptions recites that the defendant asked leave of the court to be permitted to file a brief of evidence in the case, but it is not therein stated that the brief was agreed upon or presented to the court for approval or agreement on the 9th of April, and the order dismissing the motion for a new trial distinctly states that no brief of the evidence was then offered. Even if, in this case, the presiding judge had any discretion in the matter, we cannot say that such discretion was abused, when no reason was given why the brief was not completed on the day fixed in the order, or why it was not agreed upon or presented for approval on the following day. Judgment affirmed. All the justices concurring.

CAUSEY et al. v. CAUSEY.

(Supreme Court of Georgia. Dec. 15, 1898.)

EQUITY—AMENDMENT—NEW CAUSE OF ACTION—
STRIKING NAME OF PARTY—EVIDENCE.

1. Where an equitable petition is brought against several persons, praying for a cancellation of certain deeds held by them to the property in dispute as a cloud upon plaintiff's title, and a specific performance of the contract, based upon an oral gift made to the plaintiff by his father upon a meritorious consideration, and valuable improvements made upon the faith of the gift, and relief is likewise prayed in the petition against a party who held a deed to the land as security for a loan from one of the other defendants, it is not adding a new cause of action to amend the petition by striking the name of such party and all prayers affecting his interest, and praying that the remaining defendants be required to make plaintiff a conveyance to such equity of redemption and other interest as they, or either of them, might have in the premises.

2. The charge of the court fairly and fully covered the issues in the case, and the verdict was sustained by the evidence.

(Syllabus by the Court.)

Error from superior court, Dooly county; C. C. Smith, Judge.

Bill by R. H. Causey against Mary I. Causey and others. Decree for plaintiff, and defendants bring error. Affirmed.

Busbee & Busbee and D. A. R. Crum, for plaintiffs in error. J. H. Woodward and Thomson & Whipple, for defendant in error.

LEWIS, J. 1. Where an equitable petition is brought against several defendants, the plaintiff certainly has a right to dismiss his action as to one and proceed against the others. Such an amendment adds neither new and distinct parties nor a new and distinct cause of action. The fact that the relief prayed against the remaining defendants is not as full and complete as was originally asked in the petition against all the defendants does not render the cause of action set forth in the amendment a separate and distinct one from what was claimed in the original petition. If, on the trial of an action for specific performance, it should be developed that, without fault of the plaintiff, but on account of the defendant himself, a specific performance of the contract is impossible, the court may proceed to assess damages for a breach of the contract. An amendment praying for such damages would not, in contemplation of law, make a new cause of action; for the statute expressly authorizes the granting of such relief, even when not contemplated by the original suit. Civ. Code, § 4042. Under the preceding section (4041), it is declared that "a want of title or other inability as to part, will not be a good answer to the vendee seeking performance, who is willing to accept title to the part, receiving compensation for the other." It appears, from the record in the case, that the defendants against whom a recovery was had still had some interest in the property, namely, an equity of redemption. We think the plaintiff clearly had a right, under his pleadings, to ask a conveyance of this interest, and, under the section of the Code cited, he might have gone still further, and asked for damages growing out of the wrong that had been done him by the conveyance of the property to secure a loan. The amendment, however, does not go to this extent, but only seeks a recovery of such interest as still remained in the defendants. The position of plaintiffs in error is tantamount to saying to their adversary: "We have, by our wrongful conduct, placed you where you cannot obtain the entire relief you originally sought, and therefore you should have no relief at all. We have placed a portion of the property, or a certain interest therein, where you cannot recover it, and therefore we have a right to keep what remains." Equity will not tolerate such a defense.

2. Plaintiff's cause of action in this case is not founded upon a mere voluntary agreement or gratuitous promise on the part of his father. He was induced, by a promise of a gift of the land, to leave his business in a remote county, and move upon the land in question; and, upon the faith of the gift, he erected thereon valuable and permanent

improvements. Under section 4039 of the Civil Code, equity will decree the performance of such an agreement. It is true that this action was not brought until after the father's death; but it is alleged that the defendants, who were the wife and son of the father, knew of the contract entered into between the plaintiff and his father, were fully aware of the plaintiff's rights to the property, and an understanding and agreement was had that the property should be sold by the mother, as administratrix, for the purpose of putting it in such shape that title could be conveyed to plaintiff. The administratrix, after the sale, deeded the property to the other defendant, who, instead of conveying it to the original owner, according to agreement, borrowed money upon the land, and conveyed title thereto to secure the loan. There was no demurrer filed to the petition, and it is not claimed that it does not set forth an equitable cause of action which entitles the plaintiff to the relief that he sought. The evidence in behalf of the plaintiff sustains all the material allegations in his petition. The charge of the court was fair, and fully covered the issues of fact involved; and we think, after considering the entire charge, the errors assigned on the portions of it complained of, and on the omission of the court to give certain instructions to the jury upon the weight of evidence and the credibility of witnesses, etc., are without sufficient merit to require any further attention, or any special ruling thereon. Judgment affirmed. All the justices concurring.

BIGBEE v. SATTERFIELD.

(Supreme Court of Georgia. Dec. 23, 1898.)

EQUITY—VERIFICATION OF PETITION—DECREE ON PLEADINGS—INJUNCTION—RECEIVER.

1. When an equitable petition was not verified otherwise than by an affidavit of the plaintiff averring the truth of its allegations so far as the same related to his personal knowledge, and his belief in their truth so far as his knowledge concerning the same was derived from others, and when the affidavit in this form did not amount to positive proof of portions of such allegations the establishment of which was essential, but as to the same was hearsay only, it was, upon a hearing of such petition, at which "there was no evidence introduced and no evidence or affidavits before the court except that contained in the petition and answers," in the latter of which the equity of the former was completely sworn off, erroneous to grant the extraordinary relief sought.

2. Even if the present proceeding for alleged equitable relief was maintainable, and if the plaintiff, upon due proof of his allegations, would have been entitled to such relief,—questions not now necessary to be decided,—the prayers for injunction and receiver ought, for the reason indicated in the preceding note, to have been denied.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; J. J. Kimsey, Judge.

Suit by W. H. Satterfield against J. F. Bigbee. Judgment for plaintiff. Defendant brings error. Reversed.

Boyd & Lilly and H. H. Perry, for plaintiff in error. W. P. Price, W. A. Charters, and H. H. Dean, for defendant in error.

PER CURIAM. Judgment reversed.

SHOPE v. STATE.

(Supreme Court of Georgia. Dec. 17, 1898.)

FORGERY—INDICTMENT—GRAND JURY—DISQUALIFICATION OF JUDGE—EVIDENCE.

1. A forgery of any writing, which can be used to defraud another, and which is not made the subject-matter of a prosecution for forgery elsewhere than in section 243 of the Penal Code, is indictable under that section, and the indictment need not on its face show in what manner or by what means it was intended to consummate the fraud.

2. One who has been bound over to a superior court for trial cannot, after an indictment has been returned against him, attack the same on the ground that grand jurors who acted thereon were disqualified by relationship to persons interested in the prosecution.

3. Disqualification of a judge on account of his relationship to such persons may be waived, and it is not essential that the waiver be made expressly or in writing.

4. The evidence in this case warranted the verdict, and the record discloses no sufficient reason for setting it aside.

(Syllabus by the Court.)

Error from superior court, Chattooga county; W. M. Henry, Judge.

J. L. Shope was convicted of forgery, and brings error. Affirmed.

Copeland & Jackson and C. L. Odell, for plaintiff in error. Moses Wright, Sol. Gen., and J. M. Bellah, for the State.

LUMPKIN, P. J. 1. The indictment in this case was based on section 243 of the Penal Code. It charged Shope with forging a certain instrument, by filling the blanks in a printed form, which was as follows:

"Trion Manufacturing Company.

"Trion, Ga., —, 189—.

"Marks.	Numbers.	Weights.	Prices.
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"From —, Weigher, —,"

—So as to make the same read thus:

"Trion Manufacturing Company.

"Trion, Ga., Nov. 30th, 1897.

"Marks.	Numbers.	Weights.	Prices.
	4,738	542	5 $\frac{1}{2}$
	4,739	514	5 $\frac{1}{2}$
	4,740	492	5 $\frac{1}{2}$
	4,741	501	5 $\frac{1}{2}$
	4,742	410	5 $\frac{1}{2}$

"From J. H. Hale. Weigher, C. D. H."

Counsel for the accused demurred to the indictment, alleging, in substance, that it set forth no specific act of the accused rendering him guilty of any kind or class of forgery, under the laws of this state; that it did not charge him with signing the name of any

person, company, or corporation to the writing alleged to have been forged; and that it did not aver that the letters or initials "C. D. H." represented the signature of any person connected with the Trion Manufacturing Company.

We think the court was right in overruling the demurrer. We hold, without difficulty, that the instrument alleged to have been forged fell within the broad class of papers referred to in the above-cited section of our Penal Code. In this connection, see *Berlifford v. State*, 66 Ga. 53. In that case, *Speer, J.*, remarked, with reference to section 4451 of the Code, then of force: "It evidently was the intent of the legislature to embrace every species of writing that could be used or written in a form and with a view of defrauding another." And see, also, *Travis v. State*, 83 Ga. 372, 9 S. E. 1063, where, in construing the same law, this court held that "it need not appear on the face of the indictment in what manner, or by what means, the consummation of fraud would be possible. It is enough if the writing might defraud, or might be used to defraud." The provisions of the section just referred to are embraced in section 243 of the present Penal Code. The letters "C. D. H." written after the word "Weigher," were manifestly intended to represent the initials of some person who employed this method of signing papers like the one alleged to have been forged; and the fact that the blank was headed "Trion Manufacturing Company" sufficiently indicates that "C. D. H.," whoever he was, occupied the position of weigher of this company.

2. Counsel for the accused also filed a special plea in abatement, alleging therein that certain members of the grand jury were disqualified by reason of relationship to stockholders of the Trion Manufacturing Company. The record discloses that, prior to the term of the superior court at which he was indicted, the accused had been arrested, carried before a justice of the peace, and bound over for this offense. It is plain, therefore, in view of the decision made by this court in the case of *Lascelles v. State*, 90 Ga. 372, 16 S. E. 945, the special plea was not well founded.

3. The judge who tried the case was a nephew of two stockholders of the Trion Manufacturing Company. This fact was known to counsel for the accused before the trial began. After it had proceeded for at least a day, and after most of the evidence had been introduced, counsel for the accused for the first time raised the question of the competency of the judge to preside at the trial. Granting that the judge was disqualified, we are of the opinion that, in view of the circumstances above stated, this point was waived. It ought to have been made when the case was called for trial. Section 4045 of the Civil Code, in effect, declares that a judge disqualified by reason of relationship may nevertheless preside, with the consent

of all the parties at interest. This section further provides that, where a judge has been employed as counsel in a case before going upon the bench, he cannot preside in that case, unless "the opposite party or counsel agree in writing that he may preside," but consent that a judge disqualified by relationship may preside need not be in writing.

4. It was earnestly argued here that the verdict of guilty returned by the jury was not supported by the evidence. In this connection, the special point was made that the instrument, as described in the indictment, had above the first column of figures appearing therein the word "Numbers," whereas the paper offered in evidence as the one forged had, instead of "Numbers," the abbreviation "Nos." We do not regard this as a material variance, and are satisfied that the paper was properly admitted over objection thereto by counsel for the accused.

As to the merits, we have, after a careful study of the brief of evidence, reached the conclusion that there was sufficient testimony to warrant a finding that the accused forged, and did not merely utter, the instrument in question. There was ample proof as to the uttering, and it further appeared that the accused received the fruits of the forgery, and gave a false account of his connection with the transaction; also that, a short time before money was paid upon the forged instrument to his agent, he was seen in an office or room belonging to the company inspecting printed blanks exactly like that upon which the forged instrument was made out; that soon thereafter he scrutinized and examined genuine instruments of the same character, which had been filled out by the company's weigher, and that very soon after he did so the forged instrument was presented for payment, having upon its face figures identical with those appearing in some of the genuine instruments which the accused had examined. Whether mere evidence of uttering would or not be sufficient, in a given instance, to establish a forgery, there is much more in the present case to show that the accused himself actually made the false and fraudulent instrument. Indeed, taking the evidence as a whole, it points to him as the guilty party with almost unerring certainty, and indicates that it was hardly possible for any other person than himself to have committed the forgery. The record discloses no sufficient reason for ordering a new trial in this case. Judgment affirmed. All the justices concurring.

BROWN v. TOWN OF SOCIAL CIRCLE.

(Supreme Court of Georgia. Nov. 17, 1898.)

INTOXICATING LIQUORS — ORDINANCE — EVIDENCE — CONTINUANCE.

1. The town of Social Circle has authority, under the general welfare clause in its charter, to pass and enforce an ordinance prohibiting

the keeping for unlawful sale, within the limits of the town, of any alcoholic, malt, or other intoxicating liquors. *Paulk v. Mayor, etc.* (Ga.) 31 S. E. 200, and cases cited.

2. The ground of the certiorari which complained of the refusal to grant a continuance was without merit, the evidence was sufficient to authorize the judgment, and there was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Walton county; *N. L. Hutchins, Judge.*

J. A. Brown was convicted of violating an ordinance of the town of Social Circle, and brought certiorari. From a judgment overruling the same, he brings error. Affirmed.

A. C. Stone, for plaintiff in error. *W. S. Upshaw*, for defendant in error.

PER CURIAM. Judgment affirmed. All the justices concurring, except *SIMMONS, C. J.*, absent, and *LUMPKIN, P. J.*, absent on account of sickness.

PARIS v. CITIZENS' BANKING CO. et al. CITIZENS' BANKING CO. et al. v. PARIS.

(Supreme Court of Georgia. Dec. 15, 1898.)

EXECUTION — SALE — DISTRIBUTION OF PROCEEDS — RULE ON SHERIFF.

Where it appeared in a money rule that the fund in the hands of the sheriff was the proceeds of a sale made by him under certain mortgage *fi. fas.* and an execution issued upon the foreclosure of a laborer's lien claimed by the movant as a salesman and laborer in the store of the common debtor, it was error for the court to dismiss a petition of the mortgagee, upon the ground that it did not seek to make the mortgagee a party to the rule, and raised no issue in the case, and to direct that the money be paid to the movant, when such petition set forth a claim to the fund, alleged that the movant, "in the discharge of his duties as such clerk, * * * performed no labor such as would entitle him to a lien under the law," and prayed that the fund be paid petitioner as a credit on its mortgage *fi. fas.*

(Syllabus by the Court.)

Error from superior court, Dodge county; *C. C. Smith, Judge.*

Rule by Samuel Paris against Rogers, sheriff, to pay over certain moneys collected. The Citizens' Banking Company filed claims for the same funds. From an order of distribution, Samuel Paris brings error, and the sheriff and the Citizens' Banking Company file cross errors. Judgment affirmed.

The following is the official report:

Sam Paris ruled Rogers, sheriff, in the county court, requiring him to show cause why he should not pay to movant \$300, the amount of an execution in movant's favor issued upon the foreclosure of a laborer's lien against B. S. Paris, which had been placed in the sheriff's hands. The sheriff answered that under said execution and two mortgage *fi. fas.* in favor of the Citizens' Banking Company against B. S. Paris and a certain stock of goods he had sold the stock of goods for \$1,101, and had paid over the

proceeds of the sale to the plaintiff in the mortgage *fi. fas.*, except \$300, which he had held up subject to the order of the court under the rule served upon him, and prayed for proper direction by the court as to the distribution of the fund, and for the discharge. On the hearing in the county court, movant in the rule put in evidence his affidavit to foreclose his lien for labor, the execution issued thereon, the levy entered upon the same, and closed. The affidavit stated that B. S. Paris was indebted to affiant in the sum of \$300, for that on January 1, 1897, "B. S. Paris had hired deponent as a salesman in his store in the town of Eastman, Ga., and [as a] laborer, the duties of which employment required deponent to sell goods at stipulated prices, fixed by certain selling marks, to exhibit same to customers, wrap up such packages as were sold, keep the store cleaned out, swept, and the shelves and counters dusted, carry water, build fires in the storehouse when necessary, open cases of goods and place them on the shelves, also delivering packages to customers in various parts of the town, acting then as errand boy, for which said B. S. Paris was to pay deponent \$25 per month," etc. When the plaintiff in the rule closed, the county judge called the attention of counsel representing the mortgage *fi. fas.* to the fact that no issue had been formed in the case, and that there was nothing left to be done except to order the sheriff to pay over the fund in his hands to the movant in the rule. The attorneys for the mortgagee then presented a petition which recited that the stock of goods had been sold under the mortgage *fi. fas.*, "and that before a settlement with the sheriff had been made a rule had been served upon him to hold in his hands, subject to the order of court, \$300, to be applied to a lien claimed by Sam Paris for labor done and performed as clerk in said store of B. S. Paris; the balance, except the costs, having been paid to plaintiffs. Petitioners aver that in the discharge of his duties as such clerk the said Sam Paris performed no labor such as would entitle him to a lien under the law, and upon this petitioners pray a judgment of the court, and an order directing the sheriff to pay over to your petitioners the said \$300, to be entered as a credit upon their said mortgage *fi. fas.*, and that they may have a judgment for costs in this proceeding against the said Sam Paris." This petition was dismissed by the judge of the county court on motion of counsel for movant in the rule, and the fund awarded to Sam Paris. The ground for dismissal was that the petition did not pray that the petitioner be made a party, and that it raised no issue in the case. The banking company sued out a writ of certiorari, and in the superior court the certiorari was sustained, and the case remanded to the county court for another hearing. To this judgment Sam Paris excepted, alleging that it was contrary to law and the evidence. The sheriff and the Citizens' Banking Company

filed a cross bill of exceptions alleging error in the judge's refusal to render a final judgment.

Roberts & Milner and Harrison & Bryan, for plaintiff in error. J. E. Wooten and W. M. Clements, for defendants in error.

FISH, J. The judge of the county court erred in striking the petition of the plaintiff in the mortgage *fi. fas.* upon the ground that no parties were made or issue formed in the rule proceedings, and the judge of the superior court was correct in sustaining the certiorari, and sending the case back to the county court for another hearing. Under section 4776 of the Civil Code, "all persons interested who are notified in writing by the sheriff or movant, of the pendency of the rule, will be bound by the judgment of distribution." Such notice makes them parties, and they will therefore be bound by whatever judgment may be rendered. Parties interested may, however, waive the notice, which is provided for their benefit, and come into court, and by appropriate pleadings set forth the ground of their claim to the fund. The plaintiff in the mortgage *fi. fas.* in this case took notice of the rule proceeding, and was in court with a petition setting forth its claim to the money in the hands of the sheriff, and asking for a judgment directing him to pay the fund to petitioner to be credited on the mortgage *fi. fas.* We think that such action on the part of this petitioner was as effectual in making it a party to the rule as would have been a written notice of the pendency of the rule given it by the sheriff or the movant.

It was alleged in the petition "that in the discharge of his duties as such clerk the said Sam Paris performed no labor such as would entitle him to a lien under the law, and upon this petitioner prays a judgment of the court." We are of opinion that this allegation made an issue which would have authorized the plaintiff in the mortgage *fi. fas.* to have submitted evidence for the purpose of showing that the movant in the rule did not, under his contract of employment, perform such services as would entitle him to a laborer's lien under the statute. The goods were sold under the banking company's *fi. fas.* and the execution in favor of Sam Paris, and it was too late, after the sale, for the banking company to file a counter affidavit to the foreclosure of the laborer's lien claimed by Sam Paris; but upon the rule it could contest with him for the proceeds of the sale in the sheriff's hands, and in that proceeding show anything that entitled it to the money, as fully as it could have done in any issue raised by counter affidavit prior to the sale. *Smith v. McPherson*, 78 Ga. 84. The judge of the county court did not really pass upon any contest between the banking company's mortgage *fi. fas.* and the lien claimed by Sam Paris, but dismissed the petition which sought to bring about such a contest upon the ground that

the petition did not seek to make the banking company a party to the rule proceedings, and that no issue was made. As we have already said, it was proper for the judge of the superior court to remand the case to the county court for another hearing. It results that the judgment complained of in the cross bill of exceptions should be affirmed. Judgment on main and cross bills of exceptions affirmed. All the justices concurring.

MOHRMAN v. STATE.

(Supreme Court of Georgia. Nov. 16, 1898.)

INTOXICATING LIQUORS—TIPLING HOUSE—SOCIAL CLUB—SALES ON SUNDAY.

1. The mere fact that the selling and drinking of intoxicating liquors was "only an incident, and not the main object," of the incorporation of a social club, will make the place where such liquors are dispensed and drunk none the less a tipling house, within the meaning of the statute making penal the keeping open of such houses on the Sabbath day.

2. A person who is the manager, and also a member and officer, of such a social club, and who exercises a general superintendence over the affairs of the club, including the bar from which intoxicating drinks are furnished, is amenable to the statute above referred to.

3. That "only members" are permitted in the rooms of a social club will not take such an organization out of the statute prohibiting the keeping open of tipling houses on the Sabbath day.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

J. H. Mohrman was convicted of keeping open a tipling house on the Sabbath day, and brings error. Affirmed.

E. B. Baxter, for plaintiff in error. C. Henry Cohen, for the State.

COBB, J. Mohrman was arraigned in the city court of Richmond county, charged with the offense of keeping open a tipling house on the Sabbath day. At the trial the following facts were agreed to: "(1) The rooms for keeping open which the defendant was indicted were kept open on the day named in the indictment. (2) Said rooms were used as a rendezvous where the Grabemax Social Club did gather on the Sabbath day named in the indictment, and other days, and drink, from a bar kept in the said rooms, intoxicating liquors. (3) They were kept open with the defendant's knowledge on the Sabbath day, as alleged. (4) Said rooms were rented by the Grabemax Social Club, which is incorporated, and which is an organization composed of some one hundred citizens of Augusta. All that is in them belongs to said corporation, which pays taxes thereon. The stock of liquors therein is the property of said club, and drinks therefrom were sold to members of said club on the days mentioned in the indictment. That the selling of liquor on Sunday [was] only an incident, and not the main object, of the organization. (5) Defendant is

manager of the said club, and receives a salary for his services. He was an employe and officer of the said club, with designated duties, one of which was to see that the bar in the club was properly conducted and kept open for the use of the members, from which drinks were sold. It was his business to look after the general conduct and running of the club, but he was in no sense, other than the above, the proprietor or owner of said rooms, nor had he any authority or control over them. He acted under orders, and was strictly amenable to the governing board of the said club. His authority to do all that he did do flowed wholly from his employment, and only members are permitted in the said club rooms on Sunday or any other day." On the above facts the presiding judge, sitting without a jury, found the accused guilty. His motion for a new trial on the general grounds was overruled, and he excepted. An examination of the statement of facts above quoted will show that the Grabemax Social Club was distinguished from an ordinary tipling house in three particulars: (1) The selling of liquor on Sunday was incidental to, and not the main object of, the organization. (2) The accused was an employe and officer of the club, and not the owner thereof. It was his duty, acting under orders of the governing board of the club, to see that the bar was properly conducted and kept open for the use of the members, and to exercise a general superintendence over the club. (3) "Only members are permitted in the said club rooms on Sunday or any other day." We are called upon to decide whether these three distinguishing characteristics of this social organization take it out of that class of liquor-selling establishments commonly denominated "tipling houses."

1. We are of opinion that the incidental selling of liquor will make a place none the less a tipling house than if that was the main object of its establishment. The evil intended to be corrected by the statute is the keeping open on the Sabbath day of houses where liquor is furnished and drunk; and it makes no difference, we think, for what purpose the house is being operated, if the fact remains that intoxicating liquors are furnished on the Sabbath day, to be drunk on the premises where they are supplied. It certainly can be no reply to the statute that the persons guilty of keeping open a house where liquors are sold and drunk had some other business in view, as the primary object of its operation, and that the selling of such liquors is merely an incident to this object. A person keeping a grocery store, but who kept, as incidental to his grocery business, a bar in one corner of the store, from which his friends were accustomed to gather on the Sabbath day and partake with him of intoxicating drinks, might as well make this plea as the plaintiff in error. The fact that the main purpose of the one was social pleasure, and of the other the realization of profit from his grocery

business, can make no difference. In both the selling was merely incidental to, and not the main object of, the business. In the case of *Harris v. People*, 1 Colo. App. 289, 28 Pac. 1133, the accused was convicted of "keeping open a tippling house on the Sabbath." It appeared from the evidence that he was a grocer, and kept the usual stock of goods in that line of business, and in addition kept on hand intoxicating liquors. Reed, J., in the opinion, uses this language: "The object of the statute, evidently, was to prevent places where intoxicating liquors were sold from keeping open and pursuing their traffic upon the Sabbath. It requires such places to be closed, and parties cannot evade the law by carrying on two kinds of business in the same room, and claiming that the sale of groceries was the principal, and the sale of liquors only an incident." In *Williams v. State*, 100 Ga. 511, 28 S. E. 624, it was held that where a person, "in her dwelling house, sold whisky by retail to different persons, and on each occasion permitted the same, or a portion thereof, to be drunk on the premises," she was guilty of keeping open a tippling house. The selling of whisky was only incidental to the purpose for which she occupied the house. And yet the fact that it was her dwelling did not shield her. See, also, *Harvey v. State*, 65 Ga. 568. While furnishing intoxicating drinks might have been a mere incident to the purposes for which the Grabemax Social Club was established, it does not appear but that its members, or some of them, went to the rooms of the club for the sole purpose of procuring and drinking intoxicants. A person who carries on in connection with some other employment a business which is a violation of the law is just as guilty as he who carries on such business alone.

2. The second point is controlled by the principle announced in the case of *Cochran v. State* (Ga.) 29 S. E. 438. It was there held that "evidence showing that the accused was an officer of a social club, that gaming with cards for money was carried on in a room thereof, that portions of the losses in the games played were appropriated to the use of the club, and that the accused, knowing the facts, collected and received the same for its benefit, was sufficient to warrant a verdict finding him guilty of keeping a gaming house." See, also, *State v. Mercer*, 32 Iowa, 405.

3. Is a social club which furnishes intoxicating liquors to its members only, to be drunk by them on the premises where sold, a tippling house, within the meaning of section 390 of the Penal Code, which provides that "any person who shall be guilty of open lewdness, or any notorious acts of public indecency, tending to debauch the morals, or of keeping open tippling houses on the Sabbath day, or Sabbath night, shall be guilty of a misdemeanor"? Keepers of tippling houses have sought in various ways to evade the

effect of this statute, and escape the punishment which it prescribes. Some of the methods resorted to are strikingly unique, and this court has not looked with favor upon violators of this law, and has, in every instance where it could possibly do so, upheld convictions thereunder. It has been held that "it makes no difference as to whether any liquors be sold or not. The offense consists in its being open, not in selling, or offering to sell, or giving it away." *Harvey v. State*, 65 Ga. 568. See, also, *Klug v. State*, 77 Ga. 734; *Moneses v. State*, 78 Ga. 110; *Seyden v. State*, Id. 105. In the case of *Hussey v. State*, 69 Ga. 54, no authoritative ruling was made on the question as to whether a club which furnished liquors to its members only was a tippling house, within the meaning of the statute. True, the court uses this language: "It makes no difference, in law, whether the place be called a 'barroom,' or a 'glee-club resort,' or a 'parlor,' or a 'restaurant'; if it be a place where liquor is retailed and tipped on the Sabbath day, with a door to get into it, so kept that anybody can push it open and go in and drink, the proprietor of it is guilty of keeping open a tippling house on Sunday. It makes no difference if the drinking be done standing or sitting,—at a bar or around a table; it is tippling, and the place where it is done is a tippling house; and, if anybody wishing to drink can have access thereto,—if ingress and egress be free to all comers,—it is a tippling house kept open on Sunday." The court was in that case dealing with a public resort, and, in so far as any language in the headnotes of the opinion indicates that any other character of resort would not be a tippling house, it is, of course, merely obiter. We think, however, that the first part of the language quoted will show that in the opinion of the court a house of the character now under consideration would be a tippling house. In the case of *Minor v. State*, 63 Ga. 318, an organization known as the "Albany Glee Club" was under investigation. Resolutions and by-laws for the government of the club were in evidence. From these it appeared that the main and controlling purpose of the organization was to engage in selling and drinking liquors on the Sabbath day. It was not in a strict sense a public resort, for it was provided that "no member shall invite an outsider that has not paid his quota to the benefit of the club, without the consent of two-thirds of the members present." This club was held to be a tippling house. We can see, however, some difference between the Albany Club and the club under consideration in the present case; for the latter club, according to the evidence, was thoroughly exclusive, and under no circumstances could persons other than those enjoying membership therein partake of its benefits. It does not appear, however, from the evidence, that any limitation was put upon its membership. The object of the general assembly in passing this statute, as was said by Warner, J., in *Hall v.*

State, 3 Ga. 18, "was to remove all temptation to idle and dissolute persons who might be disposed to congregate at such places and violate the Sabbath by any improper conduct." It was said in *Sanders v. State*, 74 Ga. 82, that "the purpose of the act was not only to close up such establishments on Sunday, in deference to the finer and better feelings of orderly and well-disposed people, but to remove this incitement to graver and more dangerous violations of the law." It is rather difficult to embrace within one comprehensive definition every class of resort which could properly be called a tippling house. Judge Bleckley, in *Minor v. State*, supra, says that: "It is something easier for an offender to baffle the dictionary than the Penal Code; for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps, in a broad, practical way, at the substantial transactions of men. The Code offers no definition of a tippling house. It deals with them as establishments too well known to need description, and simply prescribes a penalty for keeping them open on the Sabbath day or Sabbath night." According to *Black's Law Dictionary*, a tippling house is "a place where intoxicating drinks are sold, in drams of small quantities, to be drunk on the premises." Anderson says it is "a place of public resort, where spirituous, fermented, or other intoxicating liquors are sold or drunk in small quantities, without a license therefor"; also, "a public drinking house, where intoxicating liquor is either sold by drams to the public, or else given away and imbibed." And. Law Dict., "Tippling House." The house under consideration in the present case comes within the letter of the definition first quoted, and within the spirit, at least, of the last. See, also, *Black, Intox. Liq.* § 20. But, as Judge Warner, quoting from Chief Justice Marshall, says in *Hall v. State*, supra, "although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." And in *Sanders v. State*, supra, we find the following: "Courts are not very astute in shielding violators of this provision from punishment by resorting to niceties of verbal criticism, such as would be intelligent only to grammarians and fastidious scholars, but would utterly fail to impress less cultivated minds and tastes, in order to provide for them a way of escape."

Even if a sale is necessary before a place where liquors are furnished can be characterized as a tippling house, the weight of modern authority seems to be that such a furnishing as the evidence in the present case discloses is a sale. In the case of *State v. Lockyear*, 95 N. C. 633, a number of persons organized a club for social and literary purposes, and became duly incorporated. Incidental to the main purpose of the organization, the members, but no other persons, were permitted to purchase from the defendant, its steward, liquors and other articles, which

were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit. It was there held that the furnishing of liquors to the members of the club under these circumstances was a sale, in violation of the local option act. In the opinion, Chief Justice Smith uses this language: "There can be no question that, in a strict legal sense, the transaction described in the verdict is a sale of spirituous liquors. All the elements of an executed contract are present. The corporate body, a legal entity, and the owner of the liquor, through its servant, the defendant, delivers it to the purchaser at his call, and receives a fixed compensation in money therefor. The property in the goods passes and vests in the purchaser, and the money paid is received for, and becomes the property of, the club. Can there be any doubt that a corporation may make contracts and deal with a corporator precisely as with a stranger, and valid obligations, capable of enforcement, be thus formed between the parties? And is not this dealing with the prohibited subject directly within the terms of the statute, and does it not open the door to the mischiefs intended to be suppressed? It is not necessary that the vendor should be authorized to sell to any applicant, as an ordinary retailer. He is not allowed to sell to any one, and the fact that customers must be members of the association does not relieve him from criminal responsibility under the mandatory statute." In the opinion will be found several citations of authority supporting the ruling there made. See, also, *State v. Nels*, 108 N. C. 787, 13 S. E. 225, and authorities cited in note in the *Southeastern Reporter*. Substantially the same ruling has been made in New York. *People v. Snell* (Sup.) 12 N. Y. Supp. 40; *People v. Bradley* (Sup.) 11 N. Y. Supp. 594. At the conclusion of his opinion in *State v. Essex Club* (N. J. Sup.) 20 Atl. 769, Van Syckel, J., says that: "It is wholly immaterial whether the sale is made in open view to all who apply, or in the most secluded place, to which only the trusted few can gain admittance. The penalty of the statute is denounced against the sale without license, whether in public or private. The prohibited act is the sale without license, and in my opinion the admitted facts show that such sale was made by the defendant below in contravention of the law." See, also, *Martin v. State*, 59 Ala. 34; *People v. Soule* (Mich.) 41 N. W. 908; *Kentucky Club v. City of Louisville* (Ky.) 17 S. W. 743; *State v. Horacek* (Kan. Sup.) 21 Pac. 204. There are cases which hold that the furnishing of liquors under circumstances similar to those in the present case is not a sale, and we do not attempt to reconcile them. We think, however, that the better view is the one supported by the authorities above cited, the reasoning of which seems to be conclusive.

In this state a sale is not necessary, as has been shown, to make out the offense of keep-

ing open a tippling house on the Sabbath. Does the statute, fairly construed, embrace within its terms a house of the character described in the present case? We think so. The statute intended that all places where persons are accustomed to congregate and drink intoxicating liquors should be closed on the Sabbath day. The fact that liquors are furnished to 100 designated persons, and no others, makes the place where such liquors are supplied none the less a tippling house. It is still a place where men congregate for the purpose of drinking intoxicants. There is no limitation placed upon the membership of the club over which the plaintiff in error exercised a general superintendence. It is 100 now, and next year may be 500. It is not unfair to assume that some, at least, of its membership, are accustomed to congregate at the club rooms on the Sabbath day for the sole purpose of procuring intoxicating drinks. To hold that such a place was not a tippling house would be doing violence to the statute, and would defeat, in a large measure, the very object for which it was enacted; that is, to prevent persons congregating and imbibing intoxicants on the Sabbath day. It was claimed by counsel for plaintiff in error in his brief that the Grabemax Social Club of Augusta was "a respectable place, to which the public has not access, in which members of a club owning the resort meet for social ends, and merely drink as an incident of being there." This may be true; but it is nevertheless a tippling house, within the meaning of the statute, and must be closed on the Sabbath day. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, P. J. absent on account of sickness.

STATE v. SHEPPARD et al.

(Supreme Court of South Carolina. Feb. 1, 1899.)

INDICTMENT — SEPARATE COUNTS — MOTION TO QUASH — ELECTION OF PROSECUTION — DISCRETION — CHARGE — PRESUMPTION — CONVICTION — RIGHT TO OBJECT — PUNISHMENT.

1. A motion to quash an indictment because three misdemeanors were charged in separate counts is addressed to the sound discretion of the court.

2. A motion to compel the state to elect on which one of several counts in an indictment it will proceed is addressed to the sound discretion of the court.

3. Unless it appears that the offenses charged in separate counts of an indictment accrued out of different transactions, the state ought not to be required to elect on which one it will proceed.

4. Where no exception was taken to the charge, it will be presumed correct.

5. Defendants, convicted on only one count in an indictment containing several, cannot complain because they were tried under all.

6. While a judge keeps within the limits prescribed for punishment, the amount imposed in any case is purely discretionary.

7. Three defendants were tried under an indictment charging three separate offenses. Two

of them were convicted of one offense, and the other was convicted of two of them, and each was punished alike, though not in excess of the punishment prescribed by law. *Held*, that it would not be assumed, in the absence of any evidence as to the facts and circumstances attending the conduct of the several parties, that the court abused its discretion.

8. Defendants, convicted of disturbing a religious congregation while engaged in worship, were each sentenced to pay a fine of \$100, and be imprisoned in the county jail or the state penitentiary for one year at hard labor. *Held*, that the fine was not excessive, nor the punishment either cruel or unusual.

Appeal from general sessions circuit court of Lexington county; D. A. Townsend, Judge.

John Sheppard and others were convicted of misdemeanors, and they appeal. Defendant Sheppard abandoned his appeal, and the judgment as to the others is affirmed.

G. T. Graham and P. H. Nelson, for appellants. Solicitor Thurmond, for the State.

McIVER, C. J. The indictment under which these defendants were tried contained three counts. In the first, the offense charged was riot; in the second, the offense charged was assault with intent to kill; and in the third count the offense charged was disturbing a religious congregation. In the first count the offense was alleged to have been committed "at Countsville African Methodist Episcopal Church, in the county of Lexington and state aforesaid"; in the second count the offense was alleged to have been committed "at Lexington Court House, in the state aforesaid"; and in the third count the offense was alleged to have been committed "at Countsville African Methodist Episcopal Church, in the county of Lexington and state of South Carolina,"—all on the same day, to wit, the 20th of June, 1897. When the case was called for trial the defendants moved to quash the indictment upon the ground that it charges three offenses, which were improperly joined in the same indictment. The motion was overruled, and thereupon a motion was made requiring the solicitor to elect on which one of the counts in the indictment he would proceed to try the defendants. That motion was likewise refused, and the trial proceeded, resulting in a verdict finding the defendant John Sheppard guilty of assault with intent to kill, and disturbing a religious congregation, and finding the other two defendants guilty of disturbing a religious congregation. The court then proceeded to sentence the defendants, imposing the same punishment upon each of them. From this judgment defendants appeal upon five grounds, which are set out in the record, and need not be repeated here, as we propose to state and consider the questions which these grounds present, which are as follows: (1) Was there error in refusing the motion to quash the indictment? (2) Was there error in refusing the motion requiring the solicitor to elect upon which of the three counts he would proceed to try the defendants? (3) Was there error in im-

posing the same sentence on each of the three defendants?

The "case," as prepared for argument here, is very meager, as it contains nothing but a copy of the indictment, a brief statement of what was said by the circuit judge in refusing the two motions above mentioned, the grounds of appeal, the verdict of the jury, and the sentence of the court. At the hearing before this court the appeal as to the defendant Sheppard was abandoned, and we are therefore only to consider the appeal as to the other two defendants.

As to the first question, we do not think there was any error in refusing the motion to quash the indictment. In the first place, such a motion is generally addressed to the discretion of the court, and is not, therefore, ordinarily appealable. *State v. Shirer*, 20 S. C. 392; 10 Enc. Pl. & Prac. 567. But, even if it were, the fact that three misdemeanors were charged in separate counts in the same indictment affords no ground of exception to the indictment. As is said in 10 Enc. Pl. & Prac. 547: "It is frequently laid down as a general rule that offenses of the same class and grade, or subject to the same mode of trial and the same punishment, or punishment of the same nature, as well as distinct offenses with different degrees of punishment, the offenses themselves differing only in degree, but belonging to the same class of crimes, may be joined in separate counts." So, on page 549 of the same valuable work, it is said, "In prosecutions for misdemeanors, several distinct offenses of the same kind, requiring punishments of like nature, may be joined in separate counts of the same pleading." That this doctrine is recognized in this state may be seen by reference to the case of *State v. Smith*, 18 S. C. 149, where the cases in this state are reviewed. See, also, the subsequent case of *State v. Woodard*, 38 S. C. 353, 17 S. E. 135.

As to the second question, we see no error in refusing the motion requiring the solicitor to elect upon which count he would proceed. The rule upon this subject is thus stated in 10 Enc. Pl. & Prac. 551: "A motion to compel the state to elect upon which count it will proceed is addressed to the sound discretion of the court, as a general rule; and its action thereon will not be interfered with, unless the discretion has been used to the manifest injury of the defendant." The rule in this state, as deduced from the cases of *State v. Nelson*, 14 Rich. Law, 169, and *State v. Scott*, 15 S. C. 434, seems to be that, while distinct offenses may be charged in separate counts of the same indictment, the proper practice is, where the several offenses grow out of the same transaction, to instruct the jury to pass upon the several counts separately; but, if the several offenses charged do not grow out of the same transaction, then the proper practice is to require the prosecuting officer to elect upon which count he will proceed. In this case it has not been made to

appear that the offenses charged in the several counts grew out of different transactions, and, on the contrary, it would seem from the allegations in the indictment that the several offenses charged all grew out of the conduct of the defendants at the Countsville African Methodist Episcopal Church on the 20th of June, 1897. The charge of the circuit judge is not set out in the "case," and we can only infer from what does there appear what was its purport. No exception is taken to the charge, and we must assume that it was unexceptionable. It being the duty of the circuit judge to instruct the jury to pass upon the several counts in the indictment, we must assume, in the absence of any imputation of error in this respect, that the circuit judge performed his duty; and, in addition to this, it appears from the "case" that the jury did discriminate in their findings, as the verdict shows that they found the defendant Sheppard guilty under the second and third counts in the indictment, while the other two defendants were found guilty under the third count only, and none of the defendants were found guilty under the first count in the indictment. This shows conclusively that the jury were either properly instructed as to their duty in the premises, or that they not only knew, but performed, their duty without instruction. Besides, as the two defendants who are prosecuting this appeal (the defendant Sheppard having abandoned his appeal) were convicted under the third count in the indictment only, the practical effect, as to them, is the same as if there was no other count in the indictment; and hence they have no reason to complain.

The only remaining question to be considered is the third,—whether there was error of law in imposing the same sentence upon each of the three defendants. It is not pretended that the circuit judge exceeded the prescribed limits of punishment for each or any of the offenses charged in the indictment, and, as long as he keeps within those limits, the amount of the punishment imposed in any given case is purely discretionary with the circuit judge. Such discretion is to be measured by the circumstances of each particular case, and this court has no means of ascertaining whether such discretion has been properly exercised,—certainly not in the case now before the court, for the "case" does not disclose any of the circumstances under which the alleged offenses were committed. The complaint of the two appellants who are prosecuting this appeal is based entirely upon the fact that, while they were convicted of only one of the offenses charged in the indictment, the punishment imposed upon them was the same as that imposed upon the defendant Sheppard, who was convicted of two of the offenses charged in the indictment; and this, it is claimed, shows that the sentence imposed upon the defendants Seay and Rawls "is manifestly inequitable and unjust," and "is excessive and cruel." We do not see that this

necessarily follows. It might with equal propriety be said that it shows that the punishment imposed upon the defendant Sheppard was altogether inadequate; and of this the appellants Seay and Rawls would have no right to complain. But, as we have said, we do not know, and have no means of ascertaining, what was the conduct of each of the several parties upon the occasion in question, while the circuit judge did have before him all the facts and circumstances attending the conduct of the several parties, and was therefore in a much better position to award the proper punishment to each of the offenders; and we cannot assume, in the absence of any evidence as to these matters, that the circuit judge abused the discretion with which he was invested. All that we know is that these appellants were convicted of the very grave offense of disturbing a religious congregation while engaged in the worship of Almighty God, and were sentenced each to "pay a fine of one hundred dollars, and be imprisoned in the county jail for one year at hard labor, or be confined at hard labor in the state penitentiary for one year"; and we certainly cannot say that such a fine was "excessive," or that the punishment inflicted was either "cruel or unusual." The judgment of this court is that the judgment of the circuit court be affirmed.

BOLT, Clerk, v. GRAY.

(Supreme Court of South Carolina. Jan. 6, 1899.)

ACTION—LAW OR EQUITY—PLEADING.

1. A complaint by the administrator of an estate, on a note belonging to it, alleging that the maker and plaintiff's predecessor had a settlement, and made a mistake in calculating the amount due, and that the note was delivered to the maker on payment of less than the amount due thereon, and asking to recover the balance, declares on the note, and not for equitable relief; and hence the action is properly brought on the law side.

2. A complaint stating a good cause of action is not demurrable because it states evidentiary matter as part of the history of the case.

Appeal from common pleas circuit court of Laurens county; D. A. Townsend, Judge.

Action by John F. Bolt, clerk, etc., as administrator d. b. n. of the estate of Jane Fleming, deceased, against William L. Gray. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

The complaint was as follows: "The complaint of the above-named plaintiff respectfully shows to the court: (1) That heretofore, to wit, on the 3d day of October, 1882, the defendant, William L. Gray, Robert Gray, Joseph H. Sullivan, and Albert Dial made their joint and several promissory note, whereby they, or either of them, promised to pay, one day after the date thereof, to Jane Fleming, the sum of five hundred and fifty (\$550) dollars, with interest from date. (2)

That the said Jane Fleming died testate on or about the 28th day of May, 1892, seised and possessed of real and personal property, and that J. H. Wharton, as clerk of the court of common pleas for Laurens county, administered on her estate, with the will annexed. (3) That, before the said J. H. Wharton had fully administered the said estate, his term of office as such clerk of the court expired, and this plaintiff was duly elected to, and took charge of, the said office, on the 24th day of December, 1896, as successor therein to the said J. H. Wharton, and that thereupon the administration of the said estate was transmitted to him by virtue of such succession in office. (4) That the defendant, William L. Gray, at different times paid various sums upon the said debt to the said Jane Fleming in her lifetime, as follows, to wit: 5th November, 1883, \$40; 13th October, 1884, \$40; 7th October, 1885, \$40; 5th October, 1886, \$40; 30th September, 1887, \$40; 29th September, 1888, \$20; 12th November, 1888, \$20; 14th January, 1889, \$65; 26th June, 1889, \$25; 25th October, 1889, \$32; 13th January, 1891, \$7.41; 1st October, 1891, \$38; 4th January, 1892, \$50. (5) That after the expiration of six years from the date, or maturity of said note, the said defendant, William L. Gray, on the 7th day of April, 1893, paid to the said J. H. Wharton, as administrator as aforesaid, the sum of forty-four and thirty-five one-hundredths (\$44.35) dollars on the said debt, and thereby, in consideration of the moral obligation resting upon him to do so, promised anew to pay the balance due, and thereafter to become due, as principal and interest, upon the said debt. (6) That on the 1st day of December, 1896, the said defendant, William L. Gray, and the said J. H. Wharton, as administrator as aforesaid, undertook to have a settlement of the said debt, when the said defendant, William L. Gray, made a calculation whereby he found the sum of two hundred and fifty-eight and twenty-five one-hundredths (\$258.25) dollars as the amount then due, which said sum he, the said defendant, William L. Gray, paid on that day to the said J. H. Wharton, as administrator as aforesaid, who, relying upon the calculation made by defendant as correct, delivered said note to said defendant, who now has possession of same, and refuses to exhibit it to the attorneys for this plaintiff. (7) That a mistake was made by the said defendant, William L. Gray, as to the correct mode of calculation, and thereby a mistake was made as to the true amount due on the said debt on the 1st of December, 1896, as by a proper calculation it will be found that the true amount then due was five hundred and thirty and forty-nine one-hundredths (\$530.49) dollars; and, after the said payment of the sum of two hundred and fifty-eight and twenty-five one-hundredths (\$258.25) dollars by said defendant as aforesaid, there remained due the sum of two hundred and seventy-two and twenty-four one-hundredths (\$272.24) dollars.

which said sum is still due, unpaid, and owing upon the said debt, with interest thereon from the 1st of December, 1896, under and by virtue of the new promise aforesaid. Wherefore plaintiff demands judgment against the defendant for the sum of two hundred and seventy-two and twenty-four one-hundredths (\$272.24) dollars, with interest thereon from the 1st day of December, 1896, and for the costs and disbursements of this action."

Simpson & Barkedale, for appellant. Ball & Simkins, for respondent.

GARY, A. J. The appeal herein is from an order of his honor, D. A. Townsend, sustaining a demurrer to the complaint, a copy of which complaint will be set out in the report of the case. In sustaining the demurrer, his honor says: "The complaint alleges that there was a settlement had of the matter between the defendant and the plaintiff's predecessor in office, and the note delivered up as paid. This is an action on a note, on the law side of the court, before a jury. If there was such fraud or mistake in the settlement set out in the complaint as that the court of equity would reopen the settlement, a bill in equity for that purpose should first be brought." The circuit judge was correct in saying the action was on the note, and that it was brought on the law side of the court. *McMakin v. Gowan*, 18 S. C. 502. But he was in error in sustaining the demurrer. The complaint first stated a good cause of action on the note; but, as a part of the history of the case, it also stated certain evidentiary matters, which might have been struck out on motion to make the complaint definite and certain, but did not render it subject to a demurrer. *Saunders v. Phelps*, 53 S. C. 173, 31 S. E. 54, and cases therein cited, to which may be added the case of *Latham v. Harby*, 52 S. C. 128, 27 S. E. 862. It is the judgment of this court that the order of the circuit court be reversed.

STATE v. TAYLOR et al.

(Supreme Court of South Carolina. Feb. 1, 1899.)

CRIMINAL LAW—INSTRUCTIONS ON FACTS—IMPEACHMENT.

1. Where the accused, when questioned on the stand as to certain admissions, is advised of the person to whom, and the time and place at which, they were claimed to have been made, contradictory evidence is admissible.

2. The judge in a criminal case, on being asked if he would object to charging as to tracks as evidence, charged: "Tracks are facts in the case. You have heard the testimony as to the tracks. It's a link— I won't say that. They are submitted as a circumstance in the case, and you are to pass upon the facts." *Held* not in violation of Const. art. 5, § 23, prohibiting a charge as to the facts.

3. Where there was testimony that defendants, accused of obstructing a railroad track, had admitted they saw the cross-tie on the track, shortly before it was struck by the train, and that one of them, when asked why he did

not remove it, said, "It was near train time, and didn't have time," a charge as to the law relating to confessions and admissions, unattended by any intimation of the judge that defendants had made any confession or admission of guilt, was not error.

Appeal from general sessions circuit court of Beaufort county; James Aldrich, Judge.

Walter Taylor and Isaac Taylor were convicted of the crime of obstructing a railroad track, and appeal. Affirmed.

W. S. Tillinghast, for appellants. G. Duncan Bellinger, for the State.

McIVER, C. J. The defendants were indicted for, and convicted of, the offense of obstructing the track of the Charleston & Savannah Railroad by placing a cross-tie on said track. From the judgment rendered upon such conviction the defendants appeal upon the several grounds set out in the record.

The first exception imputes error to the circuit judge in allowing the state, in reply, to prove by a witness, D. Mann, deputy sheriff, what one of the defendants, Walter Taylor, said to him, on the day he was arrested. It appears that this defendant had been examined as a witness on his own behalf, and on his cross-examination the following occurred: "Q. You remember, after Mr. Mann arrested you, having a talk with him about the tie? A. No, sir. Mr. Mann, after he arrested me, asked me— said, 'I want to know something about obstructing this railroad.' I asked him, 'Which road?' He told me the Charleston & Savannah road. I told him I knowed nothing about that road; I had been down in the field working. Q. You asked him which road he meant? A. Yes, sir. Q. Did you not tell him you saw that tie on the railroad track? A. No, sir. Q. You remember, after he arrested you, between the railroad and your house— A. No, sir; it was not between the railroad and the house. Q. Well, where was it? A. It was at my house. Q. You did not tell him anything about the cross-ties that day at your house? A. No, sir." On the examination of Mr. Mann, a witness offered in reply by the state, the following occurred: "Q. Did you have any conversation with these boys as to the placing of that cross-tie on the track? A. Yes, sir. (This was objected to after the answer, on the ground that the foundation for a contradiction had not been laid. The court overruled the objection.) Q. Did you or did you not hear this boy say—Walter Taylor—that he saw the cross-tie on the railroad track? A. Yes, sir. Q. The day you arrested him, near his house, did you ask him about this tie on the track? A. Yes, sir; he told me he saw it on the track." From the foregoing, which we have extracted from the "Case," it seems to us that a sufficient foundation was laid for the contradiction of Walter Taylor, in the reply, even if he had been an ordinary witness, and not the party accused; for Walter Taylor, while on the stand, was

distinctly advertised of the time (the day of his arrest) and the place (at his house) as well as to the person (Mr. Mann) to whom he made statements in conflict with those which he had testified to. But, in addition to this, Walter Taylor being one of the accused, it would have been competent, even if he had not gone on the stand, to prove any admissions or confessions (otherwise competent) in reference to the crime charged. The first exception must therefore be overruled.

The second, third, and fourth exceptions impute error to the circuit judge in what he said, in his charge to the jury, as to the tracks of two persons found at the point where the cross-tie seemed to have been placed on the railroad track, and from thence traced to the house where these defendants lived. What the circuit judge said to the jury on the subject of the tracks was called out by the request of defendants' counsel, as will be seen by the following extract from the judge's charge, which contains all that he said to the jury about "tracks": "Mr. Tillinghast: Would your honor object to charge as to tracks as evidence? The court: The constitution prohibits the judge from charging upon the facts, and the question of tracks would be upon the facts of the case. That is decided in the case of *State v. Green* (S. C.) 26 S. E. 234. Well, gentlemen, tracks are facts in the case. You have heard the testimony as to the tracks. It's a link— I won't say that. They are submitted as a circumstance in the case, and you are to pass upon the facts." The complaint seems to be that by these remarks the circuit judge expressed or intimated his opinion to the jury on the facts, in violation of the constitutional provision upon that subject. We do not so construe these remarks. The practical effect was simply to say to the jury, in response to the request of defendants' counsel, that the tracks testified to by some of the witnesses were circumstances in the case to be considered by the jury; and we see nothing in the remarks made by the judge which could be regarded as conveying any intimation to the jury of the judge's opinion as to the force or effect of the testimony as to the tracks. These three exceptions must, therefore, be overruled.

The only remaining exception (the fifth) complains of error in that portion of the judge's charge which relates to confessions; but the complaint is, not that there was any error in the principles of law there laid down, but because it was inapplicable to the case, inasmuch as it is claimed that there was no testimony of any confessions in this case. While it is quite true that no witness testified that these defendants, or either of them, admitted that they were guilty of the offense charged, yet there was testimony that both of these defendants admitted that they saw the cross-tie on the track a very short time before the approaching train struck it; for one of them, when asked why he did not re-

move the cross-tie, replied, "It was near train time, and didn't have time to move it." If this testimony was true, then there was a confession, or at least an admission, on the part of these defendants, that they were at the spot where the obstruction was placed a very short time before the train struck the obstruction. This was, however, stoutly denied by both of the defendants when they were on the stand as witnesses. In this state of the testimony, there was no error or impropriety on the part of the circuit judge in instructing the jury as to the rules of law in reference to confessions or admissions; and in what he said we find nothing which indicates any intimation of an opinion on the part of the circuit judge that the defendants had, in fact, made any confessions of guilt, or any admission of any fact tending to show guilt. The fifth exception must therefore be overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

WARING et al. v. WARING.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

WILLS—CONSTRUCTION—VESTED REMAINDER.

1. Testator, by his will, devised to his son during his life, and at his death to his children, certain lands. Another clause of the will provided that, in case any of testator's children should die leaving no lineal descendants, their respective shares should be equally divided between "my surviving children and the lineal descendants of such as may be dead, the descendants to take such parts as their ancestors would have taken if alive." Of the devisee's children five survived. One had died without issue, leaving a widow, on whom he had settled the estate which he took under his grandfather's will, and one died during the life of his father, leaving a widow and five children. *Held*, that each of the grandchildren took a vested remainder of the land devised to their father for life.

2. Upon the death of the infant children their interests were inherited by their father.

3. The widow of the grandson dying without issue took, under the marriage settlement, the interest acquired by her husband.

Appeal from circuit court, Essex county.

Suit by one Waring against one Waring and others to construe the will of Capt. William L. Waring. From a decree in favor of complainant, defendants appeal. Affirmed.

Evans & Evans, for appellants. Ware & Carter, for appellee.

BUCHANAN, J. By clause 5 of the will of Capt. William L. Waring he devised to his son, Robert Payne Waring, during his natural life, and at his death to his children, the lands sought to be partitioned in this suit. The devisee had 11 children, of whom 5 survived him; four died in infancy, without issue; one, G. Wortley Waring, who, after arriving at the age of maturity, died without issue, leaving a widow, the complainant in this

sult, upon whom, prior to his marriage, he had settled the estate which he took under his grandfather's will; and one William L. Waring, who died during the life of his father, leaving a widow and five children.

It is conceded that under that clause of the will, standing alone, the children of Robert Payne Waring took a vested remainder of one-eleventh each, but it is contended that, when that clause is considered in connection with the thirteenth clause, it should be construed as giving the land to Robert Payne Waring for life, and at his death to his lineal descendants living at the time of his death.

The thirteenth clause is as follows: "In case any of my children should die leaving no lineal descendants living at the time of their respective deaths, then it is my will that their respective portions of all the property hereinbefore devised and bequeathed to them respectively shall be equally divided between my surviving children and the lineal descendants of such as may be dead, the descendants to take such part as their ancestors would have taken if alive."

The word "children" has a definite legal signification, and, where no other words are joined with it, it has, in general, no other meaning but issue in the first degree. 2 Minor, Inst. In order that it may be construed to mean lineal descendants of a more remote degree, there must be something on the face of the will to show that it was so intended, for no rule is better settled than that technical words are presumed to be used technically, and that words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument. *Nye v. Lovitt*, 92 Va. 710, 713, 714, 24 S. E. 345, and authorities cited.

It seems to us that the purpose, and the only purpose, of the testator by clause 13 was to make a further disposition of the property given by former clauses of his will to such of his children as might die leaving no lineal descendant at the time of their deaths respectively. But, if a child died leaving a lineal descendant, the property given him, whether he took the whole or lesser estate therein, passed according to the terms of such bequest or devise, and as if the will did not contain clause 13. But, whatever may have been the object of the testator by clause 13, there is nothing in it, or any other portion of the will, to show that the word "children," in the fifth clause, was used in any other than in its well-defined technical sense.

We are of opinion, therefore, that each of the children of Robert Payne Waring took a vested remainder of one-eleventh each in the lands devised to their father for life; that upon the death of the infant children their interests were inherited by their father (Code, § 2548); and that complainant, the widow of G. Wortley Waring, acquired his interest under the marriage settlement made upon her.

The circuit court so held, and its decree must be affirmed.

RIELY and CARDWELL, JJ., absent.

TALBOTTON R. CO. v. GIBSON.

GIBSON v. TALBOTTON R. CO.

(Supreme Court of Georgia. Dec. 17, 1898.)

PLEADING—PETITION—CORPORATIONS—ACTION BY OFFICER—RECOVERY OF SALARY—PAYMENT—EVIDENCE—NONSUIT.

1. The petition substantially complied with the law requiring the cause of action to be set forth "in orderly and distinct paragraphs, numbered consecutively."

2. There is no reason why a salaried officer of a corporation, elected and serving from year to year, whose yearly compensation is fixed by a resolution of its board of directors, may not, if it becomes necessary for him to sue for the recovery of an amount so due him, make out his claim against the corporation in the form of an account, and bring suit upon it as such.

3. Where a corporation is sued by A., and pleads payment, evidence that the plaintiff authorized B., who was at the time its secretary and treasurer, to collect from the corporation the amount which it owed the plaintiff, and to appropriate it towards the payment of an account which he owed B., and that B. did so collect and appropriate the money, is admissible under such plea.

4. Where the requisite foundation is not laid for the introduction of books of account, they are inadmissible.

5. Evidence which is only indirectly relevant to the issue on trial, but which tends somewhat to illustrate it, and to aid the jury in arriving at the truth of the matter, is admissible.

6. An order sustaining a motion to "nonsuit a part of a plaintiff's cause of action" is an erroneous ruling.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by T. N. Gibson against the Talbotton Railroad Company. From the judgment, both parties bring error. Reversed.

A. J. Perryman, J. J. Bull, and Brannon, Hatcher & Martin, for plaintiff. J. H. Worrell and C. J. Thornton, for defendant.

FISH, J. 1, 2. There was no merit in the demurrer to the plaintiff's petition. The petition substantially complied with the law requiring the cause of action to be set forth "in orderly and distinct paragraphs, numbered consecutively." See *Wingate v. Bank*, 95 Ga. 1, 22 S. E. 37. It was not demurrable, because the plaintiff declared upon an account, and not upon a special contract. The bill of particulars attached to the petition showed that the account sued on was for several years' salary, due by the defendant corporation to the plaintiff, for his services as its president; the years in which the services were rendered, and the respective amounts due for each year, being specified. We know of no reason why a salaried officer of a corporation, elected and serving from year to year, whose compensation for each year is fixed by resolution of its board of directors,

may not, if it becomes necessary for him to sue for the recovery of an amount so due him, make out his claim against the corporation in the form of an account, and bring suit upon it as such. It has been repeatedly held by this court that, under the old statutory form which was prescribed by the act of 1847 for "an action upon an account," the plaintiff could recover upon proof of a special agreement to pay the amount charged in the account. *Johnson v. Quinn*, 52 Ga. 485; *Id.*, 51 Ga. 289; *Roberts v. Harris*, 32 Ga. 542; *Schmidt v. Wambacker*, 62 Ga. 321. See *Bright v. Railroad Co.*, 88 Ga. 535, 15 S. E. 12; *Kirkland v. Dryfus* (Ga.) 29 S. E. 612. As the act of 1847 did not undertake to say in what cases "an action upon an account" could be brought, but simply provided a form which might be used for such an action, these decisions clearly show that an action upon an account may be brought for goods sold or services rendered, whether there is a special agreement, or not, to pay a specified sum for such goods or services.

3. One ground of error, alleged in the main bill of exceptions, is that the court below sustained the motion of the plaintiff "to rule out all of the testimony introduced by the defendant, and to direct a verdict for the plaintiff for \$600, with interest from the 1st day of May, 1892." The record does not disclose the grounds upon which this motion was predicated. Being left to mere conjecture to ascertain what these grounds were, we are at a loss to know upon what theory the court sustained this motion. S. W. Thornton, a witness for the defendant, testified "that he was secretary and treasurer of the Talbotton Railroad Company; that in 1891 he paid the salary of Mr. Gibson as president of the road, and that he paid the salary of Mr. Gibson from May, 1891, to May, 1892, as well as all other salaries that were due him; that he was carrying on a mercantile business in Talbotton, and that Mr. Gibson was elected president of the Talbotton Railroad Company, and that he was elected secretary and treasurer of the said company; that Mr. Gibson ran an account at his store, and agreed and directed him to collect his salary from the Talbotton Railroad Company, and to credit it to his (Mr. Gibson's) account; * * * and that, acting under this agreement and instruction from Mr. Gibson, he collected Mr. Gibson's salary from the Talbotton Railroad Company as president, and gave him credit upon his account for it." This testimony was certainly relevant, under the defendant's plea of payment, which, though defective, was not demurred to, and the court should not have ruled it out; for, if the plaintiff did authorize Thornton to collect from the Talbotton Railroad Company the amount which it was due the plaintiff on account of his salary, and to credit it upon an account held against him by Thornton, and Thornton did so, then the indebtedness of the railroad company to the plaintiff was extinguished. This testimony, unimpeached

and uncontradicted, would have sustained the plea of payment. There was a direct conflict, on this point, between the evidence of S. W. Thornton and that of Gibson, the plaintiff; but, Thornton's testimony being admissible, the issue thus raised should have been determined by a jury. Upon proper objection being made thereto, so much of the testimony of the defendant's witness W. J. Thornton, with reference to the payment by the railroad company of the plaintiff's salary, as appears to be based, not on his own personal knowledge, but on his conclusions from an inspection of entries on the books of the company, made by a former bookkeeper thereof, whom the witness succeeded, would have been inadmissible. If the motion to rule out the defendant's testimony, so far as the evidence of this witness was concerned, was based upon the fact that he appeared to be giving simply his conclusions, arrived at by inspecting these entries on the books, the court would not have erred in excluding from the jury this part of his testimony.

There was no error in ruling out "the books of original entry of the Talbotton Railroad Company," which were offered by the defendant for the purpose of "showing that the salary of the plaintiff had been paid." Irrespective of the ground of the objection which was made, it is clear that these books were not admissible, because no effort whatever had been made, by preliminary proof, to lay the foundation for their introduction. The Civil Code clearly prescribes the conditions under which books of account are admissible as evidence, and without a substantial compliance with these conditions they are not competent testimony.

5. While, ordinarily, the two drafts, payable to Ragland, and the two orders, payable, respectively, to Mamie Gibson and Smith, all of which appeared to have been drawn by the plaintiff on S. W. Thornton, would have been entirely irrelevant in a suit of this kind, we think, in view of the direct conflict in the testimony of S. W. Thornton and that of Gibson, they were admissible. As Thornton testified that Gibson owed him, and authorized him to collect his (Gibson's) salary from the defendant corporation, and apply it as a credit on this indebtedness, and Gibson testified that he never gave Thornton any such authority, and that Thornton was indebted to him more than he was to Thornton, we think the true state of the private accounts between them, at the time that Thornton claimed that he was authorized to collect Gibson's salary, was a circumstance which the jury might properly consider in weighing the testimony of these two witnesses, and, therefore, any evidence which tended to show what it was at that time was admissible. Evidence which is only indirectly relevant to the issue on trial, but which tends somewhat to illustrate it, and to aid the jury in arriving at the truth of the matter, should be admitted. *Walker v. Mitchell*,

41 Ga. 102. The rule in this state is to admit evidence which is of doubtful relevancy. *Augusta Factory v. Barnes*, 72 Ga. 218; *Dalton v. Drake*, 75 Ga. 115; *Railway Co. v. Flannagan*, 82 Ga. 580, 9 S. E. 471.

6. In the cross bill of exceptions it is stated that, at the close of the plaintiff's testimony, "the defendant moved that the court grant a nonsuit, so far as the items of account for the years from 1887 to May, 1891, were concerned, upon the ground that these items were barred by the statute of limitations," and that the court granted the motion. Error is assigned upon this ruling. We know of no such thing as a partial nonsuit. The effect of a nonsuit is to abruptly terminate the whole case. It puts the entire case out of court, leaving the plaintiff at liberty to bring it again. To "nonsuit" simply a part of the plaintiff's cause of action would be to divide the case into two parts, dismissing one portion, which the plaintiff could bring again, and allowing the remainder to be tried, and a verdict and judgment to be rendered therein. We are aware of no precedent for such a practice as this. As said by this court in *Swain v. Insurance Co. (Ga.)* 29 S. E. 147, "the order passed in the case at bar should be treated, not as the granting of a nonsuit, but merely as an erroneous ruling." Although this ruling of the court was, as a matter of practice, erroneous, if it clearly appeared from the evidence that all the items of the account affected by it were barred by the statute of limitations, so that, if the whole case had been submitted to a jury, under proper instructions relative to the plea of the statute, a verdict which, in effect, found against all of them, would have been demanded, we should not feel disposed to reverse the court upon this point, for the plaintiff would not have been hurt by the error. But, according to the cross bill of exceptions, the plaintiff introduced the minutes of the board of directors of the defendant corporation, which showed that, at the May meeting of the company in each of the years 1887, 1888, 1889, 1890, and 1891, he was elected president, and his salary fixed at \$300 per year, except as to the last year, when his salary was fixed at \$600. The plaintiff himself testified "that he was the president of said road for the years beginning in May, 1887, and ending the 1st of May, 1892," and "that he had received no part of his salary for any of said years." The evidence as to when each year's term of service began and ended appears to have been admitted without objection. As the suit was filed February 18, 1896, if the plaintiff was employed by the defendant as its president by the year, it is apparent, under the testimony submitted, that his salary for the year beginning May 1, 1890, and ending May 1, 1891, was not barred by the statute of limitations. We therefore sustain this exception.

As we have already seen, this is a case

which, under the pleadings and the evidence, should have been submitted to a jury for determination, and, as the statute of limitations is pleaded, at the next trial the court can submit this question to a jury under proper instructions. Judgment reversed on both main bill and cross bill of exceptions. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

TAYLOR v. AMERICAN FREEHOLD LAND-MORTGAGE CO. OF LONDON, Limited.

(Supreme Court of Georgia. Dec. 17, 1898.)

MORTGAGE BY WIFE—PAYMENT OF HUSBAND'S DEBT—USURY—EVIDENCE.

1. Where a husband made to his wife a conveyance of land upon which he had previously executed a mortgage to a third person, and the wife, being thus clothed with the title, borrowed money, and gave her promissory note for the same, intending to use a portion thereof in paying off the incumbrance, which was in fact done, she could not, although the intention to pay off the incumbrance was known to the lender at the time the loan was made, defeat a recovery by the lender upon the note, either in whole or in part, upon the ground that it was given for her husband's debt, or for money with which to pay the same.

2. Under the facts disclosed in the present record, the note which is the foundation of the plaintiff's suit is a Georgia contract, and as such will be upheld as not violative of the usury laws of this state, there being no evidence tending to show bad faith, or any device or contrivance to evade the usury laws of the state of New York.

3. There was no error in the rulings on the admissibility of evidence. The evidence demanded a finding in favor of the plaintiff, and the court did not err in directing the jury to return a verdict in its favor.

(Syllabus by the Court.)

Error from superior court, Lee county; W. N. Spence, Judge.

Suit by the American Freehold Land-Mortgage Company of London, Limited, against Clara E. Taylor. Judgment for plaintiff. Defendant brings error. Affirmed.

Allen Fort, J. W. Walters, James Taylor, and Estes & Jones, for plaintiff in error. W. E. Simmons and Anderson, Felder & Davis, for defendant in error.

COBB, J. 1. It appears from the evidence that E. Taylor owned certain lands, and that he gave a mortgage on the same to Thomas, and that after the execution of this mortgage Taylor conveyed the land to his wife. All of the money borrowed by Mrs. Taylor, and which was the consideration of the note sued on, except what was used to pay for commissions and insurance, was applied to the payment of the Thomas mortgage. Mrs. Taylor claims in her plea that this was such an assumption of the debt of her husband as to render her promise void. That such a transaction is valid and binding upon the wife was held in the case of *Daniel v. Royce*, 96 Ga. 566, 23 S. E. 493. In that case Justice Lumpkin says: "A note given by a mar-

ried woman, the consideration of which, pure and simple, is a debt due by her husband, is certainly void. But it by no means follows that she may not bind herself by a note given by her for a loan of money with which to pay off an incumbrance on her own property, although this incumbrance may have been created by the husband himself before she became the owner. In such a case it makes no difference at all that the lender knew the purpose for which the money was borrowed. The policy of the law is to forbid the wife from making herself in any manner liable for the husband's debt as such; but there is no good reason why a wife, when she becomes the owner of property formerly belonging to the husband, may not use her own means or borrow money for the purpose of relieving the property of a lien of the existence of which she fully knew when she accepted the husband's conveyance. In such a case she does not discharge the lien because it represents the husband's debt, and the consideration which moves her is not a purpose to relieve him from the indebtedness, but to free her own property from an existing incumbrance." See, also, *Strickland v. Gray*, 98 Ga. 667, 27 S. E. 155.

2. Mrs. Taylor was a resident of Georgia, and the note sued on was signed in this state. It was payable at the office of the Corbin Banking Company in New York City, to J. K. O. Sherwood, or order, and indorsed by him without recourse to the plaintiff. The note bears 8 per cent. interest. To secure this note Mrs. Taylor executed in this state a warranty deed of even date with the same to certain lands in this state, the deed reciting that it was intended to conform to certain sections of the Code of Georgia in reference to security deeds. It further appeared that Mrs. Taylor had made a written application for the loan, executing the application in Georgia, and offering therein as security real estate situated in this state, expecting a lender to be found by her agent elsewhere; that afterwards the application was accepted in New York by a person whom it may be presumed was a resident of that state; and that she executed the note and the deed above referred to as security, the note and the deed, after the latter was recorded, being delivered in New York by her agent, to whom it is clearly inferable from the evidence the money was there delivered. An examination of the facts as contained in this record brings the case clearly within the rulings made by this court in its former decisions, and the question whether, under such a state of facts, the contracts are to be treated as Georgia contracts, must be considered as no longer an open one in this state. *Security Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. 81; *Jackson v. Mortgage Co.*, 88 Ga. 756, 15 S. E. 812; *Stansell v. Trust Co.*, 96 Ga. 227, 22 S. E. 898; *Underwood v. Mortgage Co.*, 97 Ga. 239, 24 S. E. 847. The evidence disclosing nothing from which it could be inferred that there

was any purpose or attempt to violate or evade the usury laws of New York, the transaction will be upheld unless it is in violation of the usury laws of this state. The evidence showed that Mrs. Taylor made application to Felder to procure a loan, agreeing in the application to pay certain commissions; that this application was forwarded to the Corbin Banking Company, a New York corporation engaged in the brokerage and banking business; that by an arrangement with Felder and the Corbin Banking Company the latter was to receive a part of the commissions; that the amount for which the application was made was sent by the banking company to Felder, after the commission which that company was to retain had been deducted therefrom; that the banking company sent to Felder the note, deed, and bond for titles, which were the papers necessary to complete the transaction; and that in all these papers the lender appeared to be J. K. O. Sherwood. There does not seem to be any direct evidence that Sherwood delivered the money to the Corbin Banking Company, but this is necessarily to be inferred from the circumstances. It further appeared that Felder, with the knowledge of Mrs. Taylor, appropriated the money to the payment of the Thomas execution, and the commission due him, and for insurance on the property; that there was not enough to pay in full all of these items, and that for the purpose of procuring the additional amount necessary a note signed by Mrs. Taylor and indorsed by Felder was executed. There was no evidence that Sherwood received any part of the money retained by the Corbin Banking Company as commissions, and nothing whatever appears in the record to negative the conclusion that he had not actually parted with the full amount for which the note was given. See *Hudson v. Mortgage Co.*, 100 Ga. 83, 26 S. E. 75. There is no direct evidence that the Corbin Banking Company was the agent of Sherwood, but, even if this could be inferred, there was absolutely no evidence tending to show that he knew that the Corbin Company had retained any part of the money as commissions. Under this state of facts there was no usury in the transaction. Such is what we understand to be the repeated adjudications of this court. *Boardman v. Taylor*, 68 Ga. 638; *Merck v. Mortgage Co.*, 79 Ga. 213, 7 S. E. 265; *Hughes v. Griswold*, 82 Ga. 299, 9 S. E. 1092; *Riley v. Olin*, 82 Ga. 312, 9 S. E. 1095; *McLean v. Camak*, 97 Ga. 804, 25 S. E. 493.

3. There was no error in refusing to allow E. Taylor to testify that his wife was ignorant of the fact that a verdict and judgment finding the property subject had been rendered against her on her claim interposed in Lee superior court to the levy of the Thomas mortgage execution. This verdict and judgment was consented to in open court by attorneys who appeared as representing Mrs. Taylor, and, while the evidence offered tends

to establish that they acted in the matter without conferring directly with their client, there is no pretense that the attorneys who consented to the verdict and judgment were not duly authorized by Mrs. Taylor to represent her in the trial of the case, and, this being true, it is immaterial whether she knew of what had been done in the case or not. See Civ. Code, § 4417; *Webster v. Trust Co.*, 93 Ga. 279, 20 S. E. 310. If her attorneys exceeded their authority, or she has suffered by their negligent conduct, she has a remedy against them, but the verdict and judgment would nevertheless be valid.

There was no error in refusing to allow E. Taylor to testify that at the time he gave Thomas the mortgage on the lands in Lee county he told Thomas that Mrs. Taylor's money had paid for the lands, and that he (Taylor) simply held the paper title to the same, and that Thomas remarked: "All right; he would risk it anyhow, as he already had a mortgage on the house and lot in Americus, which was good security for all the debt except the interest." It was contended that this evidence was admissible, because the plaintiff had taken a transfer of the Thomas mortgage execution, and that, therefore, notice to Thomas was notice to the transferee. The plaintiff is not seeking to enforce the Thomas mortgage execution, and for this reason the evidence was irrelevant, and properly excluded.

This case is controlled on all points by the former decisions of this court cited above. We have carefully read every line of this brief of evidence, and, after as thorough an investigation of the facts as it is possible to give a case, we have reached the conclusion that, if a verdict had been rendered in favor of the defendant on any of the pleas filed by her, there would have been absolutely no evidence to support such a finding. Her contentions are not directly supported by any proof, nor sustained by any legitimate inferences from any of the facts in evidence. Such being the case, we cannot but hold that the circuit judge was correct in directing the jury to find as they did. Civ. Code, § 5381. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., disqualified.

WILLIS v. STATE.

(Supreme Court of Georgia. Oct. 13, 1898.)

CARRYING WEAPONS.

Evidence showing that the accused, while a passenger in a railway car, had about his person a satchel with a strap thereto attached, which rested upon his shoulder, and that this satchel contained a pistol concealed from view, will warrant a conviction under section 341 of the Penal Code.

(Syllabus by the Court.)

Error from city court of Newnan; Alvan D. Freeman, Judge.

Perry Willis was convicted of carrying weapons, and brings error. Affirmed.

The following is the official report:

The plaintiff in error, having been convicted, moved for a new trial, upon the grounds that the verdict was contrary to law and the evidence. The motion was overruled, and he excepted. The evidence was as follows: J. D. Brewster testified: "On July 10, 1898, while passing through an excursion train that stopped at Newnan, I heard Perry Willis say, 'There are those damn country police.' I am a policeman in the city of Newnan, and, when Willis used the above language, I sought to arrest him for profanity. At this time Willis and his wife were sitting on the same seat, and between them there was a satchel or hand bag. This bag was open, and they were eating out of it. All I saw in the bag was some lunch, and under this lunch was some paper. Attached to this bag was a long strap, which reached to and around Perry Willis' shoulder, and was around and over his shoulder. The bag was not suspended by said strap, but was sitting on seat between them, and resting entirely on said seat. Perry Willis resisted arrest. I called Mr. Will Cavender to my assistance. A scuffle ensued, and I struck Willis with my club. Cavender grabbed Willis on one side, and I had hold on the other. We took him out of seat and train, and satchel was left on seat. I do not know how strap got off of his shoulder. Once during scuffle he made a motion as if to get to satchel, which was on seat. The satchel was not strapped around him, but the strap which was attached to said satchel rested on his right shoulder while he was sitting down, and the satchel and his wife were to the right of him. We caught hold of him while he was sitting down. When we got to calaboose, his wife came running up with satchel,—the same satchel left in train. It seemed that she wanted to get it to him. I objected to her turning it over to defendant, and demanded that she hand it to me. She then started away with satchel, and I left defendant with Cavender, and went after her, and got satchel. We took satchel, and found in it a pistol, some lunch, and a pint of whisky. The satchel was the same one we saw between them, and out of which they were eating. Before we opened satchel, and about the time we took it from his wife, Willis said, 'If you are looking for a pistol, there is one in that satchel.' I do not know whether there was a pistol in satchel at time we saw it on train or not. I could not see one. I found in his pockets cartridges of same caliber as pistol. I first saw Willis when I walked in train when it stopped in Newnan. This was in Coweta county. The calaboose is about one hundred yards from the place where I boarded train. I could not be mistaken as to the fact of the strap attached to satchel being around shoulder of defendant when he was on seat in train at Newnan, and it could easily have slipped off his shoulder in the scuffle during the arrest. When we got defendant out of train, he had neither the satchel nor his hat." Cavender corroborated

the evidence of Brewster. The accused made a statement as follows: "When Mr. Brewster came into the car, my wife and myself were eating our lunch out of a satchel which was between us. There was no strap on my shoulder. The satchel was on seat. I used no profane language. I did not tell Brewster and others there was a pistol in satchel."

W. L. Stallings, for plaintiff in error. W. C. Wright, for the State.

LUMPKIN, P. J. This case presents for decision a single question, viz. whether or not the evidence warranted a conviction under section 341 of the Penal Code, which declares: "Any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol, dirk, sword in a cane, spear, bowie-knife, or any other kind of knives manufactured and sold for the purpose of offense and defense, shall be guilty of a misdemeanor." The preceding official report sets forth all the evidence, as well as the statement of the accused. We have no difficulty in holding that the jury were warranted in finding that the pistol which the accused was charged with carrying unlawfully was in the satchel at the time he was arrested in the car. This being so, the naked question for decision is: Does a man violate the above-quoted section of our Penal Code by concealing a pistol in a traveling bag or satchel, placing the receptacle by his side upon a seat in a railway car, and attaching it to his person by means of a strap thrown over his shoulder? We think this question is answered in the affirmative by the decision of this court in *Boles v. State*, 86 Ga. 255, 12 S. E. 361, in which it was ruled that it was not essential to a violation of the statute "for the weapon to be concealed in the clothing of the person, but the same result is accomplished by carrying it in a basket or bag upon the arm, and not for transportation alone." In *Crawford v. State*, 94 Ga. 774, 21 S. E. 992, a doubt was intimated whether, by the use of the words "and not for transportation alone," this court intended to express the view that carrying a pistol concealed in a basket or bag for transportation only would not be a criminal offense. Be this as it may, the question whether or not having or carrying about the person in a satchel, "for transportation alone," a pistol not exposed to view is a violation of section 341 of the Penal Code, is nowhere made in the present case. There is nothing, either in the evidence or in the statement of the accused, tending to show that he set up or relied upon any such defense; and it does not appear that the trial judge, in charging or in refusing to charge, in any manner dealt with the question just stated. The case was argued here by briefs. There is no contention in the brief filed by counsel for the plaintiff in error that the accused should have been acquitted upon the idea that he was carrying

the pistol "for transportation alone." The only points insisted upon in that brief were (1) that the accused did not have the pistol "about his person," even conceding he had placed it in his satchel; and (2) that the evidence failed to show the pistol was in fact in the satchel while in the possession of the accused. It would therefore be improper for this court to undertake now to decide whether or not it would be penal for a person to carry a pistol concealed in a satchel, when it affirmatively appeared that his only purpose in so doing was to convey the weapon from one place to another. Accordingly, we simply hold that, on the facts appearing in the record before us, a conviction was warranted. In support of our present decision, see *State v. McManus*, 89 N. C. 555; 5 Am. & Eng. Enc. Law (2d Ed.) p. 733, and authorities cited in note 1. Judgment affirmed. All the justices concurring.

RAY v. FLEETWOOD.

(Supreme Court of Georgia. Dec. 17, 1896.)

ACTION ON ACCOUNT—EVIDENCE.

In the trial of a suit, where the defendant admits an indebtedness to the plaintiff, but claims that the amount of such indebtedness has been, by agreement with the plaintiff and a third person, paid over to such third person, the record in a suit by the plaintiff against such third person upon an account, embracing numerous items, running through a number of years, to which is filed a plea of set-off upon an account of similar nature, and which was tried before the alleged agreement was entered into, and resulted in a judgment in favor of such third person for a balance due, while not conclusive evidence that all matters of account between the parties were settled in such suit, is admissible in evidence as a circumstance tending to establish that such is the fact; but it is subject to explanation.

(Syllabus by the Court.)

Error from superior court, Telfair county; O. C. Smith, Judge.

Action by W. F. Ray against Green Fleetwood. Judgment for defendant, and plaintiff brings error. Reversed.

D. C. McLennan, for plaintiff in error. Elson & McRae, for defendant in error.

COBB, J. Ray sued Fleetwood upon an account as follows: "1896, Feb. 6. To one-half interest in one scab raft of pine timber, consisting of 60 pieces, in Ocmulgee river, in Coffee county, \$92. 1896, Feb. 10. By cash, \$22.50. Balance due, \$69.50." From the evidence at the trial it appeared that the 60 pieces of timber mentioned in the account were furnished to the plaintiff by Mrs. Mary E. Girtman, under an agreement that he was to cut and haul the timber, raft it to Darien, and sell it, and they were then to divide the proceeds equally. The defendant agreed with the plaintiff to buy the plaintiff's half interest in the timber for \$92, provided he could buy the other half interest from Mrs. Girtman. Mrs. Girtman sold the

defendant her half interest, and the plaintiff delivered the timber to him. The transaction occurred about February 1, 1897. The defendant subsequently paid plaintiff the \$22.50 credited on the account sued on, but paid the balance of the \$92 to Mrs. Girtman. According to the defendant's evidence, the plaintiff authorized him to pay this money to her. Mrs. Girtman testified that the plaintiff owed her husband's estate, of which she was administratrix, \$100 or over, and she let him cut the timber to pay what he owed the estate, agreeing to divide the proceeds with him as above stated, and when the defendant came to her, with the plaintiff, to buy her interest in the timber, the plaintiff agreed for the defendant to pay her, on the account he owed the estate, the money coming to him for his interest in the timber, except about \$20, which the defendant was to pay him. She and plaintiff had a lawsuit in a justice's court some time after the "timber transaction." He sued her as administratrix of her husband's estate, and the case was disposed of some time in May, 1897. The plaintiff, in his testimony, denied that he had agreed that the money should be paid to her. He testified that, at the time of the sale of the timber to the defendant, she claimed that he (plaintiff) had made an account in her name with Cook & Co., and she wanted the defendant to hold up the money coming to the plaintiff until that account was settled; that he (plaintiff) denied that he had made such an account, but agreed that the defendant should hold up the money, except \$22.50, until he could satisfy her that he had made no such account; and they were to meet at her house at a specified time after the sale of the timber by the defendant. The defendant did not meet him as agreed, but paid the money to Mrs. Girtman without his consent. The trial resulted in a verdict for the defendant. The plaintiff's motion for a new trial was overruled, and the movant excepted.

Error is assigned in the motion for a new trial upon the refusal of the court to admit in evidence a certified copy of the record of a certain case in the justice's court between plaintiff and Mrs. Girtman; the evidence being offered for the purpose of showing that he was not indebted to her for the timber involved in the present litigation, and that she did not hold any demand against him for the timber, and for the additional purpose of impeaching her testimony. The paper referred to was attached to the motion for a new trial, and was the record of a suit brought on April 16, 1897, by the present plaintiff against Mrs. Girtman, as administratrix, upon an open account containing numerous items, bearing dates from June 1, 1890, to August, 1895, with a credit of \$35; leaving the net amount claimed to be due, \$100. No item in this account seems to have any relation to the timber transaction involved in the present suit. To this suit

Mrs. Girtman filed a plea of set-off, upon an account containing the following items:

To one note, paid as per contract, made for the purchase of one sewing machine	\$ 52 00
To 400 bundles of fodder, 800 lbs., at \$1.00	8 00
To 250 bundles of fodder, 500 lbs., at \$1.00	5 00
To 46 lbs. bacon, at 10.....	4 60
To 4 1/4 lbs. lard, at 10.....	45
To 12 bus. of corn, at 75.....	9 00
To 3 pks. peas, at \$2.25.....	1 68
To 1/4 bu. seed potatoes, at 50.....	25
To 18 sticks of timber, at \$1.00.....	28 00
To one promissory note, payable to Warren Girtman or bearer, dated and due, due and payable, in 1894 & 1895	32 70
	\$111 78
For guano	3 00
	\$114 78

On May 19, 1897, this case was tried, and resulted in a judgment in favor of Mrs. Girtman against Ray for \$9.85.

We think this evidence should have been admitted. The evidence in the present case was sharply conflicting on the controlling issue; that is, whether Ray had ever authorized Fleetwood to pay to Mrs. Girtman the balance due him for his one-half interest in the raft of timber. The contention of Ray was that he did not give the authority, and his reason for the same was that he did not owe Mrs. Girtman, as administratrix, anything, except the amount of the judgment recovered in the suit, the record of which was offered in evidence, and that, therefore, there was no occasion for the arrangement which Fleetwood claimed had been made between Mrs. Girtman, Ray, and himself. The testimony of Mrs. Girtman was that Ray owed the estate of her deceased husband a debt of \$100 or over, and that it was in part payment of this claim that he had authorized Fleetwood to pay over to her the balance due on the purchase money of the raft of timber. The plea of set-off filed by Mrs. Girtman in the suit in the justice's court sets up a claim against Ray in favor of the estate of her husband of something over \$100. If this was the claim referred to in her testimony, the judgment rendered in the suit between her, as administratrix, and Ray was a settlement of the matter, and evidence of this settlement would be a strong circumstance tending to support his contention. It does not distinctly appear from the evidence of Fleetwood or Mrs. Girtman when the alleged agreement with Ray was made. It can be inferred, however, from their testimony, that it was before the suit in the justice's court. It can be gathered from the testimony of Ray that, if any agreement was ever entered into, it could not have been made until after the judgment in the justice's court; he giving as one of his reasons why he did not enter into this agreement that his only indebtedness to the estate of Girtman was the judgment rendered on this

suit in the justice's court. It is true that, in the order overruling the motion for a new trial, the judge says that the evidence shows that the "timber transaction" was in February, 1897; but this probably does not refer to anything more than so much of the transaction as related to the purchase by Fleetwood of the interests of Ray and Mrs. Girtman in the raft of timber. In the light of the record, the meaning of the expression "timber transaction," as used in the judge's order, must be limited in this way. If the agreement between Ray and Fleetwood that the amount due by the latter to the former should be paid over to Mrs. Girtman was entered into after the suit in the justice's court, it is apparent that the record of that suit would be admissible as a circumstance to discredit the testimony of Mrs. Girtman as to Ray's indebtedness to the estate of her husband at the time of the alleged agreement. While it is true that a defendant is not bound to plead all matters of set-off which he has against a plaintiff, still, when matters of a certain character are so pleaded, and others of similar character are omitted, and are attempted to be enforced in subsequent transactions, the fact that such other matters were not relied upon in the plea is a circumstance tending to establish that the subsequent claim did not in fact exist. When this record is admitted, it is, of course, subject to explanation; and it may be shown that Ray was indebted to Mrs. Girtman, as administratrix, in another amount, not embraced in this suit, and upon which had been credited the amount paid Mrs. Girtman by Fleetwood, or any other fact tending to show that Ray at the time of the alleged agreement was really indebted to the estate of Girtman. Being subject to such explanation, the evidence rejected is not of great probative value, but the plaintiff was entitled to the benefit of it, in order that the jury might pass on its worth; and we think the case should be tried again, with this evidence before the jury. Judgment reversed. All the justices concurring.

DAVIS v. STATE.

(Supreme Court of Georgia. Nov. 19, 1898.)

BURGLARY—EVIDENCE—VARIANCE—CONFESSION.

1. On the trial of a person charged with burglary, by breaking and entering a railroad depot with intent to steal therefrom certain goods, it was not error in the court to refuse to rule out testimony of a witness who swore from his memory, after having made a personal examination of the goods, what amount of the particular class alleged to have been stolen was shipped and stored in the depot before the burglary, and what quantity had been missed therefrom after the breaking and entering, although it appeared that the amount of such goods was also indicated by waybills in the custody of the witness.

2. Where, on the trial of an indictment for burglary which charged the accused with breaking and entering the depot of the "Chattanooga

Southern Railroad Company," proof was made by the state that the depot of the company named was burglariously entered as charged, testimony, offered in behalf of the defendant, to the effect that the corporate name of the owner of the depot was "Chattanooga Southern Railway Company," even if admitted, would not establish a material variance between the allegations in the indictment and the proof.

3. Proof of the corpus delicti may be sufficient corroboration of a confession of guilt to sustain a verdict of guilty. There was no error in the court so charging the jury; the court expressly stating, in the same connection, that such proof "might be a form of corroboration, but the jury in every case are the judges of what corroborations are sufficient."

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Wilson Davis was convicted of burglary, and brings error. Affirmed.

Copeland & Jackson, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

LEWIS, J. Wilson Davis was indicted by the grand jury of Walker county for the offense of burglary, "for that, on the 24th day of April, 1897, in the county aforesaid, he did unlawfully, burglariously, and feloniously break and enter into the depot of the Chattanooga Southern Railroad Co., at Kensington, Ga., said depot being a place where valuable goods were stored and kept, with intent to commit a larceny therein, the said intent being then and there to take and carry away seven sacks of cotton-seed meal, of the value of ten dollars, with intent to steal the same." On the trial of the case there was proof introduced by the state that, when the depot was closed on a certain afternoon, there was a given quantity of cotton-seed meal therein, and that the next morning seven sacks of this meal were found missing. It further appeared that, while one of the windows was up in the depot, the blinds to the same were closed, and that the next morning the blinds were found open and the window down. The defendant confessed to entering the depot, and taking therefrom the seven sacks of cotton-seed meal, and carrying them to a certain place. He implicated in his confession another party as an accomplice, who, he stated, made the opening in the depot for him before he entered. Cotton-seed meal answering to the description of that stolen was found at the place where the defendant stated he had put the stolen goods. The defendant was found guilty, with recommendation that he be punished as for a misdemeanor, and, upon overruling his motion for a new trial, he excepted.

1. The first assignment in the motion for a new trial is that the court erred in overruling the motion of movant to rule out the evidence of the witness Smith relative to the date of receiving the goods alleged to have been taken from the depot at Kensington, the fact of receiving such goods, and the amount received. This motion was based up-

on the ground that it appeared, from the evidence of said witness, that the alleged facts testified to were in writing. It appeared, from the testimony, that the only writings on the subject were waybills, giving the amount of the goods that had been shipped to this depot. But the witness did not undertake to testify to the contents of the waybills, or any other written instrument. He testified from his recollection, after having inspected and counted the sacks of cotton-seed meal, both before and after the alleged crime, as to what was stored in the depot, and what had been taken therefrom. The waybills alone, instead of being the highest proof of this fact, would not have been any proof at all. They could only serve as a memoranda to refresh the recollection of the witness as to what goods were actually in the depot; but it seemed the witness needed no such aid, and, manifestly, his testimony on the subject was admissible, and was evidence of as high a character as could have been procured.

2. Complaint is further made that the court erred in refusing to admit in evidence the act of the legislature, approved October 27, 1898, showing that the same line of railroad upon which the depot was located was incorporated as the "Chattanooga Southern Railway Company." The indictment charged the depot to belong to the "Chattanooga Southern Railroad Company." The object of this proof was, manifestly, to show that the depot was not the property of the company named in the indictment, but of another company. We think there was clearly no error in refusing to allow the proof offered. It was proven by the state that the depot belonged to the Chattanooga Southern Railroad Company, as charged in the indictment. Even if the proof had shown that the name of the corporation owning the depot was improperly stated, by its being called a "railroad," instead of a "railway," company, we do not think such a slight variance between the allegation and proof would have been fatal. As will be seen by the case of Jackson v. State, 76 Ga. 552 (Syl. point 6), and the opinion of the court on page 567, the controlling question upon this point is whether or not "the indictment, by its description, sufficiently identifies the artificial person it mentions as the same being as that which is created by the act of the legislature." The words "railway" and "railroad" have identically the same meaning, and we think the identification of the owner of the depot in this case was sufficiently clear from the description in the indictment, notwithstanding there might have been a slight error made in the use of a wrong word identical in meaning and similar in sound to the particular term used in the charter. There is no doubt that, as a general rule of law, when an indictment alleges that property, which is the subject-matter of such a crime as larceny or burglary, belongs to a corporation, the name of the corporation should be proved as laid, and any

material variation would be fatal. 1 Bish. New Cr. Proc. §§ 488, 682.

There is some conflict of authority as to what would constitute a material variation in such matters. In the case of McGary v. People, 45 N. Y. 153, 154, the indictment for arson charged the building fired as belonging to the "Phoenix Mills Company," and it appeared on the trial that the true corporate name of the company owning the building was the "Phoenix Mills of Seneca Falls." It was there held the variation was fatally defective. In the case of Sykes v. People, 132 Ill. 32, 23 N. E. 391, the indictment charged an intention to defraud the "Merchants' Loan & Trust Company, organized and incorporated under and by virtue of the laws of the state of Illinois." The proof showed that the name of the corporation was the "Merchants' Savings, Loan & Trust Company," and such variance was held to be fatal. In both these cases, however, it will be seen that there was a total omission of an entire word or words which formed an integral part of the corporate name. These decisions are the strongest we have been able to find that would even tend to support a contrary view to our ruling in this case; but it will be readily seen that the variation between the indictment and proof in each of those cases is much greater than what exists in the case at bar. Here there is no omission of an integral part of the corporate name, but merely the use of a wrong word, which means identically the same thing as the word used in the charter. The decisions, however, cited in the New York and Illinois cases above, we think in conflict with the rule in Com. v. Jacobs, 152 Mass. 276, 25 N. E. 463, where it was decided that no fatal variance existed where the indictment used the words "Warren Club," and the proof showed that the corporate name was the "Warren Social Club," if the club was as well known by one name as the other. In accord with the principle ruled in the Massachusetts case is the decision of this court in Rogers v. State, 90 Ga. 463, 16 S. E. 205, in which it was held that, where an indictment charged the cotton was stolen from the possession of the "Central Railroad & Banking Company," and the proof showed that the corporate name of the company that had possession of the goods was the "Central Railroad & Banking Company of Georgia," the variance was immaterial. In the case of Putnam v. U. S., 162 U. S. 687-691, 16 Sup. Ct. 923, the above cases from New York and Illinois are referred to, but not indorsed, while the decision of this court in Rogers v. State is approved. The exact question raised by this record was ruled in the case of State v. Goode, 68 Iowa, 593, 27 N. W. 772, where it was decided: "That the company from which the alleged embezzlement was made was called 'Railroad Company' in the indictment and instructions, while its corporate name was 'Railway Company,' held to be immaterial."

We think, therefore, that it is well estab-

lished by authority that while, as a general rule, the proof should conform to the allegations in the indictment, both with respect to the name of the defendant and to names of other persons necessary to be described, yet a variance not affecting the identity of the parties will be immaterial. 10 Enc. Pl. & Prac. p. 510. Applying this rule to the case under consideration, we think there can be no question that the variance sought to be shown by plaintiff in error is utterly immaterial. It could not possibly have affected the identity of the corporation alleged to be the owner of the depot. The state proved by witnesses that that was the depot belonging to the company named in the indictment. Manifestly, then, the company was known, at least, by some, under the descriptive name set forth in the indictment. Even the agent, an employé of the corporation itself, who is presumed to be familiar with the name by which his company is ordinarily called, gives it the identical name mentioned in the indictment.

3. Exception was taken to the charge of the court to the effect that a confession of guilt might be corroborated by proof of the corpus delicti; the court in this connection charging the jury, in substance, that if they believed it was satisfactorily established that a burglary had been committed by somebody, as charged in the indictment, then "that would be a sufficient corroboration of the confession to justify a conviction, if the jury believe that it was sufficient corroboration; that is, it might be a form of corroboration, but the jury in every case are the judges of what corroborations are sufficient." Error is assigned on this charge, on the ground that it strongly tended to express an opinion of the court against movant. While the charge of the court was rather awkwardly expressed, yet we think the manifest meaning can be gathered therefrom that it was not the purpose of the court to charge, as a matter of law, that proof of the crime having been committed was sufficient corroboration of a confession, but simply to state that the jury were authorized to draw this conclusion, and that the sufficiency of the corroboration was one entirely for them to pass upon. The question as to whether a confession was made, and whether a crime had been committed as charged, was, under the charge of the court, left entirely with the jury, and there was no intimation of any opinion on these facts, as complained of by plaintiff in error.

The only remaining grounds in the motion are those of a general nature,—that the verdict is contrary to law and evidence. It will be observed, from the brief recital of the facts above given, that the burglary was not only shown, but a confession of guilt was established, and, in addition to being corroborated by proof of the burglary, was corroborated further by the fact that the goods were found where the defendant stated in his confession he had carried them. We think, therefore, the testimony not only sustains,

but demands, a verdict of guilty. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, P. J., absent on account of sickness.

BATTLE v. STATE.

(Supreme Court of Georgia. Nov. 16, 1898.)

HOMICIDE—INSTRUCTIONS—EVIDENCE—NEW TRIAL
—REMARKS OF COUNSEL.

1. The written request to charge was fully covered by the charge given.

2. The prompt condemnation by the court of the improper language used by the solicitor general, and the instruction to the jury that they should be controlled by the evidence only in trying the case, were sufficient to counteract any injurious effect to the defendant which such language may have tended to produce upon the minds of the jury.

3. There was no merit in the ground of the motion for a new trial based on the alleged newly-discovered evidence.

4. The evidence demanded a verdict of guilty, the jury saw fit not to recommend imprisonment in the penitentiary for life, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Reuben Battle was convicted of murder, and brings error. Affirmed.

Jas. Davison, for plaintiff in error. H. G. Lewis, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

FISH, J. Upon the trial of Reuben Battle, charged with the murder of James Davis, there was a verdict of guilty, without a recommendation. The testimony of the witnesses for the state was to the effect that Battle assassinated Davis. When the state closed its evidence, defendant's counsel announced that he would only contend that the defendant should be recommended to imprisonment for life. The defendant, in his statement, admitted the assassination, and said he shot Davis because the latter had, several days prior to the homicide, cursed him and threatened to kill him, and he feared such threat would be carried into effect. The grounds of the original motion for a new trial were that the verdict was contrary to law and the evidence, etc.

1. The first ground of the amended motion was that the court erred in refusing to charge the following written request: "The law leaves with you in capital cases the discretion of fixing the punishment at imprisonment for life, or of fixing the death penalty. This is a matter which is governed by no rule save your discretion. If you fix the death penalty, or if you make it life imprisonment, in either event you have discharged your duty under your oath and under the law." The court, in its charge, instructed the jury: "The punishment for the offense of murder is death, but it is within the discretion of the jury trying the case to recommend that the defendant be imprison-

ed in the penitentiary for life. * * * If you believe, from the evidence in this case, that the defendant, Reuben Battle, assaulted the person alleged in the indictment, and if you believe that with malice aforethought he killed the deceased, at the time and place and in the manner alleged in the indictment, it would be your duty to return a verdict of guilty, either with or without a recommendation to mercy, as you see proper." And, in instructing the jury as to the forms of the different verdicts, the court said: "Or you can say, 'We the jury find the defendant guilty, and recommend that he be imprisoned in the penitentiary for life,' and in that event your verdict would be the sentence of the court." There are many rulings of this court to the effect that the court is not bound to charge in the exact language of a request, and that a new trial will not be granted for refusing to charge as requested, when the charge given substantially covers the request. *Long v. State*, 12 Ga. 204; *Tolleson v. State*, 97 Ga. 352, 23 S. E. 993; *Keener v. State*, 97 Ga. 388, 24 S. E. 28. See a number of civil cases cited under section 5479, p. 1667, Civ. Code. The charge given in the case under consideration was clear and accurate as to the jury's discretion to recommend that the defendant be punished by imprisonment in the penitentiary for life, in the event they should find him guilty of murder. The court expressly instructed them that the recommendation was in their discretion, that they could make it if they saw proper, and gave the form of the verdict containing a recommendation, and told them, if they returned such a verdict, the sentence of the court would be in accordance therewith. The request was fully covered by the charge.

2. In the second ground of the amended motion for a new trial, complaint is made that the solicitor general, in his argument to the jury, said: "You must do it. The time has come in the history of the country when it is demanded,"—meaning that the jury should find the defendant guilty without a recommendation of life imprisonment in the penitentiary. As to this ground, the court certifies as follows: "The solicitor general used the language as stated, and counsel for defendant immediately complained thereof, and asked me to charge the jury not to be controlled by the appeal of counsel; and I immediately told the jury that the language of the solicitor general was improper, and, in trying this case, they would be controlled only by the evidence." We are of the opinion that this prompt condemnation by the court of the improper language of the solicitor general, and the instruction to the jury that they should be controlled only by the evidence in trying the case, were sufficient to have counteracted any injurious effect to the defendant which such language may have tended to produce upon the minds of the jury. There was no mo-

tion for a mistrial. *Hudson v. State*, 101 Ga. 520, 28 S. E. 1010.

3. The third and last ground of the amended motion for a new trial was based upon alleged newly-discovered evidence. The affidavits of four persons were submitted to sustain this ground. Charles J. Doherty deposed that: "I have known the boy, Reuben Battle, since he was very young, and have had ample opportunity to know his mental condition. Said defendant is stupid and idiotic, and from my knowledge of his mental condition, as above shown, to wit, his stupid and idiotic demeanor, I regard him as being an idiot and of unsound mind. I believe Reuben Battle was an idiot and of unsound mind on the 12th day of April, 1898 [the date of the homicide]." L. H. Branch deposed that: "I know the defendant, Reuben Battle, who is charged with murder. His sister has been in my employ for some time, and I had opportunity for observing the boy while he was at his sister's house, where he spent a good portion of his time. Said Battle is stupid and idiotic, and from my knowledge of his mental condition, to wit, his being stupid and idiotic, I consider him simple-minded." Mrs. H. M. Robertson deposed that: "I know Reuben Battle. A few years ago said Battle was employed by me as a general help in conducting a family grocery store of which I am proprietress. On account of his employment by me I had ample opportunity to know his mental condition. Said Battle had just mind enough to obey an order, without having sense enough to know the consequence of the act; and, if he had been ordered by me to kill some one, he would have obeyed. While in my employment, said Battle once went on the street, and began to halloo, without any cause, at the top of his voice, and no one could prevail on him to stop. From my knowledge of said Battle's mental condition, formed by his actions as above set forth, as well as by his entire manner and mental condition while in my employ, I believe him to be an idiot, and consequently of unsound mind." John E. Barnhart deposed that: "I am marshal of the city of Greensboro. I know the defendant, Reuben Battle, who is charged in this case with murder. Said defendant has spent a great portion of his life around the city of Greensboro, and in my position as marshal I have had cause to observe the defendant, and form a knowledge of his characteristics. Said Reuben Battle is stupid and idiotic, and from my knowledge of his mental condition, because of his stupidity and idioecy, I consider him simple-minded." G. A. Merritt, an attorney at law, and James H. McWhorter, the ordinary of Greene county, made affidavit as to the credibility of the four above-named affiants. The defendant himself made affidavit that he did not know of the existence of this evidence until after verdict, and that it could not have been discovered by ordinary diligence; that because of his poverty he was unable to employ counsel to represent him; and that, after counsel had been

provided for him, he did all in his power or knowledge to aid his counsel in the preparation of the case for trial, and informed him of the existence of all testimony that, so far as defendant knew, would likely be of benefit in the case. Defendant's counsel made affidavit that he did not know of the newly-discovered evidence until after verdict, and that it could not have been discovered by ordinary diligence; that he was employed in the case, only four days prior to the trial, by defendant's half-sister; that deponent used ordinary diligence to discover all testimony of witnesses who would swear to any relevant or material fact of benefit to defendant; "that, while said Battle showed no interest in his case, appeared utterly unaware of his situation, and gave other evidences of his condition, deponent could not, by the exercise of ordinary diligence, discover before said trial any creditable witness by whom he could prove said mental condition; nor did deponent have any reason to believe that he would or could be able to discover such evidence or witnesses by the next court, so as to authorize him to move for a continuance." As a counter showing, there was submitted for the state the joint affidavit of 10 persons, who deposed as follows: "That they are acquainted with Reuben Battle, convicted of murder at the last term of Greene superior court, and have known him for several years. Affiants say that said Reuben Battle is a negro of ordinary intelligence, knows the difference between right and wrong, and is responsible for his acts. Affiants never had any intimation before that said Reuben Battle was at all idiotic, and never saw or heard of anything indicating that he was not of sound mind."

So far as the record shows, these affidavits as to the mental condition of the defendant were submitted to and considered by the court without objection. Only one of them, that of Doherty, referred to the defendant's mental condition at the time of the homicide. None of the affiants appear to have been experts, yet they gave no facts upon which they based their opinions, except Mrs. Robertson. and the only fact stated by her for believing defendant to be an idiot was that, while in her employ as general help in her store, he on one occasion and without cause hallooed at the top of his voice on the street, and no one could prevail on him to stop. The bare opinions of the affiants, unaccompanied by any facts, doubtless had little weight with the court. Even if the defendant was stupid, simple-minded, or of unsound mind at the time of the homicide, he was criminally responsible, if he then had reason sufficient to distinguish between right and wrong in relation to the particular act he was about to commit, unless he committed such act in consequence of and in connection with some delusion which overmastered his will, so that he had no criminal intent. See *Graham v. State* (Ga.) 29 S. E. 582, where the prior rulings of this court upon the subject are cited. If the defendant was

an idiot at the time of the homicide, of course, he could not be held criminally responsible. Cr. Code, § 86. An idiot is one "who hath had no understanding from his nativity." 1 Bl. Comm. 304. He is a natural fool, or fool from birth. It is not probable that the persons who made the affidavits in behalf of the defendant intended to swear that he was an "idiot," in the real sense of the term. The circumstances of the homicide, the defendant's statement, his manner and appearance at the trial, his affidavit presented upon the motion, the fact that the trial was had in the town of Greensboro, where defendant had spent a great portion of his life, and where the counsel employed by his half-sister resided, and the fact that all the witnesses who testified for the state knew the defendant, one of them having been his companion and bed-fellow, and, so far as the record shows, no one giving the least intimation of his mental condition, before the verdict, were all matters which the court doubtless took into consideration, in connection with the weakness of the evidence submitted for defendant, in reaching the conclusion that there was no merit in this last ground of the motion for a new trial.

4. The evidence, if not defendant's statement itself, demanded a verdict of guilty of murder; the jury, in their discretion, saw fit not to recommend punishment by life imprisonment in the penitentiary; and there was no error in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent. and LUMPKIN, P. J., absent on account of sickness.

STATE v. COTTRELL.

(Supreme Court of Appeals of West Virginia.
Feb. 8, 1899.)

BURGLARY—INDICTMENT—SENTENCE—DISQUALIFICATION OF JUDGE.

1. In an indictment, a count evidently intended for burglary, which fails to charge the offense as burglariously committed, is bad, and should be quashed. *State v. Meadows*, 22 W. Va. 768.

2. A person found guilty by the verdict of a jury, under a bad count for burglary, cannot be sentenced for housebreaking, although the indictment contain a good count, charging the latter offense.

3. It is improper for a judge to try indictments signed by him as prosecuting attorney.
(Syllabus by the Court.)

Error to circuit court, Ritchie county; R. H. Freer, Judge.

Richard Cottrell was convicted of burglary, and brings error. Reversed.

P. Lipscomb, for plaintiff in error.

DENT, J. Richard Cottrell was tried for a felony in the circuit court of Ritchie county, found guilty, and sentenced to two years in the penitentiary. On a writ of error to this court he relies on the following assignments: (1) That the count in the indictment on which

he was found guilty should be quashed, because it fails to use the word "burglariously"; (2) that the judge who tried the case was also the prosecuting attorney who signed the indictment.

The indictment is as follows: "The State of West Virginia, Ritchie County, to wit: In the Circuit Court of said County. The grand jurors of the state of West Virginia, in and for the body of the county of Ritchie, and now attending the said court, upon their oaths present that Richard Cottrell, on the — day of July, 1896, in said county of Ritchie, the dwelling house of one H. J. Amos therestate, in the nighttime of that day, feloniously did enter, without breaking the same, with intent the goods and chattels of the said H. J. Amos, in the said dwelling house then and there being, feloniously did steal, take, and carry away, and three pillows of the value of one dollar each, and three pillow slips of the value of twenty-five cents each, one bucket of the value of twenty-five cents, and one lamp of the value of one dollar, three table forks of the value of fifty cents each, and two chairs of the value of one dollar each, and one pepper box of the value of twenty-five cents, and one coffee mill of the value of one dollar, and three bed quilts of the value of two dollars each, of the goods and chattels of the said H. J. Amos, in the said dwelling house then and there being found, feloniously did steal, take, and carry away, against the peace and dignity of the state. And the jurors aforesaid, on their oaths aforesaid, do further present that the said Richard Cottrell, on the — day of July, 1896, in the said county of Ritchie, a certain other dwelling house of H. J. Amos there situate, in the daytime of that day, did feloniously break and enter; with intent the goods and chattels of the said H. J. Amos, in the said dwelling house then and there being, feloniously to steal, take, and carry away, and three pillows of the value of one dollar each, and three pillow slips of the value of twenty-five cents each, and one bucket of the value of twenty-five cents, and one lamp of the value of one dollar, and three table forks of the value of fifty cents each, and two chairs of the value of one dollar each, and one pepper box of the value of twenty-five cents, and one coffee mill of the value of one dollar, and three bed quilts of the value of two dollars each, of the goods and chattels of the said H. J. Amos in the said dwelling house then and there being found, feloniously did steal, take, and carry away, against the peace and dignity of the state. R. H. Freer, Prosecuting Attorney." The prisoner moved to quash it, which motion was never acted upon. The jury brought in a verdict of guilty under the first count of the indictment. The prisoner moved to set it aside and in arrest of judgment. The court overruled his motion, and sentenced him to two years' confinement in the penitentiary.

The first count evidently attempts to charge burglary, but fails for want of the word

"burglariously," and it therefore should have been quashed, and, the jury having found their verdict on such bad count, the judgment should have been arrested and the count quashed, for the reason that there is no punishment prescribed by the statute for the offense charged. *State v. Meadows*, 22 W. Va. 766. The court, however, presumably not desiring to quash papers prepared when holding the office of prosecuting attorney, proceeded to sentence the prisoner under the second count. For burglary the punishment is not less than five nor more than fifteen years in the penitentiary; for housebreaking, it is not less than one nor more than ten years; and for petit larceny, it is not exceeding one year in jail. The time fixed was evidently under the second count, as it could not have been under the first, nor could it have been for petit larceny. The things charged as taken were less than \$20 in value.

Nor is it proper for a judge to try indictments signed by him as prosecuting attorney. No prosecutor likes to quash his own papers, and his knowledge of the facts obtained while prosecutor may tend to prejudice the prisoner's right to a fair and impartial trial. Evil appearances should be avoided, that the fountain of justice may be kept pure. The judgment is reversed, the verdict set aside, the first count in the indictment is quashed, and the case remanded to be proceeded in according to law.

KNIGHT et al. v. TOWN OF WEST UNION et al.

(Supreme Court of Appeals of West Virginia.
Nov. 10, 1898.)

ORDINANCE—REPEAL—MUNICIPAL BONDS—ELECTION—INFORMALITIES—DE FACTO OFFICERS—TAXATION.

1. A subsequent municipal ordinance, fully covering the subject-matter of a previous ordinance, being a substitute therefor, repeals the former by implication, without words to that effect.

2. In a municipality having less than 600 voters, an election confined solely to the question of the issue of municipal bonds is not invalid because conducted in the mode prescribed for the election of municipal officers in the absence of political or party nominations.

3. Mere informalities of the election officers in holding, and ascertaining and declaring the result of, an election, unless otherwise provided by statute, will not vitiate an election otherwise fair and impartial.

4. In an ordinance the authorization of bonds not to exceed \$8,000 is equivalent, in legal effect, to fixing the amount of such bonds at such sum. In either case, the authorities would only have the right to issue bonds sufficient to cover the purpose for which the ordinance is adopted.

5. The acts of de facto municipal officers, within the scope of their authority and under color of law, are valid and binding, in the absence of clear proof that they are not the de jure officers of such municipality.

6. Section 31, c. 47, Code, authorizes towns and villages chartered under such chapter to levy taxes, not exceeding one dollar on every hundred dollars of property within such municipality.

(Syllabus by the Court.)

Appeal from circuit court, Doddridge county; R. H. Freer, Judge.

Suit by T. K. Knight and others against the town of West Union and others. Decree for defendants, and plaintiffs appeal. Affirmed.

W. S. Stuart, for appellants. Willis & Stuck and J. V. Blair, for appellees.

DENT, J. Injunction against the issue of waterworks bonds by the municipal authorities, which was dissolved on final hearing by the circuit court of Doddridge county. Plaintiffs appeal, and rely upon numerous alleged errors, as follows, to wit:

1. As the first assignment of error is merely general, and is admitted to be covered by the other assignments, it becomes unnecessary to discuss it specifically.

2. The second assignment is, in effect, that, at the time of the passage of the ordinance in controversy, there was already in existence an unrepealed ordinance, relating to the same subject-matter, appearing in the minutes of the council. The adoption of a subsequent ordinance, covering fully and completely the subject-matter of a former ordinance, operates by implication to repeal the same. 23 Am. & Enc. Law, 485.

3. The third, fourth, and fifth assignments relate to the mode of holding the election. The appellants insist that it should have been held under the present, or what is known as the "Australian," ballot system; whereas, it was held in the mode and according to the laws in force prior to the adoption of such system in this state. It is conceded by appellants' counsel that the election was held as provided in section 85, c. 29, Acts 1895, for the election of municipal officers, in absence of party nominations, in municipalities containing less than 600 voters, and that the town of West Union was a municipality coming within the purview of such law. Section 4, c. 141, Acts 1872-73, provides: "Such elections shall be conducted in all things according to the laws then in force governing elections and the provisions of the charter of the city, town or village in which they are held." This means in so far, of course, as such provisions are applicable, and is to the effect that such election, when held in a municipality, shall be conducted in all things as elections for municipal officers are conducted; and hence, as it is in no wise a party question, and in a municipality containing less than 600 voters, it should be conducted as elections for municipal officers are conducted when there are no party nominations. The words, "in which an election is held for municipal officers," are used in opposition to elections held for national, state, and county officers, and were not intended to exclude elections held for other municipal purposes. In a simple bond election of this character, it is not reasonable to hold that the legislature intended it should be held under the intricate and nonapplicable provisions of the Australian

ballot system. Nor was there any good reason why the council should postpone the ascertainment of the result until after the fifth day of the election, as no irregularities on its part, as to ascertaining, declaring, and recording the result, could possibly invalidate the same. Its duties in this respect are merely ministerial, and are subject to correction in the manner provided by law.

4. In the fifth assignment it is insisted that the ordinance is invalid, for the reason that the amount of bonds to be authorized, instead of being fixed at \$6,000, is fixed at a sum not to exceed \$6,000. One expression is equivalent to the other, and in either case it would be necessarily construed to mean that the council was authorized to issue bonds to the amount of \$6,000, if necessary, for the purpose expressed in the ordinance; otherwise not. It is time enough for the council to make provision for the investment of the sinking fund when it accrues.

5. The sixth assignment of error is unsustainable, because it clearly appears that the authorities had given sufficient notice, and were proceeding to sell said bonds at public sale, to the highest bidder in writing. The notice was to the public, and was sufficiently explicit to be in compliance with the statute.

6. The seventh assignment of error relates to the conduct of election officers. It is the settled law of this state that misconduct of election officers, which does not affect the result of the election, cannot invalidate such election. *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

7. The eighth assignment attacks the official integrity of the mayor and council of the town. They are admitted to be de facto officers, with the title to their offices unimpeached, except in this collateral proceeding, and, unless the contrary plainly appears, they will be presumed to be de jure officers, and all their official acts be respected and upheld. Mere vague charges as to their failure to qualify will not render their official acts void.

8. The ninth assignment relates to the title of the ordinance, "An ordinance for the issue of waterworks," which the appellants insist is insufficient to give notice of the subject-matter thereof. This is clearly shown to have been a mere clerical omission in the recordation of the ordinance. It is, however, self-corrective, as it easily suggests the words necessary to make complete sense. No person was misled thereby, as it appears from the bill to have been properly corrected in the published copy thereof.

9. The tenth assignment is: "Because the regular annual levy of the said town for running the same was already 60 cents on the hundred dollars, and the said 25 cents additional direct annual levy is unlawful, and exceeds the limit fixed by said section 1 of chapter 141 of said Acts of 1872-73." A sufficient answer to this is that section 31, c. 47, Code,—being the chapter under which the town of West Union exists,—authorizes a levy of

not exceeding one dollar on every hundred dollars of property, and which, at least, must be regarded as amendatory of section 1, c. 141, Acts 1872-73, being a subsequent enactment.

10. The eleventh assignment of error, relating to the term of court at which the injunction was dissolved and bill dismissed, has been cured by the production of the necessary orders showing the appointing and holding of a special term of court in accordance with law, at which this cause was heard and determined.

A careful scrutiny of the record reveals no good reason why the legally expressed will of the voters of the town of West Union should not be carried out by the authorities thereof, within the limitation of the constitution and laws of this state, and therefore the decree complained of is affirmed.

BROWN v. RANDOLPH COUNTY COURT.
(Supreme Court of Appeals of West Virginia.
Feb. 4, 1899.)

COUNTY-SEAT ELECTION—CONTEST—CANVASS OF VOTES—STATUTES—CONSTRUCTION.

1. A voter or taxpayer of a county may contest before the county court, for any legal cause, a vote upon the relocation of a county seat.

2. Returns of a vote on relocation of a county seat, taken at either a general or special election, must be canvassed, and the result declared by the county court, not by the board of canvassers.

3. In construing a statute which revises a former one, and the meaning of the former one was settled either by clear expressions in it or by adjudications upon it, mere change of phraseology will not be construed to be change of the law, unless it evidently purports an intention in the legislature to work a change.

(Syllabus by the Court.)

Application by T. P. R. Brown for a writ of mandamus against the Randolph county court. Writ granted.

D. C. Westenmacher, E. A. Cunningham, L. D. & J. F. Strader, and T. P. R. Brown, for petitioner. C. Wood Dailey and John H. Holt, for respondents.

BRANNON, J. At the general election in November, 1898, the voters of Randolph county voted upon the question of the removal of its county seat from Beverly to Elkins, and when the commissioners of the county court met as a board of canvassers to canvass the returns of the election for governor and other officers, C. H. Scott, John T. Davis, and W. G. Wilson, voters and taxpayers of the county, appeared before that board, and moved it to take up the certificates sent from the voting precincts as the vote upon the question, and declare the result; and T. P. R. Brown, a voter and taxpayer, objected, but the board overruled his objection, and proceeded to open the certificates. Then Brown asked a recount of the ballots, and asked that he be allowed to go behind the returns apparent from the certificates, and offer evidence to set aside the election for fraud, and to exclude

certain precincts for fraud. The matter having been postponed till the completion of the canvass as to the election as to officers, on a later day Brown objected to any canvass by the canvassers of the vote on the removal of the county seat, and asked that the certificates as to it be transferred to the county court, insisting that it alone had jurisdiction to ascertain and declare the result of this vote, and not the board of canvassers; while Scott and others insisted that the canvassers ascertain and declare the result from the certificates, without recount of ballots, and without going behind the certificates, and hearing evidence of fraud in the election. The board decided that it had jurisdiction to canvass the returns and recount the ballots, but no further; and that, if asked then to hear evidence upon the fairness and legality of the election, it would transfer the controversy to the county court, in order that that court might determine it, and declare the result. Both sides excepted to this action. When, later, the county court met in regular session, Brown asked it to take up the returns of the election upon this question, and canvass them, recount ballots, and hear evidence as to the fairness and validity of the election, and ascertain and declare the result; but it refused. Brown has obtained from this court a mandamus nisi, and now asks that a peremptory mandamus be awarded compelling the county court to exercise jurisdiction, and take up the returns, recount ballots, hear evidence of fraud, and ascertain and declare the result of the election. We must determine whether this peremptory mandamus shall issue. Scott, Davis, and Wilson, upon a mandamus nisi obtained from this court, ask a peremptory mandamus to compel the board of canvassers to simply declare the result of the election from the certificates. We must determine whether this mandamus shall issue. Brown also obtained from this court a rule against the board of canvassers to show cause why a writ of prohibition shall not issue to prohibit from any proceeding touching the canvass of the returns. We must decide whether this prohibition shall issue. All these proceedings involve and turn upon the same questions of law.

The sole question in this litigation is, which body shall canvass the returns of a vote at a general election upon the relocation of a county seat,—the county court as such, or the board of canvassers as such? Though these bodies are composed of the same persons,—the county commissioners,—yet they are in law not the same, but distinct, bodies. The board of canvassers is merely a body to canvass the returns of elections for public officers, acting simply on the certificates sent from voting precincts by certain officers holding the election, and recounting ballots when demand is made. They may send for those precinct officers to ascertain the true result; but they hear no contests judicially, no evidence of fraud in the election. They act ministerially only. If

any candidate claims that the election is fraudulent or in any wise illegal, or that ballots are unlawfully counted against him, or not counted for him, he must get relief by contest as provided in the statute. *Brazie v. Commissioners*, 25 W. Va. 213. But a county court, as such, canvassing the returns of an election upon a vote upon a county-seat relocation, is an entirely different tribunal, having wider function. It canvasses the returns upon the certificates, can recount ballots, bear evidence of fraud and illegality, and do what, in the case of candidates for office, could be done by that court in hearing a contest. *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. 97. And that case, as also *Welch v. County Court*, 29 W. Va. 68, 1 S. E. 337, held that returns of election on a county seat must go before the county court to be canvassed, and to have the result declared, and not before the board of canvassers. Such was the law under chapter 5, § 15, Acts 1881 (Code 1887, c. 39, § 15), as settled by those two cases. But it is insisted by Scott and others that all this has been changed by chapter 37, Acts 1895 (Code 1891, c. 39, § 15). Scott contends that under this act of 1895 the board of canvassers must canvass the returns of such vote, if at a general election, simply by the certificates sent from the precincts, and declare the result of the vote; and that the county court has nothing to do with such canvass and declaration. If the election is a special one on the question, it is conceded that the county court makes the canvass and declaration. I do not concur in this position. If we look back through the entire life of the state, we find that under the constitution of 1863 the board of supervisors, and under that of 1872 the county court, and under the amendment in 1879 of article 8 the county court, were given "superintendence and administration of the internal police and fiscal affairs of their counties." The location of a county seat falls under this head. If we look at the legislation upon this subject in all this time, we find that it gave the supervisors and the county courts jurisdiction to entertain petitions for the removal of the county seats, and to order votes thereon, and to ascertain and declare their results. Acts passed in 1863, 1868, 1873, and 1881 show this. It was fit, under these constitutions, that the whole proceeding as to ordering a vote upon the question of removal of a county seat, ascertaining its result, and then providing a court house and other buildings at the new county seat, should be committed to the county court. It might be questioned whether this power could be given to other hands. It requires plain legislation, not merely doubtful construction, to revolutionize this policy, established so long. The act of 1891 is made to do so by implication only, the chief point to sustain such implication being the omission to provide, as former acts did, that the clerk should lay the returns of a general election before the county court. Let us look at the

act. The controlling reason for its enactment was to authorize, for the first time, a special election upon the relocation of a county seat. I see no other great change. Under it the petition for a vote on relocation must go to the county court. It alone could order a vote, and make all provisions necessary for it up to the election. How after the election? It says: "The said vote shall be taken, superintended, conducted and returned in the same manner and by the same officers as elections for county and state officers. If said election be held at a general election, the commissioners of election shall make out and sign a separate certificate of the result of said vote, and deliver the same to the clerk of the county court within the same time they are required by law to deliver the certificates of the result of the election of officers held by them. And if said election be held at a special election, then said county court shall at the session at which the election is ordered, appoint three commissioners of that election for each voting place in said county, who shall ascertain and certify the result of such election in the same manner as herein provided to be done at a general election. And the certificates of the result of such special election shall be laid before the court by the clerk thereof, at a special session thereof, which shall be held within five days (Sundays excepted) after said special election. Said court shall thereupon ascertain and declare the result of said vote and enter the same of record." Here we observe an aim at similarity of procedure in general and special elections, as far as possible. In words it requires the returns of a special election to go before the county court for canvass and declaration of result. Why should it be different in the case of a general election? Is it because there are canvassers after a general election to canvass as to candidates, and none at a special election, and that convenience requires that they canvass as to both candidates and relocation? This idea is of slight force. The county court is in existence, and it makes no speed to have the canvassers act, as removal cannot occur until the county court orders it, as the act shows. This act requires separate certificates as to this election from those as to candidates. Why? Because they go for action before different bodies. If the canvassers are to declare the result, why the separate certificates? And then the unreasonableness of making such a difference between a special and general election. What calls for it? But it is urged that former acts provided, as to the certificates at general elections, that "said clerk shall lay the same before the county court at its next session," whereas the act of 1891 omits this provision as to a general election, but retains it as to a special election. If this does not sustain the theory that only the canvassers can act, no other provision does. This clause may be dispensed with entirely without affecting the power of the county court, for the

act requires the election officers to make certificates and deliver them to the clerk in the case of general and special elections. For what purpose? Plainly that he may lay them before the court, for there is the clause saying: "Said court shall thereupon ascertain and declare the result of said vote, and enter the same of record." This clause applies to both general and special elections. On what can the court act but on those certificates? The law intends them in both elections for their action. They are sent to the court, because sent to their clerk. His custody of them is the custody of the court. Why say that the clerk shall lay them before the court? If it is said that the fact that it requires the clerk to lay the certificates before the court in a special election excludes the idea that he is to do so also in the case of a general election, I answer this is at most only an implication, and that, if it had been the intention to have the clerk lay them before the board of canvassers sitting, not under this act, but under chapter 3, § 68, Code,—a body not mentioned in this act,—we should reasonably expect, if this sharp distinction was in the brain of the legislature, that it would have said so in words. Scott's counsel contends that, as these certificates are not directed to be laid before the county court, they must go somewhere, and they go before the canvassers. I answer that this act does not say so, but, to the reverse, leaves the fair strong inference that they go before the court; and I answer, further, that they do not go before the canvassers under section 68, c. 3, because that in terms is limited to a canvass as to candidates for office, and never mentions the canvass of returns to remove a county seat, and confers no power on the canvassers as to that. The form of declaration of result gives a place for every candidate "for office," but no place for a candidate for a county seat. This section knows not that such a candidate is running. Why carry these certificates to a tribunal knowing them not, whose power of attorney is silent as to them?

And now, as a telling argument, contemplate the great evil ensuing upon the construction of the act contended for. The case of *Brazie v. Commissioners*, 25 W. Va. 213, holds that canvassers have no power to go behind the returns to inquire as to fraud or illegality in the election. Thence it would follow that, if the board of canvassers act on a county-seat election, fraud would go unchallenged, and the result must be declared by the returns, however tainted by fraud. There is statutory provision for a contest given to a candidate defeated by fraud, but none in the case of a county-seat vote. If the construction of the statute contended for by Scott is given it, the result is, as Judge Green said in the *Poteet Case*, that one running for the petty office of constable has remedy against fraud, but the opponents of a fraudulent removal of a county seat—a most important matter—have none. If the act is given the

construction I contend for, we preserve the remedy laid down in the *Poteet Case*. If we give it the effect of changing the law so as to carry the returns before the board of canvassers, we ought, as a sequence, for reasons stated so well in the *Poteet Case*, as a necessity, vest in that board power to go behind the returns, and hear evidence of fraud and illegality. But that would be a total change in the character of that tribunal, and counsel for Scott repudiates that result. If canvassers cannot go behind returns, then certiorari would not answer to meet fraud, as the fraud could not be made to appear. It is suggested by counsel that chancery would entertain jurisdiction. Why destroy the remedy already existing to go abroad seeking a doubtful remedy, and that by mere construction of a statute by implication? In fact, equity disclaims jurisdiction in cases of contested elections. It does not overthrow elections, or try title to office, as will be seen in that late excellent work, *American & English Decisions in Equity* (volume 3, pp. 413, 437). *Alderson v. Commissioners*, 32 W. Va. 643, 9 S. E. 868. Though a vote upon removal of a county seat is not an "election" in strict sense, yet this rule of equity might apply by analogy. However, as this is not an election for office, but only on a public question, it may be that equity would take jurisdiction by injunction to prevent a county court from removing a county seat under a vote tainted with fraud. As shown by cases collected in the work just cited (page 439), this may be done; but the cases conflict. Be this as it may, it is no reason for changing the well-considered case of *Poteet v. Commissioners*, and destroying the ready remedy it gives, without very plain language from the legislature. The object is to reach the intention of the legislature. 1 Bl. Comm. 61. Is it reasonable to say that it intended to make a difference between special and general elections as to the tribunal for declaring the result? Why so? Why not harmonize by committing the power to the county court in both cases? Why make a difference, especially when it destroys an essential remedy? The new law retains the feature that in both elections separate certificates shall go to the clerk, and the general clause that the county court shall declare the result, and retains the clause that the clerk shall lay the certificates before the county court, but only says so as to a special election. This is a mere inadvertence of drafting. The draftsman intended it as to both general and special elections. If he had intended them in a general election to be laid by the clerk before another body, would he not have said so? The clause that the county court shall declare the result is controlling. "Where the law antecedently to the revision was settled, either by clear expression in the statute or adjudication thereon, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legisla-

ture to work a change. A contrary construction might be productive of the most dangerous consequences." *Parramore v. Taylor*, 11 Grat. 220, 243; 1 Minor, Inst. 41. The motive of the act of 1891 was to change the old law only to the extent of allowing a vote at a special election. It was not intended to allow the county court to canvass a vote only at a special, and not at a general, one, and thus take away the citizen's right to contest an illegal vote on the removal of a county seat. Such change does not speak from the act. If the construction contended for by Scott is correct, it results in this anomaly: that a vote at a special election can be contested for fraud or other illegality, but one at a general election cannot be. This was never intended. This alone is enough to repel that construction, though other reasons supplement and fortify it. I should add the argument that the act not only requires the county court to "ascertain and declare the result of said vote," but elsewhere also says that, if three-fifths of the votes be in favor of relocation, "the said county court shall enter an order declaring the place so receiving three-fifths of all the votes cast therefor to be the county seat." Now, if the intent was that the canvassers should canvass the returns, we would look for some provision to certify from the canvassers to the county court the result of the canvass. There is none. Why? Because it was intended that the county court shall canvass, and as the result would be on its own record, there was no need of a certificate of the result of the canvass. If we could say, even, that the act does not provide what body shall declare the result of a vote at a general election, what then? As it is the county court that entertains the proceeding for relocation by receiving the petition for a vote, and ordering it, and the certificates from the precincts are in the custody of its clerk, we would say that it was also to declare the result, not the board of canvassers, as was held in *State v. Whitney*, 12 Wash. 420, 41 Pac. 189. A taxpayer or a voter of a county, merely as such, may appear before the county court, and in any legal mode contest the returns of and vote upon a relocation of a county seat for fraud, irregularity, or illegality, or other ground which in law would change the result or overthrow the vote, in whole or part. This is presented in brief of Brown's counsel, but is not contested. *Poteet v. Commissioners*, 30 W. Va. 59, 3 S. E. 97; *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337; *Hamilton v. County Court*, 38 W. Va. 76, 18 S. E. 8; *Krieschel v. Board*, 12 Wash. 436, 41 Pac. 186.

In deference to the extended oral and printed argument of counsel, I have said too much in the case. I regard it as quite plain. From these views it follows that we must award a peremptory mandamus to Brown to compel the county court to take jurisdiction, and take up the returns of the vote, and canvass them, and recount the ballots, and hear

evidence touching fraud and illegality in the vote, if asked, and declare the result, and enter it of record; and we must award the writ of prohibition sought by Brown against the board of canvassers prohibiting it from exercising any jurisdiction whatever over the certificates and returns of said vote, and we must refuse the mandamus asked by Scott, Davis, and Wilson to compel the board of canvassers to proceed with the canvass of said vote.

NOTE BY DENT, P. So far as the opinion of Judge BRANNON holds that the county court has authority to hear and determine contests with regard to the relocation of a court house, it is undoubtedly legislation by judicial construction to supply as a matter of necessity an inadvertent omission in the statute. The same may be said of the decision in the case of *Poteet v. Commissioners*, 30 W. Va. 59, 3 S. E. 97. But to hold otherwise is to deny to the taxpayers the undoubted right to inquire into and know whether their court house has been relocated in the manner provided by law. And for this reason, though reluctant to usurp legislative functions, I concur in the proposed judicial amendment of the statute to prevent a denial of the just rights of those in interest. Judge-made law, in such an unforeseen event, is better than no law. It is at least in accord with, and preservative of, that favorite maxim of the courts of common law, founded on fiction though it be, that "there is no right without a remedy." *Charleston & S. Bridge Co. v. Kanawha County Court*, 41 W. Va. 676, 24 S. E. 1002.

BROWN v. BOARD OF ELECTION CAN- VASSERS OF RANDOLPH COUNTY.

(Supreme Court of Appeals of West Virginia.
Feb. 4, 1899.)

PROHIBITION—COUNTY-SEAT ELECTION.

When a board of election canvassers assumes jurisdiction, which it has not, to canvass and declare the result of a vote upon the relocation of a county seat, prohibition will lie to restrain it, though, in its proper action, its functions are ministerial, and not subject to prohibition.

(Syllabus by the Court.)

Application of T. P. R. Brown for a writ of prohibition against the board of election canvassers of Randolph county. Writ granted.

D. C. Westenhaber, E. A. Cunningham, L. D. & J. F. Strader, and T. P. R. Brown, for petitioner. C. Wood Dalley and John H. Holt, for respondents.

BRANNON, J. T. P. R. Brown obtained from this court a rule against certain persons, who constitute the board of election canvassers of Randolph county, to show cause why a writ of prohibition should not be awarded him to prohibit that board from exercising jurisdiction to canvass the returns and declare the result of a vote upon the question of the relocation of the county seat. We think that the board, though a mere ministerial body, is yet one organized and performing public functions under law, and such a tribunal as may be kept within the legal bounds of its jurisdiction by prohibition. This seems to be conceded. *Fleming v. Commis-*

sloners, 31 W. Va. 608, 8 S. E. 267; Alderson v. Commissioners, 31 W. Va. 637, 8 S. E. 274; Brazle v. Commissioners, 25 W. Va. 213. We award the prohibition for the reason that the canvassers have no jurisdiction to act in the matter of this vote. It belongs to the county court. Reasons for this conclusion are given in Brown v. County Court, 32 S. E. 165, this day decided.

WADE v. SOUTH PENN OIL CO.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1898.)

LEASE—SURRENDER—OPTION TO PURCHASE—TENANT FOR LIFE—PURCHASE OF REVERSION.

1. If a lessee for life or years take a new lease of the reversioner for a longer or shorter term than before, it is a surrender of the first lease.

2. A lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it.

3. Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of the purchase price under it, ends the lease and its rent.

4. A purchase of the reversion in fee by a tenant for years ends the tenancy, and the tenant is not thereafter estopped from denying further continuing title or rent in the landlord.

(Syllabus by the Court.)

Appeal from circuit court, Wetzel county; Romeo H. Freer, Judge.

Bill by James Wade against the South Penn Oil Company. Decree for defendant, and plaintiff appeals. Affirmed.

Thomas P. Jacobs and J. W. Newman, for appellant. A. B. Fleming and U. N. Arnett, for appellee.

BRANNON, P. Wade, on June 9, 1890, made a lease for five years to McCaslin of a tract of land for production of oil and gas, giving Wade one-eighth of the oil and \$600 per year for each gas well as rent, which lease was assigned, July 2, 1890, by McCaslin to South Penn Oil Company. On April 5, 1894, Wade made a deed, which, in its granting clause, granted to one Smith all the oil and gas in the tract, but the deed says that it was agreed that Smith had an option to buy at the end of five years the oil and gas in the tract, and on payment they were to be conveyed to him; and the deed further states that it was on the condition that Smith should, within 30 days after the completion of a well, either pay Wade \$1,252, or release and reconvey; and it further states that it was on condition to be void if a well should not be completed in five years, unless Smith should pay \$1,252 before the expiration of that time; and it further provided that, if "the above lease become void," then the oil and gas right should draw one dollar per acre yearly until "this option is paid in full, then deed to be made by parties of first part, or surrendered." Smith assigned his rights under this instrument to the South Penn Oil Company, April

16, 1894. Afterwards, July 31, 1896, the South Penn Oil Company took from Wade a lease of the same land for production of oil and gas for the term of 10 years, covenanting to pay Wade as rent one-eighth of the oil and \$550 per year for each gas well. The company made no development during the life of the McCaslin lease, but under the lease to itself it developed oil upon the tract in paying quantity, and tendered Wade \$1,252 in full satisfaction of his rights to the oil and gas, claiming right to do so under the said option; but Wade refused to receive it, and the money was paid in bank to his credit, and the answer of the company still tenders it. Wade demanded an eighth of the oil, and, the company refusing it, Wade brought this suit to compel a discovery of the oil produced from the tract, and for an account thereof. The circuit court dismissed his bill, and he appeals.

There is no dispute of facts. The sole question in the case is as to the effect of said papers. There can be no question that the taking of the second lease was, by law, a surrender of the McCaslin lease by the company, as, if a lessee for life or years, or his assignee, take a new lease, of the reversioner, for a greater or shorter term than before, there is a surrender of the first lease. 2 Minor, Inst. 791; 2 Tayl. Landl. & Ten. § 512. But then comes the question, what is the effect of the second lease upon the option instrument? If it were a mere lease, it would be surrendered like the first lease; but it is not a lease. What is it? It is an option to buy all the oil and gas within five years of its date. Read by its four corners, it imports nothing else. If its strictly granting part stood alone, it would be an absolute grant, and, no doubt, the subsequent lease covenanting to pay a share of the oil would be binding on the lessee company, for there is the covenant to pay, and a lessee cannot deny his landlord's title or his agreement to pay rent; and, even when one who is the real owner enters into a lease leasing his own land from another, this rule prevents him from setting up title in himself. 3 Tayl. Landl. & Ten. § 80. To bring the case under this doctrine, counsel for Wade contends that by the first lease and said option deed the company, at the date of the second lease, owned all the oil, and, taking the second lease, it is the case of a man making himself by deed a tenant to another of his own land, and he cannot deny his landlord's title, or avoid the rent. This would be so were this option not a mere option, but an instrument of absolute grant which had already invested the company with ownership of the oil. But it had not so operated; it was a mere right to elect to become such owner. If an absolute grant, why such profuse provisions of option to purchase? There is no legal inconsistency between the second lease and the option. The former gave the lessee the right to mine for oil for ten years, paying rent; the latter gave the separate distinct right to purchase outright, at a fixed price.

within five years. The purchase would, of course, close the lease by merger, as the right to the rental would pass from the landlord upon his sale of the fee to the tenant, and the leasehold estate would sink and cease in the reversion the greater estate, upon their union in the same person, under well-known principles. Tied. Real Prop. § 63. And it is clear, when a tenant purchases the fee, his estoppel to deny the landlord's title ceases, because the tenancy ceases. *Campbell v. Fetterman's Heirs*, 20 W. Va. 396; 2 Tayl. Landl. & Ten. § 502. He may thereafter set up his own title in fee against rent. *Wood, Landl. & Ten.* 373. The option invested Smith, before the second lease, with only an election to purchase, and its acceptance after said lease made a purchase after it. *Swearingen v. Watson*, 35 W. Va. 463, 14 S. E. 249. Surely, a tenant can make a purchase of the fee after he becomes a tenant. This is all I see in the case. Upon tender of the price fixed for a purchase, Wade was not entitled to a share of the oil, and had no right to demand an account of the oil produced, and his bill was properly dismissed. He is entitled only to the \$1,242. Decree affirmed.

MICHAELSON v. CAUTLEY.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1898.)

APPEAL—REVIEW—GRANT OF CERTIORARI—NEW TRIAL—EVIDENCE.

1. The writ of certiorari, when awarded in civil cases before justices, under sections 2, 3, c. 110, Code, is an appellate process, designed to effect the ends of justice; and the circuit court has a large discretion in awarding the same, reviewing judgments, and granting new trials thereunder, and, unless such discretion is plainly abused, this court cannot interfere therewith.

2. If the evidence presents mixed questions of law and fact, material to the issue involved, about which two reasonable men, learned in the law, might differ as to the proper determination thereof, the circuit court commits no appealable error in awarding a new trial.

3. If improper testimony in favor of the prevailing party is admitted by the justice, and it be doubtful whether the same was prejudicial to the opposite party or not, the action of the circuit court in awarding a new trial will not be reviewed by this court.

(Syllabus by the Court.)

Error to circuit court, Kanawha county;
F. A. Guthrie, Judge.

Action by O. H. Michaelson against Lucy R. Cautley. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Dismissed.

W. S. Laidley, for plaintiff in error.
Brown & Brown, S. L. Mounoy, Joseph M. Brown, and W. Mollohan, for defendant in error.

DENT, J. On writ of error, the plaintiff complains that the circuit court did not quash the certiorari allowed the defendant in the above case to a judgment of a justice

founded on the verdict of a jury for \$300, but reversed the judgment and awarded a new trial. The facts are as follows: The plaintiff rented of the defendant the first story and the basement of a certain building situated on Quarrier street, in Charleston. The upper portion of the building was rented by other tenants, except a certain room, which was vacant. On the night of the 4th of February, 1898, an exposed water pipe in this vacant room burst, and the water ran out, down into the room occupied by plaintiff, and damaged his goods to a sum in excess of the \$300 damages demanded. The place to turn off the water from the building was in the basement, rented by plaintiff, and no one could reach it except by his permission. During the middle of the night, when the leakage was discovered, a messenger was sent to plaintiff, who lived some distance away, to inform him, and get the key; and the water was then turned off, and due effort made to save plaintiff's goods, consisting of musical instruments, etc.

On a trial of the case before the jury, the justice, on motion of the plaintiff, gave the two following instructions, to which defendant objected: "(1) That if the jury believes from the evidence adduced that the plaintiff was a tenant of the defendant, and that in consequence of the defective plumbing or want of repair, or negligence of the defendant, the plaintiff suffered an injury to his property without any fault of his own, then the plaintiff is entitled to recover damages for the injury sustained in consequence thereof. (2) If the jury find that the defendant is liable to the plaintiff, that the measure of damages for the injury done is that amount that will compensate and make the plaintiff whole,—the difference in value of the property injured between that which was immediately before the injury done and that afterwards." These instructions appear to properly propound the law, and are simply to the effect that if the damages suffered by the plaintiff were caused by defective plumbing, owing to the negligence of the defendant, the jury should award such damages as plaintiff had suffered by reason of such negligence. The plumbing is a part of the building, and the landlord is liable to his tenant for defective construction thereof, although there is no covenant to repair. 12 Am. & Eng. Enc. Law, 687; *Stapenhorst v. Manufacturing Co.*, 15 Abb. Prac. (N. S.) 355. The room in which the leak occurred was not rented, but was vacant, and under the control of the landlord. The pipe was exposed, and an inevitable accident happened by reason of the freezing weather. This is an accident that in this climate, in the month of February, can be easily foreseen and provided against, either by proper protection of exposed pipes, or turning off the water supply, and is one that only calls for ordinary care. In such case the landlord is liable, unless he can shift such liability to the ten-

ant by reason of the latter's contributory negligence. If the tenant is fully informed of the defect, and has it in his power to avoid the same by proper precaution on his part, and fails to do so, his negligence, being contributory, will relieve the landlord from liability. *Shear. & R. Neg. (4th Ed.)* § 722; *Brown v. Elliott*, 4 Daly, 329; *Mendel v. Fink*, 8 Ill. App. 878; *Kenny v. Barns*, 67 Mich. 336, 84 N. W. 587.

The defendant asked for the following five instructions, which were refused by the justice: "(1) The court instructs the jury that if they believe from the evidence that there was no express contract to the effect that the landlord, Cautley, should keep in repair the house and tenement occupied by her tenant, Michaelson, then they should find for the defendant, Cautley. (2) The court instructs the jury that, if they believe from the evidence that there was no express contract on the part of Cautley to keep in repair the building leased from her by Michaelson, then the jury should find said defendant, Cautley, not liable for any damages which plaintiff, Michaelson, might have suffered from water leaking and running down from apartments in said building above those occupied by Michaelson. (3) The court instructs the jury that if they believe from the evidence that the landlord, Cautley, had not covenanted to repair the building leased by her tenant, Michaelson, and that Cautley is not chargeable with any affirmative misfeasance, or neglect of positive duty, then the jury should find for the defendant, Cautley. (4) The court further instructs the jury that if they believe from the evidence that the premises leased by the plaintiff from the defendant were not in good repair at the date of the lease, or thereafter, and that by reason of said premises being out of repair the plaintiff was damaged, and that there was no covenant or agreement by the defendant that she should repair said premises, then the jury should find for said defendant, Cautley. (5) The court further instructs the jury that if they believe from the evidence that the plaintiff, Michaelson, was damaged by the water pipe bursting and leaking water in a room in the leased building above those rooms leased by said Michaelson in said building, and that said water pipe which caused said damage was not constructed or used to supply water to that part of said building which was leased by said Michaelson, and that said defendant, Cautley, had not contracted to repair said premises, and had not caused said damage by any act of affirmative misfeasance, or neglect of positive duty, on her part, then the jury should find for the defendant, Cautley." These instructions were not proper in this case, for it does not involve the question of repair, but defective construction of the building, owing to the water pipe not being properly protected from the frost in a room in the building not under rent or occupied by any one; hence it was

under the control of the landlord. If she had gone up there in the nighttime and flooded the building with a hose to the same extent, her legal liability would have been of the same character, except her conduct would have been more wilful. Negligence in looking after the matter herself, or having her agents or tenants to do so for her, was the cause of the leakage. If the room where it occurred had been under rent to the plaintiff or other person, the liability might have shifted.

The only remaining question is as to whether the circuit court erred in setting aside the verdict of the jury on the evidence alone. In the case of *Grogan v. Railway Co.*, 39 W. Va. 415, 19 S. E. 563 (Syl. point 2): "Though evidence is conflicting, the court may set aside the verdict if against the weight of the evidence, but such power should be exercised cautiously. When the court does so, its action is regarded with peculiar respect in an appellate court, and will not be reversed, unless plainly wrong." This is the rule as to trials had in the circuit court. It should be applied with equal liberality as to trials had before justices, when reviewed by the circuit court, and a new trial has been awarded. In the case of *Harrow v. Railroad Co.*, 38 W. Va. 717, 18 S. E. 926, Judge Holt says: "The statutory writ of certiorari is intended as a method whereby the rulings of the justice, etc., may be reviewed,—especially his rulings granting or refusing to set aside verdicts; and the scope and tenor of the act show plainly that it was intended that the circuit court should be liberal in granting it, so far as it is a substitute for appeal from the judgment of a justice, so that the petitioner may have the judgment of the justice reviewed upon the merits, and such judgment or order made upon the whole matter as law and justice may require." The statute which provides certiorari as an appeal or appellate remedy was enacted for the purpose of, so far as possible, obviating the evil effects of the holding of this court in the case of *Barlow v. Daniels*, 25 W. Va. 512, and *Hickman v. Railroad Co.*, 30 W. Va. 296, 4 S. E. 654, and 7 S. E. 455, that a fact tried before a justice's jury of six persons could not be otherwise re-examined than according to the rules of the common law (meaning thereby a writ of error), and that a justice's tribunal, not being a court of record, to which such writ lies, the constitution inhibited the re-examination of jury trials before justices by an appellate court in any manner whatsoever, thus making them a finality. To sustain the position taken by the court at that time, it was held that the word "appeals," as used in the last clause of the twenty-eighth section of article 8 of the constitution, in these words, "Appeals shall be allowed from judgments of justices in such manner as may be prescribed by law," was used in its technical sense strictly, and did not include appellate proceedings

generally, and that, therefore, the legislature had no authority to grant such "appeals" in cases where a jury trial was involved. See Judge Snyder's opinion, 25 W. Va., pages 521 to 523, inclusive. Yet in the case of *Fouse v. Vandervert*, 30 W. Va. 327, 4 S. E. 298, Judge Snyder, again rendering the opinion of the court, on page 331, 30 W. Va., and page 301, 4 S. E., says: "Is said chapter 110 constitutional? The constitutional provision first above quoted expressly declares that 'appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law.' This provision positively commands that appeals from judgments of justices shall be allowed, and it expressly authorizes the legislature to prescribe the manner in which they shall be allowed. The statute under consideration was enacted a very short time after said constitution was adopted, and, as it has prescribed no other effective mode by which judgments of justices of the character now before us can be reviewed, it is the duty of the courts, if they can do so consistently with the legal rules of interpretation, to construe the statute as giving the circuit courts such power of review. The only difficulty in giving such construction is the use of the word 'appeal' in the constitution, instead of common-law terms, 'writ of error' or 'certiorari.' The term 'appeal' was unknown to the common law. * * * The able judge then reaches the conclusion (directly contrary to the one in *Barlow v. Daniels*) that the word "appeal" means certiorari, or any other process the legislature may adopt for the review of judgments of justices. Here there is a direct conflict of the same authority, which cannot be reconciled. How much better would it have been for the court to have held in the case of *Barlow v. Daniels* that the two provisions of the constitution under consideration should be construed together, so as to read: "In suits at common law, where the value in controversy exceeds twenty dollars, exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved, and in such suit before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law," except "appeals shall be allowed from judgments of justices in such manner as may be prescribed by law." This was undoubtedly the plain meaning and intention of the constitution makers, and, if it had been adhered to, the illegal and inconsistent conclusions of the court might have been avoided, and the ends of justice better promoted. It never entered the minds of the constitution makers to construe the word "appeals" to mean "writ of error" or "certiorari" in this connection; for they well knew that a justice's court was not a court of record, nor the justice usually a man learned in the law, and they never intended that upon his

shoulders should be imposed the laborious task of instructing juries on intricate and difficult points of law, and of making up and signing bills of exceptions embodying his rulings. The jury was reduced to 6 in number for the very reason that an appeal as a matter of right would furnish an adequate remedy, if they erred, or there was dissatisfaction with their verdict. It is foolishness to talk about the great common-law right of trial by jury, and yet say that such jury may consist of less than 12 persons, and that 6 or 3 or 1 person may be such jury, if the people so declare. It is like sticking a knife into a man's heart, and at the same time assuring him you do not intend to hurt him. When the people depart from the number 12, they do away with the common-law right of trial by jury. Not only is this true, but the rules of common-law jury trials have been greatly encroached upon by legislative enactment; so that the constitution must be construed to read, "No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law" as modified by legislation. Especially is this true when this section is construed in connection with section 21, art. 8, to wit, "Such parts of the common law, and of the laws of this state as are in force when this article goes into operation and are not repugnant thereto, shall be and continue the law of the state until altered or repealed by the legislature." The rules of the common law are subject to alteration or repeal by the legislature. Hence the conclusion is inevitable that the meaning of the words used in the constitution, to wit, "according to the rules of the common law," were intended to be according to the procedure of common-law courts, in contradistinction to equity courts, as modified, prescribed, and fixed by legislative enactment, and that a fact once tried by a jury could not be re-examined or retried except by another jury, if either party required it, according to such procedure. Questions of law or questions of mixed law and fact may be reviewed by appeal, or in any other manner the legislature may prescribe, as the section can only apply to a fact alone tried by a jury, and re-examination and retrial before another jury according to common-law procedure, as provided and regulated by legislative enactment, fully satisfy the constitutional requirement. This gives the legislature full control, except that facts must be re-examined and retried until finally settled, if either party require, by a jury, leaving questions of law to be determined by the courts. Thus is the great common-law right of trial of facts by a jury of 12 persons impartially selected preserved, untouched either by constitutional or legislative enactment. The right of appeal from the crude rulings of the justice secures it in a court of record presided over by a judge learned in the law. These considerations lead to the conclusion that the legislature,

in bestowing on the circuit courts or judges the authority to review the facts as found by a jury of 6 in a justice's trial, intended to give them a large discretion, so that the "great common-law right of trial by jury" might be preserved, not only in name and form, but in pristine purity, vigor, and substance. The circuit court or judge is not authorized by sections 2, 3, c. 110, Code, to grant such "appeal" as a matter of right, but as, in his discretion, law and justice may require. If the judgment brought in review is plainly right, law and justice require that it shall be final, that there may be an end to useless litigation. But if there are strong probable grounds to suppose that the merits have not been fairly and fully heard, and that the decision is not agreeable to the justice and truth of the case, it should be retried. If the circuit court on review reaches the conclusion that the matter ought to be retried, and the evidence presents such a case that reasonable men, learned in the law, might differ in regard thereto, this court ought not to interfere until at least there has been a retrial. Otherwise the sacred common-law right of trial by jury, instead of being preserved, is perverted into an instrument of wrong and injustice.

In the present case the justice permitted, as is usual in such trials, the witness Michaelson to testify, against the objection of the defendant, that he thought "that the pipe had been frozen and burst during Thursday, the 3d, and that the ice in the pipe prevented the water from flowing, and that the plumber failed to see and repair it, and that afterwards, when the weather moderated, the water dissolved the ice, and flowed out and run down on the goods of the plaintiff"; "that the loss was occasioned by bad plumbing, or negligence in placing the pipes in the building, as they were true, or by the negligence of nonrepair, and overlooking the break, and leaving the same unrepaired; that it was this negligence that caused the injury to the plaintiff, and that without any fault on his part"; "that he has suffered loss from the negligence of the defendant and her agents or servants." This is all mere opinion evidence, which was highly improper, and would not have been admitted in a court learned in the law. Other evidence of an expert character was also erroneously introduced and admitted. This would not be allowed to disturb the verdict, if the legal evidence plainly justified it. But, while the evidence tends to show the negligence of the defendant in allowing the water pipe to be exposed in a vacant room entirely under her control, it also tends to show that the plaintiff was aware of her negligence and of the danger of the pipes freezing, and refused, in the daytime, to turn on the water or have anything to do therewith, and that at night, when he closed his store, he had under his control the only means of turning off the water, except the outside street connection,

in charge of the waterworks officials; and without turning off the water, which he had the right to do for his own protection, he left the store, taking the key thereof with him, so that no one else could turn off the water until he could be found and the key obtained, while the defendant, having provided the plaintiff with means of self-protection, so far as the proof shows, was entirely in ignorance as to whether the water was off or on the night the damage occurred, thus tending to show the plaintiff guilty of contributory negligence; and, instead of permitting this question to be settled by the jury from the admissible facts and circumstances, the plaintiff is permitted to tell them that he was injured by the negligence of the defendant without any fault on his part, thus allowing him to state a conclusion of law and fact improperly, and to the prejudice of the defendant. In the case of *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29 (Syl. point 3), the law is settled to be: "Where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party, and if it may have prejudiced, though it be doubtful whether it did or did not, it will be cause for the reversal of the judgment." *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493; *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512; *State v. Kinney*, 26 W. Va. 141; *Beach v. O'Riley*, 14 W. Va. 55; *State v. Musgrave*, 43 W. Va. 673, 28 S. E. 818. As to a case resembling the present one in some particulars, see *Brown v. Elliott*, 4 Daly, 329.

From these considerations, the conclusion follows that the circuit court did not abuse its appellate powers in setting aside the verdict of the jury and granting the defendant a new trial; and therefore the writ of error granted by this court is dismissed, as improvidently awarded.

JONES et al. v. THORN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 16, 1898.)

TRUSTS—CONVEYANCE TO SECURE HUSBAND'S DEBT.

1. Where a tract of land is owned by a husband and wife, the same being part of a larger tract, she owning as her separate estate four-ninths, and he two-ninths, and she joins with him in the execution of a deed of trust on the entire six-ninths to secure the payment of a debt owed by the husband, and dies before the debt falls due, leaving children, and when the trustee proceeds to sell the entire six-ninths conveyed to him, if collusion is shown between him and the trustee, and it appears the sale is made only for the purpose of conferring title on him, equity will consider and treat him as a trustee for the children who inherited said four-ninths, subject to the trust as to said four-ninths.

2. Where the debt secured by such trust was the debt of the husband, and the wife's property was only included in the trust deed as an additional security, equity would require that the husband's portion of the property should be exhausted before selling the wife's property.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; J. M. Hagans, Judge.

Bill by Bessie L. Jones and another against Benjamin Thorn and others. From a decree dismissing the bill, plaintiffs appeal. Reversed.

John W. Mason and James A. Haggerty, for appellants. W. S. Meredith, for appellees.

ENGLISH, J. On the 30th day of August, 1877, Nimrod Toothman sold four undivided ninths of a tract of land situated in Marion county, containing 60 acres, to Mary A. Jones, wife of H. Frank Jones, in consideration of \$850, subject to the dower of Phoebe J. Swisher, widow of John W. Swisher; and on the 16th of December, 1879, James N. Swisher and Sarah C. Swisher, his wife, Nimrod Toothman and Sisson M. Toothman, his wife, and Phoebe Jane Davis, late widow of John W. Swisher, conveyed two undivided ninths of said 60-acre tract to said H. Frank Jones, said Jones also purchasing from said Phoebe Jane Davis her dower interest in said four undivided ninths of said land conveyed as aforesaid to Mary A. Jones. On December 29, 1880, said Jones was indebted to one John Core in the sum of \$550, payable October 1, 1880, and on December 29, 1880, said Jones and Mary Jones, his wife, executed a deed of trust on the four-ninths of said tract conveyed as above stated to Mary Jones, and the two-ninths of same conveyed by said H. Frank Jones to A. S. Hayden, trustee, to secure the payment of said sum of \$550 to said John Core, and in this way the four-ninths of said tracts which had been conveyed to said Mary A. Jones became pledged for the debt which her husband owed to John Core. On the 4th of July, 1881, said Mary A. Jones died, leaving four infant children, to wit, Bessie L. Jones, Andie L. Jones, Edith E. Brand, and Reno Jones. Said debt to John Core became due October 1, 1881, and default was made in the payment thereof. On November 19, 1881, A. S. Hayden, trustee, sold the four-ninths of said tract conveyed to said Mary A. Jones, together with the two-ninths which had been conveyed to said Frank Jones under the deed of trust, and said H. Frank Jones became the purchaser at \$600, which sum was sufficient to pay said Core debt; and thereupon said trustee deeded the entire property described in the trust deed to H. Frank Jones, who afterwards acquired some additional interests in said 60-acre tract, and contracted a considerable indebtedness, and, to secure the payment of the same, conveyed his interest in said land, including the four-ninths conveyed to Mary A. Jones, and purchased by him at said trust sale, to A. S. Hayden, trustee. On August 29, 1889, said Hayden attempted to sell the same under said trust deed, but was restrained by injunction in the circuit court of Marion county. In the injunction cause a decree was rendered directing a sale of said land, and Hayden, acting as special commis-

sioner under this decree, sold the land to Jesse G. Floyd and Hiram Kent on March 7, 1893, who, in December, 1893, sold and conveyed it to Benjamin Thorn and wife. On the 18th of September, 1894, a suit in equity was instituted by Bessie L. Jones and Andie L. Jones in the circuit court of Marion county, said plaintiffs being children and heirs at law of Mary A. Jones, against said Benjamin Thorn, Alice S. Thorn, Edith E. Brand, Reno Jones, and others, to set aside said last three named conveyances, claiming that four-ninths of said 60 acres belonged to them and said Edith E. Brand and Reno Jones, as heirs at law of Mary A. Jones; praying a partition of said tract giving to the four children of Mary A. Jones the four-ninths thereof. The note from H. Frank Jones to John Core for \$550, to secure the payment of which the deed of trust of December 29, 1880, was executed, bears even date with said trust deed, while the conveyance of the four-ninths of said 60 acres from Nimrod Toothman to Mary A. Jones bears date August 30, 1877. It does not appear that said H. Frank Jones owed any debts at the time said conveyance was made to his wife, and the heirs of said Mary A. Jones do not appear to have been made parties to any of the suits against said Jones. Answers were filed by Jesse G. Floyd, Hiram Kent, Benjamin Thorn, in his own right and as committee of Alice S. Thorn, which were replied to generally; depositions were taken; the cause submitted; and upon the hearing the court dismissed the bill, and the plaintiffs obtained this appeal, claiming that said decree was erroneous—First, because, said Mary A. Jones, who owned two-thirds of the land conveyed by the deed of trust of November 29, 1880, to secure the Core debt, having died before the debt became due, it was error for the trustee, under the circumstances, to execute the trust. A part of the land belonged to the principal debtor, a part to the surety,—that belonging to the principal being worth enough to pay the debt; and, the surety being dead, leaving infant children, no sale should have been made without the intervention of a court of equity.

Now, the fact that four-ninths of the 60-acre tract of land was the separate property of Mary A. Jones must be conceded when we consider that the record discloses that said four-ninths were conveyed to said Mary A. Jones by Nimrod Toothman on August 30, 1877, and at that time our statute provided that any married woman might take by inheritance, or by gift, grant, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner, and with like effect, as if she were unmarried, and they should not be subject to the disposal of her husband, nor be liable for his debts. By joining with her husband, Mary A. Jones gave a deed of trust upon said

four-ninths to secure the debt of \$350 to Core, which her husband owed; and in the same deed he executed a trust upon the two-ninths owned by him to secure the same debt. After the death of said Mary A. Jones, said H. Frank Jones suffered the entire six-ninths of said property to be sold, and became the purchaser himself for the amount of the Core debt. In his deposition said Jones states that he went to the trustee, Hayden, with the money to pay off the Core debt, but the trustee advised him to allow the property to be sold under the trust; his wife being dead, he could purchase at the sale, and in that way, it would become his land,—that is, the entire six-ninths. The legal title was then in the trustee, Hayden, and the equity of redemption as to the four-ninths belonging to Mary Jones at the time of her decease was in her four children, and the equity of redemption of said two-ninths was in said H. Frank Jones. In the circumstances equity would consider that in purchasing said property for the amount of his debt to Core he merely redeemed the same, relieving the entire six-ninths from said trust lien. It would also appear to be in accordance with the principles of equity that, the property of said Mary Jones having been included in said deed of trust as security for the debt of her husband, the property of the principal should have been exhausted first before coming on to her four-ninths for satisfaction.

As to the suggestion in the above assignment of error that, Mary A. Jones, one of the grantors in said deed of trust, being dead, leaving infant children, no sale should have been made without the intervention of a court of equity, this court has passed upon this question in the case of *Spencer v. Lee*, 19 W. Va. 179 (Syl. point 6), where it is held that "a court of equity will in no case set aside a sale made by a trustee simply because it was made after the death of the grantor." See, also, *Burke v. Adair*, 23 W. Va. 159. After becoming the owner of other portions of said 60 acres, said H. Frank Jones executed another deed of trust upon said six-ninths of said 60 acres, and the other portions he had acquired, to the same trustee, to secure certain indebtedness therein specified. Subsequently, a chancery suit was brought by said H. Frank Jones against said Hayden, trustee, and others, in which such proceedings were had that said Hayden, as trustee, was directed by a decree therein rendered to make sale of said land mentioned in said trust deed; in pursuance of which decree said land was sold by Hayden, trustee, at which sale Jesse G. Floyd and Hiram Kent became the purchasers of the land described in said last-named deed of trust, including the four-ninths which was the separate estate of Mary Jones, deceased, and which was conveyed by said Hayden, trustee, to said Floyd and Kent, and by them conveyed to Benjamin Thorn. It is contended by the appellants that the deed executed by A. S. Hayden, trustee, to H. Frank

Jones, was void as to the four-ninths of said land belonging to the estate of Mary A. Jones; and, while there is no allegation of fraud on the part of said Hayden, or of collusion between him and said H. Frank Jones, yet it appears from the deposition of said Jones that he went to said trustee to pay the debt secured by the trust, and the trustee advised him to allow the land to go to sale, and become the purchaser of it for himself; which he afterwards did. Now, the very serious question here presented for our consideration is, could Jones, by paying his own debt, not a cent of which the estate of his wife was bound for, otherwise than as his security, acquire title to the four-ninths of said land, which was the separate estate of his wife at the time said trust was executed? What consideration did she or her heirs receive from said Jones, directly or indirectly, for said four-ninths? Surely, the payment of his own debt was no consideration, and did not entitle him to a deed for it. As Hayden was Jones' agent, and his creditor John Core, in paying the money to Hayden, he only paid it to Core; but did that payment entitle him to a deed to his wife's land? Her contract in conveying her land to said trustee was that if her husband, H. F. Jones, did not pay said note, with interest, to Core, her land might be sold with his to raise the money; but her husband, as is alleged in the bill, and as shown on the face of the deed from Hayden, purchased the land for \$600,—enough to pay the Core debt, interest, and cost of sale. It is true that the answer claims that Jones, on the day of the purchase, executed a deed of trust on said six-ninths of said tract to secure one Eli C. Morris the payment of money borrowed of him for the purpose of paying said Core debt; but no such copy of said trust is exhibited, and Jones, in his deposition, says he borrowed the money from the First National Bank of Fairmont to pay the Core trust, and repaid the bank from money received by him from his father. Now, if H. F. Jones acquired no title to the four-ninths of said tract conveyed to the trustee by his wife, it is certain he could convey no title thereto in the second deed of trust to Hayden, trustee, nor can we see that said Hayden's right to sell the same was increased by the decree directing him to do so as trustee. As to the purchasers at the sale made under said decree, caveat emptor applied. My first impression was that said H. Frank Jones was entitled to a life estate in said four-ninths of said 60-acre tract as a tenant by curtesy, but attention has been called to the fact that said four-ninths of said tract was conveyed to Mary A. Jones by Nimrod Toothman and wife, subject to the dower right of Phoebe J. Swisher, and that said Mary A. Jones died before said Phoebe J. Swisher; and, although said Phoebe is now dead, the said Mary A. Jones was never seised in fact of said four-ninths of said 60 acres, and therefore her husband, H. Frank Jones, was never entitled to a life estate therein as

tenant by the curtesy, and therefore the case does not fall within the purview of the case of *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56, where it is held that "a remainder-man or reversioner cannot compel partition during the continuance of the particular estate." I am therefore led to the conclusion that the heirs at law of said Mary A. Jones are entitled to the partition prayed for. In the absence of any allegations of fraud or collusion between said H. F. Jones and Trustee Hayden, can we, in response to the prayer of the bill, declare the deed from said trustee to said Jones void? We must presume that the land was properly advertised and regularly sold. The deed appears to be formal and regular on its face; and while, in the circumstances, it may not have conveyed to said Jones the title of the heirs at law of Mary A. Jones to said four-ninths, would not equity treat it as a release of the trust lien on said four-ninths, and not consider the deed absolutely void? I cannot believe that the title of these remainder-men was extinguished by the sale of this property under said trust deed by Hayden, trustee, and by H. F. Jones bidding it in, and obtaining a deed by paying his own debt and the costs of sale, or that H. F. Jones, by reason of that transaction, acquired title to the four-ninths of said 60-acre tract, which was the separate estate of his wife, subject only to the dower right of Phoebe J. Swisher. Now, as to the effect of the sale under the second trust deed to Hayden, trustee, who was the same trustee that sold the property under the first trust, said Hayden had notice of all the facts connected with the former transaction, and, in addition, Jones could only convey to him such title as was vested in him; and in selling under the trust said trustee would convey with special warranty, and to Floyd and Kent, the purchasers under said second trust deed, the principle of caveat emptor applies. So, in the case of *Fleming v. Holt*, 12 W. Va. 162, Green, J., in delivering the opinion of the court, uses the following language: "In considering this question, we must bear in mind that a purchaser at a public sale of land made by a trustee must look to the title of the grantor of the land, and is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent. He cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle of caveat emptor applies,"—citing *Petermans v. Laws*, 6 Leigh, 529; *Saunders v. Pate*, 4 Rand. (Va.) 8; *Sutton v. Sutton*, 7 Grat. 237; *Findlay v. Toncray*, 2 Rob. (Va.) 374; *Rawle*, Cov. 418; *Goddin v. Vaughan's Ex'x*, 14 Grat. 117. When, therefore, Floyd and Kent became the purchasers under said trust sale, they only purchased such title as was vested in Jones. By looking to the records, they could have seen that Jones obtained a conveyance of the property left by his deceased wife to her children by paying his own debt, for which

that property had been pledged, with a sufficient amount of his own to pay the debt, to secure the payment of his own debt; and that, while he obtained a deed from the trustee for the four-ninths of the property left by his wife, he paid no consideration for it, and, the equity of redemption to said four-ninths of the 60-acre tract having descended to the children of said Mary Jones, H. Frank Jones, having obtained a deed therefor from said trustee without paying any consideration, must be held and considered as a trustee holding the title to said four-ninths for the plaintiffs and the defendants Edith M. Brand and Reno Jones. See *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644, in which the doctrine of implied trusts is discussed, and in which the facts are somewhat similar to those in the case under consideration. In this case the land of the heirs of Mary Jones was included in the sale with a view to conferring title upon H. F. Jones, when it appears that the two-ninths owned by him was sufficient to pay the trust debt, and by inducing the trustee to sell the entire six-ninths he obtained an ostensible title to said four-ninths without paying any consideration therefor, for the reason that the two-ninths owned by him were worth more than the trust debt. My conclusion, therefore, is that the circuit court erred in dismissing the plaintiffs' bill, and, as the evidence in the cause discloses that there was collusion between said trustee, Hayden, and said H. F. Jones, and that Hayden, trustee, instead of receiving the amount of the debt secured by said first trust deed from H. F. Jones, advised said Jones to allow the property to be sold, and at the sale purchase the entire six-ninths of said tract, the decree complained of is reversed, and the cause remanded, with directions to the circuit court of Marion county to take such steps as will convey the legal title of the four-ninths of said 60-acre tract to the heirs at law of Mary A. Jones, deceased, and award to them the partition prayed for, with costs to the appellants.

HARRIS v. ELLIOTT.

(Supreme Court of Appeals of West Virginia.
Nov. 19, 1898.)

SPECIFIC PERFORMANCE — ORAL CONTRACT — RESULTING TRUST — PAYMENT OF PURCHASE PRICE — SUBROGATION.

1. The evidence must be clear, full, and free from suspicion to enable a court of equity to enforce an oral contract for the sale of land.
2. To raise a resulting trust for one paying purchase money for land when title is taken in the name of another, the trust must arise from equity principles, at the moment title passes, and no subsequent payment will create it; nor will a subsequent agreement by the party holding title to hold in trust raise such trust.
3. A resulting trust will not arise in favor of one paying for land conveyed to another, if that other be wife or son or other person as to whom the one paying voluntarily places himself in loco parentis in the transaction. A resulting trust will not arise in favor of one paying for

land conveyed to another where such payment is only a loan to such other person.

4. Where it appears clearly that, in paying for land by one with conveyance to another, the party paying intended to make a gift or confer a benefit, no resulting trust arises in his favor. To warrant subrogation in favor of one paying a debt as surety or otherwise, the debt paid must have been a lien on the land.

5. In a suit to charge land in the hands of a fraudulent purchaser with money, he yet holding the land, that must be subjected; and there cannot be a personal decree against him for the money, though there may be for costs, if the land does not pay the money and costs. If he has sold, he may be charged with the proceeds.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county; John H. Holt, Judge.

Bill by Jasper W. Harris against James B. Elliott and Creed C. Harris. From the decree, defendants appeal, and J. W. Harris cross-assigns error. Reversed.

Samuel V. Woods, for appellant. Dayton & Dayton and Fred O. Blue, for appellee.

BRANNON, P. Jasper W. Harris filed a bill in equity in the circuit court of Barbour county against Creed C. Harris and James B. Elliott, alleging that Elliott had sold and conveyed to one Wolf a lot in Meadowvill; that Wolf sold it to Jasper W. and Creed C. Harris, and, as the deed from Elliott to Wolf had been lost, Wolf and Elliott joined in conveying it to Creed C. Harris, for their joint benefit, however; that they were to pay Wolf \$205 for the lot, of which Jasper had paid \$95, and they executed their two joint notes for part of the balance, except about \$5. The \$95 was paid in a note of both Harrises under an arrangement with Wolf to Knotts, which was later paid by Jasper. Jasper paid also \$38.48 on this purchase-money debt. He paid, in all, it seems, \$134.76. Afterwards, Creed sold and conveyed to Elliott this lot, paying for it by discharging a balance of purchase money yet due him under said Harris notes, and a note for store bill given him by Creed Harris, and some money. The bill charged that Elliott, when he took the conveyance from Creed Harris, knew that Jasper Harris was a joint owner with Creed Harris, and knew of the rights of Jasper under his payment of part of the purchase money. The bill also stated that some time after the conveyance to Creed Harris from Wolf and Elliott, under which Creed was in possession, Creed moved to Tucker county, agreeing with Jasper that, if he would pay the balance of purchase money due Elliott, he might have the property, and he (Creed) would convey to Jasper all his interest therein; that Creed surrendered possession to him; and that Elliott knew of this oral contract when he bought of Creed. The bill prayed that Elliott be held as trustee holding legal title for the plaintiff, and that he be either required to convey to plaintiff, or that the lot be sold, and out of its proceeds he be repaid what he had so paid. A decree was pronounced, denying right to the

plaintiff to have a conveyance of the lot itself from Elliott; but a later decree declared that a trust existed in favor of Jasper W. Harris for \$183.12, to repay him what he had paid, and subjecting the lot to sale therefor, and decreeing the same as a personal decree against Creed C. Harris and Elliott. Jasper W. Harris cross-assigns as error against him the decision of the circuit court that he was not entitled to a conveyance of the lot itself. The theory of the bill is that the purchase of the lot was by the two Harrises jointly. It is a strong circumstance against this theory that the deed was made to Creed alone, especially as it is proven that, when Wolf, Elliott, and the two Harrises were arranging for the execution of the deed, Jasper distinctly directed the deed to be made to Creed, and said he did not want the property, had no use for it; that Creed wanted it, and he wanted to help him, as it would make a good home for him; that Creed had been with him a long time, and had been a good boy; that, if Creed ever got able to pay it back, it would be all right, and, if he should not, it would be all right. This is a reasonable probability. Jasper was a man of 53, of some means; Creed about 21, his nephew, very poor, with a family, who had made his home at Jasper's from the age of 14 years, and did a good deal of work for him. Other circumstances, not necessary for detail here, negative this ground for relief. Indeed, Jasper himself, as a witness, when asked whether he claimed the lot under the purchase from Wolf, or under an oral contract with Creed, answered that he claimed it under the oral contract; and, further, his counsel lay their argument alone on that oral contract for a conveyance of the property.

Next, as to that oral contract: Jasper says that, some time after the deed to Creed, Creed moved from the lot to Tucker county, telling Jasper to pay the purchase and take the property, and he would convey it to him. He never paid it all, which tends to negative this contract. But Creed denies this contract, and the proof is short and unconvincing upon it. Courts, with the statute requiring writings for contracts of sale of real estate staring them in the face, should be very slow to apply that principle, which is nothing but a judicial nullification of that statute known as "part performance." And courts are slow to do so. If I could, I would abolish, by legislation, the doctrine of part performance, as productive of more harm, from fraud and perjury and engendering of litigation, than benefit, from its defeating fraud. Modern English judges regret its introduction into equity law. Some of our states reject it. At any rate, courts should, and do, require proof full and above suspicion before applying it. The circuit court, upon conflicting evidence, found against the plaintiff as to this claim for relief, and we cannot reverse for this cause.

Next, as to the theory expressed by the

circuit court as the basis for its decree; that is, that a resulting trust exists in favor of Jasper W. Harris, not for the lot itself, but for repayment of money paid by him "into the property," "creating lien upon it": There is no evidence to show that Creed Harris took title upon the trust to pay out of it this money, and therefore there is no express trust for its repayment. The theory of the circuit court does not claim this. Whether one could create a lien on land by taking title on promise to pay money to another is a question not necessary to answer. If a grantor were to convey upon such trust, likely so; but not where a borrower or debtor so promises. 2 Am. Dig. Eq. 522. The payment of the purchase money by a stranger, and title taken in the name of another, raises a trust called a "resulting" or "constructive" trust, in equity, in favor of that stranger, either in toto or pro tanto, according as he paid for the land in whole or in part. *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721; *Currence v. Ward*, 43 W. Va. 368, 27 S. E. 329. But this trust is for all or part of the very land itself, not a lien for the money. *Shaffer v. Fetty*, 30 W. Va. 348, 4 S. E. 278. Another reason against such resulting trust is that what money Jasper paid he paid after the deed to Creed; as it is a rule that the payment which is to raise a resulting trust must be made at the very instant the title is taken by the alleged trustee, as no subsequent payment, or even oral agreement for such trust, will raise it. No subsequent application of the money of the third person to the payment of the purchase will create such trust. *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46; 1 *Perry, Trusts*, §§ 126, 133. Another fact against this trust is that, as above stated, Jasper declared, when the deed to Creed was agreed upon, that it was to be made to Creed, and he (Jasper) would help him to pay for the land, as Creed had lived at his home, and had been a good boy, and, if he ever got able, he could pay it back, and, if not, it would be all right. Creed had come to Jasper's house when a small boy, and lived with and worked for the latter, and Jasper was as a parent, being his uncle. When one pays for land, and the title is made to a stranger, the presumption is that he who paid intended to own; but if the person invested with title is a wife, son, or near relative, or one to whom the purchaser has placed himself in loco parentis, there is no resulting trust. Creed was but a nephew to Jasper, and I concede that such relationship would not alone repel a trust, as would that of a wife or child; but it is the particular circumstances of this case that make such relationship negative a trust, as Jasper's having largely raised Creed, and his declarations and his directing the deed to be made to Creed, without any other explanation of not himself taking an interest by the deed, and his declaration that he did not need the land, but wanted it for a home for Creed, show that he placed himself in the place of parent to Creed,

and intended to confer a benefit, not to create a trust for himself. All the circumstances in law repel a trust, since a trust, being based on a mere presumption that the one paying for property intended to own it, may be repelled by circumstances showing a contrary intent. 1 *Perry, Trusts*, §§ 139, 140, 144; *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721. When once it appears, as it does clearly in this case, that no resulting trust was intended at the time, but that a benefit for a relative was designed, the party cannot afterwards recant his generosity and plead a trust; for, even if the donee were afterwards to admit such trust,—nay, admit it in writing,—a court would not enforce, without fresh consideration of value. 1 *Perry, Trusts*, § 140. Say that Jasper intended a loan; then he must treat his payment as a personal loan. It is no trust in law. 1 *Perry, Trusts*, § 133. I have called this payment a gift to help a needy, poor relative. If Jasper did not owe Creed, we can fairly treat it so. But the truth is Jasper owed Creed for work, as the evidence shows; and, if so, Jasper was only paying a debt, not raising a trust. Many circumstances repel a trust. It must not be thought that Jasper can get relief on the idea of subrogation, as having paid purchase money under joint notes given by him and Creed, for no lien was retained therefor. Subrogation only places the party paying in the shoes of the creditor,—gives him the creditor's rights; but, if there is no lien, there is no subrogation. I cannot find any warrant for the decree.

The decree is erroneous for another reason. It is a personal decree against Creed Harris and Elliott for the money paid by Jasper Harris. If even Elliott acquired the property from Creed in fraud of Jasper's rights, Jasper could look to nothing but that on which his claim rested,—the property. You could subject that, and Elliott could relieve it by payment; but you must give him right to elect to yield the property instead of paying, and not put a debt on him he never agreed to pay. Had he sold the property, and pocketed its proceeds, you could follow the proceeds to his pockets, not otherwise. *Shoe Co. v. Haught*, 41 W. Va. 215, 23 S. E. 553; *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46; *Hinton v. Ellis*, 27 W. Va. 422.

Reversed, and bill dismissed,

FOUSE et al. v. GILFILLAN et al.
(Supreme Court of Appeals of West Virginia.
Nov. 19, 1898.)

MARRIED WOMEN—CHARGES ON SEPARATE ESTATE
—CONTRACTS—MODIFICATION—RECORDATION—
BONA FIDE PURCHASERS—WITNESSES—TRANSACTIONS
WITH DECEDENT.

1. G., a married woman, together with her husband, enter into a written contract, under seal, dated June 25, 1892, with F., to erect a three-story double brick building on her lot in the city of Parkersburg, according to specifications, for which she is to pay to F., in payments as in said contract set forth, \$6,500 (\$3,250 is to

be paid as the work progresses, and the balance, \$1,625, in one year from the date of the completion of the work, and \$1,625 in two years from the completion of the work, to be evidenced by negotiable notes, with the bank discount added), and to execute a deed of trust upon said property to secure the balance unpaid, when building is completed. This contract is signed and sealed by all the parties, but not acknowledged. On the 26th day of September, 1892, another agreement or addendum is made to said agreement, designated as: "Modification of an Agreement Made and Entered into on the 25th Day of June, 1892." This agreement, made and entered into this 26th day of September, 1892, by and between Mrs. E. M. Gilfillan and Edward Gilfillan, parties of the second part,"—which agreement provides that F. shall provide an additional story, the fourth story to be finished for a hall, and the price therefor to be agreed upon, as well as any changes in the plans that might be made, and, if the parties could not agree upon the price, their differences were to be submitted to a third party, and specifically refers to the original agreement of June 25th, and in terms makes it part of this. The addendum also set forth that the contract was made, and the price to be paid, for the improvement of G.'s separate real estate, and declared that the debt thereby contracted was created and incurred for that purpose, and expressly charged her (lot) separate real estate, and all the improvements thereon, with the payment of said debt mentioned in the original agreement, and with the amount of any and all sums necessary to put on the fourth story, and any other modifications that might be agreed upon, which addendum and modification was also signed and sealed by the said G. and husband; and the paper, thus completed, was by them duly acknowledged on the 7th day of October, 1892, and duly recorded on the 1st day of November, 1892. Held to be a valid contract, under section 12, c. 66, of the Code, as amended by chapter 109, Acts 1891, and to create a charge and liability upon said property for the price of such improvements.

2. A purchaser of such property takes it with notice of such charge and liability.

3. The certificate of a notary public to said paper, that "E. M. G. and E. G., whose names are signed to the foregoing writing, have this day acknowledged the same before me, in my county aforesaid," is sufficient to show the acknowledgment of the whole paper dated June 25 and September 26, 1892.

4. The certificate of the clerk of the county court of the proper county to said paper, that the foregoing writing, bearing date on the 25th day of June, 1892, with the certificate of acknowledgment thereto annexed, was on the day mentioned duly admitted to record in his said office, is sufficient evidence of the recordation of the whole paper.

5. A reference, by the certificate of acknowledgment or of recordation, to the deed as "the foregoing writing," is sufficient to identify it as the deed which was acknowledged or recorded, is the case may be, without giving the date of the deed.

6. In a suit growing out of said contract, after the decease of G., the testimony of F. is competent to prove materials furnished for, and labor and work done on, the building, under the exception in section 23, c. 130, of the Code, providing that no party to any action, suit, or proceeding shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, etc.

7. In such a case the test of the admissibility of the testimony is, does it tend to prove what the transaction was?

(Syllabus by the Court.)

Appeal from circuit court, Wood county; L. I. Boreman, Judge.

Bill by Fred Fouse against Elizabeth M. Gilfillan and others. A decree was rendered from which complainant and defendant Herman Fouse appeal. Reversed.

J. G. McClure, for appellants. Turner & Turner, for appellees.

McWHORTER, J. On the 25th day of June, 1892, Herman Fouse entered into a contract in writing with Edward Gilfillan and E. M. Gilfillan, his wife, to furnish the material and work and build a three-story double brick building on the lot of said E. M. Gilfillan according to the specifications given,—the first story to be business rooms, the second story for dwellings, and the third story for a hall,—for which building Fouse was to be paid the sum of \$6,500, as follows: \$500 when the stonework should be completed, \$800 additional when the second tier of joists were on, \$800 when the building was under roof, \$1,150 when building completed, \$1,625 in one year from date of completion, and the like amount in two years from said date; said payments to have added to them bank discount, to be included in notes to be given by the party of the second part, negotiable and payable in some bank in the city of Parkersburg, and a deed of trust to be given on the lot and building to secure their payment. This contract was signed and sealed by the parties thereto, but not acknowledged and recorded. Afterwards, on the 26th day of September, 1892, an addendum was made thereto, designated as "Modification of an Agreement Made and Entered into on the 25th Day of June, 1892," by the parties of the second part, Mrs. E. M. Gilfillan and Edward Gilfillan, to the effect "that in consideration of the premises, conditions, and stipulations in said original agreement contained, it is hereby agreed that Herman Fouse shall build an additional story to the building therein mentioned," and providing that said fourth story was to be finished for a hall, and the price to be paid was to be agreed upon between the parties, and, in case they could not agree, they were to select a third person, who should fix the amount to be paid to Fouse for said work, such finding to be binding on both parties, and, further, that any and all changes in the plans of said building should be paid for at the same price for the same class and kind of work as in the original agreement specified, and any work or material which might be dispensed with was to be deducted from the contract price in the same proportion and at the same price mentioned in the original agreement, and that said agreement was made and the price to be paid Fouse was for the improvement of the separate real estate of the said E. M. Gilfillan, who was a married woman, and that she thereby declared that the debt for the building of the brick house mentioned in said original agreement, which was there referred to and made a part thereof, was created and incurred for the purpose of improving her separate real es-

tate the brick building was to be constructed upon, and that the said E. M. Gilfillan thereby expressly charged her (lot) separate real estate, and all the improvements thereon, with the payment of said debt mentioned in the original agreement, and with the amount of any and all sums necessary to put on the fourth story, and any other modifications that might be agreed upon. To this modification and addition were annexed the signatures and seals of the said Mrs. Elizabeth E. Gilfillan and Edward Gilfillan, and to which was annexed the following certificate of acknowledgment and certificate of recordation:

"State of West Virginia, Wood County, to wit: I, Walter E. McDough, a notary public of said county, do certify that Mrs. Elizabeth M. Gilfillan and Edward Gilfillan, whose names are signed to the foregoing writing, have this day acknowledged the same before me in my county aforesaid. Given under my hand this 7th day of October, 1892. Walter E. McDough, Notary Public."

"State of West Virginia, Wood County Court Clerk's Office, November 1, 1892. The foregoing writing, bearing date on the 25th day of June, 1892, with the certificate of acknowledgment thereto annexed, was this day admitted to record in said office. Teste: B. F. Stewart, C. W. C. C."

On the 12th day of December, 1892, the said Herman Fouse and Fred Fouse entered into an agreement reciting the agreement of June 25, 1892, together with its modification of September 26, 1892, and that in consideration of \$1,000 then delivered by Fred to Herman, and the agreement of Fred to furnish to Herman money from time to time until the buildings should be completed, Herman assigned to Fred the said writings and agreements of June 25 and September 26, 1892, and made said agreements part of their said agreement, as exhibits therewith, which agreement of December 12, 1892, was signed and sealed by the parties thereto, and duly acknowledged and recorded on February 7, 1893. On the 10th day of August, 1893, the said E. M. Gilfillan and Edward Gilfillan, her husband, entered into a further agreement with Herman Fouse, reciting the agreement of June and September, and making the same a part of the said agreement of August 10, 1893, and stating that under said agreements Herman Fouse was to construct for said Elizabeth M. Gilfillan, on her lot in Parkersburg, a four-story brick house, as in said agreements and modifications specified and set forth; that Fouse had gone to work on said house, and payments on such work and material done and furnished had been made by said E. M. Gilfillan, but the house was not completed, and there had not been agreed upon, or in any way fixed, the price to be paid for the fourth story to and in and on said house, and agreed and contracted with each other to stop the work on the house, and to settle with each other for the work that had been done upon, in, and on said house upon the basis and according

to the terms and conditions in said agreements in writing set forth and specified, and agreed to an arbitration of any and all matters growing out of the business dealings theretofore had between the parties thereto, and especially between the said E. M. Gilfillan and Herman Fouse, and agreed that all such matters should be submitted for arbitration to three disinterested persons for final decision (arbitrators to be chosen, one by each party, and the two to choose a third), and that the decision of any two should be binding on both the parties, and their award to be entered up as the judgment of the circuit court of Wood county, by decree on chancery side thereof, at the July term, 1893; that said award should be rendered, and report to the circuit court made, within ten days from the date of the agreement, and the parties waived any rule or summons for entering said award as judgment of the court, and the parties agreed and bound themselves to and with each other to abide by and perform any such award and judgment, which agreement was duly signed, sealed, and acknowledged by the parties thereto. And on the 10th day of August, 1893, said parties chose their respective arbitrators, who chose the third, who rendered their award August 18, 1893, finding the sum of \$1,349.89 in favor of Herman Fouse as due from E. M. Gilfillan. On the 7th day of October, 1893, Elizabeth M. Gilfillan and Edward, her husband, conveyed, by deed of that date, the lot and building so erected, but not completed, to the appellee M. J. Hughes, in consideration of \$7,000, of which \$1,250 was paid in cash, and certain other sums, recognized as valid liens on said property, assumed to be paid to the holders thereof by said Hughes; and for the residue of purchase money, being \$803.88, the said Hughes made his note at 90 days, negotiable and payable at the First National Bank, to said E. M. Gilfillan, the vendor retaining her vendor's lien on said property to secure the payment of said unpaid purchase money, which deed was duly acknowledged and recorded on the 9th day of October, 1893, a copy of which deed is exhibited with the bill of plaintiff, Fred Fouse, hereafter mentioned.

At the January rules, 1894, Fred Fouse filed his bill in chancery against Elizabeth Gilfillan, Edward Gilfillan, Herman Fouse, M. F. Tetrick, Jacob Young, Martin J. Hughes, and others, alleging the contract of June 25th and September 26th between Herman Fouse and the Gilfillans, and setting up the assignment thereof by Herman Fouse to plaintiff, and exhibited said agreements and assignment with his bill; that under said assignment he had furnished Herman Fouse the sum of \$2,311.27, which went into the material used in the construction of said building, and to pay laborers who worked thereon, whereby Herman was enabled to proceed with the building until the Gilfillans were unable, failed, and refused to pay the

money under the contract; that Herman stopped work from no fault of his, but did so because of the failure of Gilfillan; that Herman stopped work about the middle of the summer of 1893, at which time he had furnished material and done work to amount of \$8,800; that they had paid him on account thereof \$3,400, leaving \$5,360 still due Fouse, less whatever amount they may have paid Thomas Savage, which plaintiff was informed was about \$660; that several parties had filed mechanics' liens; that the lien of M. F. Tetrick should be only \$391.77, instead of \$980.15, as claimed; that no part of plaintiff's demand of \$2,311.27 advanced by him to Herman under their contract of December 12, 1892, had been paid by said Gilfillans, although they often promised to do so, nor had it been returned to him by Herman, and that the Gilfillans had due notice, and agreed in the presence of Herman to pay it, and that the property was liable to plaintiff for it,—and prayed that the cause be referred to a commissioner to ascertain what was due and unpaid to the various persons who performed labor on the building erected by Herman under the contract, and to whom and what materials furnished, and by whom, what amount was due from Gilfillans to Herman under the contract, what amounts had been paid him, what the value of the property, and how much was paid for it by Hughes, and what amount was still due from Hughes upon the purchase of said property; that the parties named as defendants be required to answer under oath; that plaintiff's contract with Herman be specifically enforced; that plaintiff's claim be decreed out of whatever might be found to be due to Herman from the Gilfillans under his contract with them, after the payment of the amount of all material, lumber, etc., which went into the building, and the labor upon said building, up to the time Herman quit work upon same; that the lien of Tetrick be corrected and set aside, except as to the amount of lumber furnished by him which actually went into the building, and that plaintiff's claim, to that extent, be declared to be a lien upon the property, and the property sold to pay it, and for general relief.

Herman Fouse answered the bill, admitting the contract made with Gilfillans of June 25, and September 26, 1892, and with plaintiff of December 12, 1892; that under the contract with plaintiff he had received from plaintiff \$2,311.27, which had not been returned to plaintiff by him, nor paid by the Gilfillans; averring that up to the time when he quit work under his contract, in the summer of 1893, the work and material he had done and furnished amounted to \$8,800; that all he had been paid was \$3,400, and that there was then due him from Gilfillans \$5,360, unless they had paid to Thomas Savage a claim he had against respondent for \$660, for which they would be entitled to credit, if paid; that the Gilfillans were cognizant and had notice of the

agreement between respondent and plaintiff, and that the same was recorded, as alleged in plaintiff's bill; that Tetrick's lien should be corrected to \$391.77, as alleged; that the amount due respondent constitutes a lien upon the property as against the Gilfillans, and also as against any other of his co-defendants who became the purchasers of said property with notice,—and prays for affirmative relief, in that the cause be referred to a commissioner to ascertain and report amount of work performed and material furnished by him upon and for the building, the amount of money paid him under the contract, what amount of lumber was furnished by Tetrick to respondent which was used in the building, what amount is due respondent from the Gilfillans, and to plaintiff as assignee of respondent under the contracts.

Defendant Martin J. Hughes demurred to the bill, and, without waiving his demurrer, filed his answer, admitting the contract of June 25, 1892; that it was signed by the parties, but never recorded; that afterwards, on the 26th day of September, 1892, said Herman Fouse, of the one part, and Elizabeth M. Gilfillan and Edward Gilfillan, her husband, of the other part, entered into another agreement in writing, styled, "Modification of the Agreement Made and Entered into on the 25th Day of June, 1892," and averred that said contracts of June 25 and September 26, 1892, were absolutely null and void and of no effect; that the same do not comply with the requirements of section 12, c. 66, Acts 1891, concerning the separate property, rights, powers, and privileges of married women; that all of said work and material done and furnished, respectively, upon said building, were done and furnished under said contracts, and that the same created no liability whatever against Mrs. Elizabeth M. Gilfillan, or any of her separate personal or real estate; that respondent was advised, and so charged, that the contract of September 26, 1892, was an entire contract, and that the statute aforesaid required that the amount of the whole debt created thereby be stated therein; that in case the court should hold that the contract was void as to the fourth story, and for the additional and extra work, so called, and the additional materials furnished for the three stories as originally contracted for, then Herman Fouse had been fully paid for all the work done and material furnished upon and for said three stories, and much more. Respondent denied that Herman had done \$8,800 worth of work and material furnished, as alleged, or that Gilfillan had paid him only \$3,400, or that there was still due him \$5,360 on said contract, or any other amount; averred that Herman did proceed with the work until some time during the year 1893, but that he quit work without any fault or failure on the part of Gilfillan to comply with her contract, but that he failed, neglected, and refused to proceed further with the construction of the house, and abandoned the work after Gilfillan had paid him more

money than he was entitled to under the contract at that time; that all and every part of work done and material furnished up to that time had been performed and furnished upon and in the construction of the first three stories. Respondent denied notice or knowledge of the contract between plaintiff and Herman Fouse until after his purchase of the property; denied that plaintiff advanced Herman the \$1,000 at date of assignment, or the residue of \$2,311.27; that at the time of said assignment, December 12, 1892, Herman was insolvent, and plaintiff knew the fact; and that in order to evade the payment of the said debts, and keep the benefits and profits which might arise from the construction of said house, plaintiff and Herman conspired together to cheat and defraud the creditors of Herman and the Gilfillans, and entered into and caused said assignment to be placed upon record; and averred that said assignment was not only fraudulent in fact, but was fraudulent on its face, and that plaintiff was not entitled to one cent under it; denied notice to Gilfillan of said contract prior to September 1, 1893; averred that on the 7th day of October, 1893, he purchased the property without any knowledge of the contract of December 12, 1892, between Fred and Herman Fouse; that he agreed to pay and did pay certain mechanics' liens upon the property, as part of the purchase money. Respondent set up the agreement of August 10, 1893, between Mrs. E. M. Gilfillan and her husband, Edward Gilfillan, and Herman Fouse, agreeing that work on the house should be stopped, and submitting their settlement for the work already done and material furnished to arbitration; also, set up the fact of such arbitration, with date and amount of the award of the arbitrators, and averred certain omissions of credits to Mrs. Gilfillan by the arbitrators.

Defendants Elizabeth M. Gilfillan and Edward Gilfillan filed their demurrer and answer to the bill; admitted the contract of June 25, 1892, and the modification thereof on the 26th of September, 1892, but averred that said contracts were absolutely void and of no effect; that they did not comply with section 12, c. 66, Acts 1891; that the work done and material furnished were done and furnished under said pretended contracts, and created no liability whatever against respondent, or any of her separate personal or real estate, or against respondents, or either of them; that said contract of September 26, 1892, was an entire contract, and that the statute required that the whole amount of the debt created thereby be stated therein; that if the court should hold that said contract was void as to the fourth story of the building, and for the additional and extra work, so called, and additional materials furnished for the three stories originally contracted for, then Herman Fouse had been fully paid for all work done and materials furnished upon and for said three stories, and much more,—so much more as was nec-

essary to pay for all the material and labor furnished by said Fouse in the construction of said fourth story; denied that the work and material which had been done and furnished at the time work stopped amounted to \$8,800, or that respondents had only paid Fouse \$3,400, or that there was still due him \$5,360, or any other sum; admitted that Herman Fouse proceeded with the work until some time during the year 1893, when he failed, neglected, and refused to proceed further with the work, and abandoned it, without any fault or failure on the part of respondents, and after he had been paid more money than he was entitled to under the contract at the time; denied that Fred Fouse advanced to Herman either the \$1,000, or the residue of the \$2,311.27, as claimed by Fred; averred that at the time of said contract between Herman and Fred Fouse, December 12, 1892, Herman was insolvent, which fact was well known to Fred Fouse, and that the said contract was made and placed on record to evade the payment of said debts, and keep the profits and benefits that might arise from the construction of said building; that said Herman and plaintiff conspired to cheat and defraud the creditors of Herman as well as respondents, and entered into said agreement, and put it upon record, for that purpose, and that said agreement was not only void in fact, but void upon its face, and that plaintiff was not entitled to one cent thereunder; denied that the lien of M. F. Tetrick was incorrect; set up the agreement between respondents and Herman Fouse of August 10, 1893, to submit their differences to arbitration upon the basis and in accordance with the terms and conditions of the agreements of June 25 and September 26, 1892, and averred that Fred Fouse had full knowledge of, and acquiesced therein, and that an award was made thereunder by the arbitrators as of August 18, 1893, finding \$1,349.89 in favor of Herman Fouse, and exhibited a copy of the said award with their answer, and averred that credits which were omitted by the arbitrators would properly reduce the amount to \$130.34, and denied that even that sum was a lien or charge upon said building; averred that Elizabeth M. Gilfillan was the owner of other large, separate real estate, situate in Wood county, totally unincumbered, of sufficient value to satisfy even a decree for the amount claimed by Herman and Fred Fouse, and that, if she be in any way bound to said Herman or Fred Fouse for any sum on account of said contracts, the same should be made out of her said other separate estate, to the exclusion of the property purchased by Hughes from her; and prayed for affirmative relief, that said award should be corrected by allowing the credits omitted by mistake of the arbitrators, and that the contracts of June 25 and September 26, 1892, be declared null and void and canceled, and for general relief.

On the 3d day of January, 1895, the cause came on to be heard upon the demurrers, which were overruled, the several answers filed, and general replications thereto; and the cause was referred to W. W. Jackson, one of the commissioners of the court, to ascertain and report upon the matters raised by the pleadings in the cause. On the 16th day of July, 1896, said commissioner tendered his report, together with the exceptions thereto, which was filed by the court; and on the 27th day of November, 1896, the cause was finally heard upon the report of Commissioner Jackson, and the eight exceptions thereto, when the court overruled all of said exceptions, except the eighth, which was sustained, and decreed "that the commissioner should have found and reported that there were no liens upon the house and lot in the bill and exhibits mentioned and described, and that no liens existed for any amount that was or may be due from the Gilfillans on account of the construction of the house under the contract of June 25, 1892, and September 26, 1892, upon said lot and building, and in that particular the court doth correct said report, and so finds," and proceeded to decree that said contract of June 25th and September 26th created no lien upon said house and lot, and that defendant Hughes, when he purchased the same, took them free from any lien or other liability arising out of said contract, and that said Hughes and said house and lot are not liable to the said Herman Fouse or Fred Fouse for any sum upon any demand made in the bill and proceedings; and dismissed the bill as to said Hughes, and decreed that said Fred and Herman Fouse, or either of them, recover nothing of the said Hughes, and that said house and lot are liable in no way to any of said demands made in the bill and proceedings; and the court further decreed that it appeared that at the time of the execution of the contract of June 25 and September 26, 1892, said E. M. Gilfillan owned property other than the house and lot, and the court not then deciding whether such other property and said Gilfillans are liable to said Fred Fouse and Herman Fouse, or either of them, for any amount, the cause was continued, and plaintiff granted leave to file an amended bill within 60 days of the rising of the court, if he should be so advised. From which final decree said Fred Fouse and Herman Fouse appealed to this court, and assign the following errors: "The court erred in sustaining exception 8 to the commissioner's report, in this: that the court overruled the finding of the commissioner that the claim of Herman Fouse against E. M. Gilfillan for \$1,256.02 was a lien upon the property of E. M. Gilfillan under the contracts of June 25 and September 26, 1892, entered into between Herman Fouse, E. M. Gilfillan, and Edward Gilfillan. Second. The court further erred in said decree in declaring that the said Fred Fouse, Herman Fouse, nor either

of them, should recover anything of Martin Hughes, and the said house and lot were liable in no way to any of the demands made in the said bill of complaint of Fred Fouse filed in this cause. Third. The court further erred in correcting Commissioner W. W. Jackson's report as to his finding that the claim of Herman Fouse, ascertained by the commissioner at \$1,256.02, was a lien upon the property of E. M. Gilfillan, and by decreeing that the said property was not liable for the payment of the said debt to Herman Fouse. Fourth. The court further erred in decreeing that the plaintiff took nothing by his appeal filed in this cause, and virtually dismissed the same as to all parties defendant except Edward Gilfillan. Fifth. The court further erred in its statement in said decree of the fact, which was the dictum of the court, and which does not appear from the record, that Edward Gilfillan was the owner of real estate at the time (on the 25th day of June, 1892), and leaving the plaintiff, Fouse, to prosecute his claim against Edward Gilfillan. Sixth. The court further erred in not decreeing that the claim of Herman Fouse, as ascertained by Commissioner Jackson, was a valid and subsisting lien upon the house and lot mentioned in the bill and proceedings in the cause, and that the said house and lot of ground were bound for the payment of the same in the hands of the purchaser, Martin Hughes. Seventh. The court further erred in not decreeing that the labor and material furnished by Herman Fouse, and placed in the said building, was not a permanent improvement upon the real estate of Mrs. E. M. Gilfillan, placed there under and by virtue of a contract with her, and that the amount found by W. W. Jackson, commissioner, as due to Herman Fouse for the materials furnished, and for the erection of said building, should be, and was, a lien upon the said property under her contract with him of June 25 and September 26, 1892, and that Fred Fouse, the plaintiff in this cause, was entitled to said amount under his contract with Herman Fouse as of date the 12th day of December, 1892. Eighth. The court further erred in not decreeing that M. Tetrick should only be allowed for the value of the lumber and material furnished by him to Herman Fouse which actually was used in the construction of the building upon the Gilfillan lot under his mechanic's lien filed in this case."

The principal questions involved in this case are whether the contract made between Elizabeth Gilfillan and Edward Gilfillan, her husband, of the one part, and Herman Fouse, of the other part, dated June 25, 1892, and modified by an addendum thereto on the 26th day of September, 1892, was duly executed, acknowledged, and recorded, and a valid contract, and whether appellee Hughes had notice thereof when he purchased the property from Mrs. Gilfillan, and took conveyance therefor. This contract was executed while that re-

markable provision enacted by the legislature of 1891, in re-enacting section 12, c. 66, of the Code, was in force. The first part of the contract, dated June 25th, was signed and sealed by all the parties thereto, but neither acknowledged nor recorded. Under said section, as re-enacted in 1891, both acknowledgment and recordation were necessary to its validity. On the 26th day of September, 1892, the said E. M. Gilfillan, desiring a change in the plan of the building, by adding a fourth story thereto, together with her husband, Edward Gilfillan, extended the contract by adding thereto, and in explicit terms contained in the last part of the contract, made that part of the contract dated June 25, 1892, a part of that dated September 26, 1892. When the last paper was signed and sealed by the said Gilfillans, the paper, as then completed, was duly acknowledged on the 7th day of October, 1892; and on the 1st day of November, 1892, the whole paper was admitted to and spread upon the record together in the proper clerk's office in Wood county. It is insisted that the addendum, being dated the 26th day of September, 1892, was not recorded, because the clerk, in his certificate of recordation, refers to it as, "The foregoing writing, bearing date on the 25th day of June, 1892, with the certificate of acknowledgment thereto annexed, was this day admitted to record in said office," and failed to mention the modification or addendum by its date, although it follows immediately, spread upon the records with it. The addendum was what it purported to be,—a "modification of an agreement made and entered into on the 25th day of June, 1892," which modification was made on the 26th day of September, 1892, and made the whole one instrument. Suppose the clerk, in his certificate, had referred to the paper as dated September 26, 1892, which refers to another dated June 25, 1892, and makes it a part of it, which paper so referred to is recorded with it; will it be contended that the same was not acknowledged and recorded with, and as part of it? The certificate of the notary taking the acknowledgment treats it as one instrument, certifying that "Mrs. Elizabeth M. Gilfillan and Edward Gilfillan, whose names are signed to the foregoing writing, have this day acknowledged," etc. The only object in referring to the date, either in certificate of acknowledgment or recordation, is to identify the instrument acknowledged or recorded. *Adams v. Medsker*, 25 W. Va. 128. The words "foregoing writing," in the clerk's certificate, would have been a sufficient identification, without giving any date; or, if he had referred to the writing as dated September 26, 1892, it would have been a proper and sufficient reference to the whole paper, because that part dated September 26th refers to that dated June 25th, and makes it a part thereof.

But it is contended that the contract is an absolute nullity, because it does not comply

with the provisions of section 12, c. 66, of the Code, for the further reason that it fails to state the whole of the amount of the debt. Said section provides, "But every such charge must be evidenced by a writing duly executed and acknowledged by her, and duly recorded in the proper clerk's office, stating the amount of the debt and for what it was created." We have seen that the writing was duly executed, acknowledged, and recorded. This married woman, Mrs. Gilfillan, was the owner of a valuable lot in the business part of the city of Parkersburg, and desired to have erected thereon a double brick building,—the first story to be business rooms, the second for dwellings, and the third for a hall,—and on June 25, 1892, undertook to contract in writing with Herman Fouse, a builder, to furnish the labor and material, and build it, for the gross sum of \$6,500. After work was begun under this contract, although it was not yet complete by acknowledgment and recordation, she decided to change the plan and add another story, which would necessitate some extra work, also, on the lower stories to make the walls strong enough to support the additional work, so that to the contract already written and signed was added the modification mentioned, and the contract completed. This contract was for the purpose of improving her separate estate, by erecting the building thereon, and, by its terms, expressly charged the property, her separate estate, and all the improvements thereon, with the payment of said debt mentioned in the original agreement, \$6,500, and "with the amount of any and all sums necessary to be put on the fourth story, and any other modifications that might be agreed upon." There can be no question about the contract being sufficient, to the extent of the debt specified in the contract; and there is a distinct provision in the contract of June 25, 1892, to secure by deed of trust a balance of \$3,250, and no provision for deferred payments made in that part of the contract for the fourth story and changes dated September 26th. Work proceeded and payments were made under said contract until in the summer of 1893, when, by mutual consent, the work was stopped on said building, and the parties agreed to submit to arbitrators the matters in difference between them, and to settle to and with each other for the work that had been done upon and in and on said house upon the basis and according to the terms and conditions as in said agreements of June 25 and September 26, 1892, set forth and specified, as shown by a contract in writing between said Elizabeth M. Gilfillan and Edward Gilfillan, her husband, and Herman Fouse, dated August 10, 1893, which contract was duly acknowledged by the parties, and referred to both in the answer of defendant M. J. Hughes and in that of E. M. and Edward Gilfillan, and which contract was brought to this court on certiorari sued out on motion of appellee Hughes, as part

of the record in the cause. On the — day of February, 1893, the legislature reenacted chapter 66 of the Code, and repealed the restrictions and limitations upon married women in relation to charging their separate property and estate, as contained in said section 12, c. 109, Acts 1891 (section 12, c. 66, Code); and by said contract of August 10, 1893, Mrs. Elizabeth M. Gilfillan recognized the said contract of June 25th and September 26th as valid and binding, and agreed thereby to settle upon a quantum meruit for the work already done; and the record shows that the parties actually went on under the said contract of August 10, 1893, and tried their matters before the arbitrators selected thereunder, who returned an award finding on the hearing of the whole matter in favor of Herman Fouse the sum of \$1,349.89. Appellee contends: "There can be no recovery upon a quantum meruit, since the labor was performed under a special contract. Fouse could only claim to recover the contract price, first having shown that he had fully executed it,"—and cites many authorities in support of this proposition. His proposition of law is not objectionable, but it has no application to this case as it stands. The work was not completed,—the Fouses say, because of the failure of the Gilfillans to comply with their contract; the Gilfillans say, because Fouse failed to proceed with the work, and abandoned it, without fault on their part. Whether the one or the other was in default, what boots it, when the parties come together and agree, in writing under seal, duly acknowledged, on the terms of settlement? The work already done is accepted by Mrs. Gilfillan, to be paid for as the arbitrators may decide. Mrs. Gilfillan was authorized by law to make such contract, and until long after it was made she had shown no disposition to repudiate the contract of June 25 and September 26, 1892, so far as the record shows. The amount remaining unpaid is far less than the sum she bound herself to secure by deed of trust under the first part of the contract, which was a sum certain. What notice had appellee Hughes of any charges against the property when he took the conveyance thereof from the Gilfillans on October 7, 1893? The contract of June 25 and September 26, 1892, was on record. The contract of December 12, 1892, between Fred Fouse and Herman Fouse, was on record. The deed from the Gilfillans to Hughes recited several mechanics' liens existing on the property, which Hughes assumed to pay as part of the purchase money, which mechanics' liens, recognized by both Mrs. Gilfillan and Hughes as valid liens, were based and depended upon the contract of record dated June 25 and September 26, 1892, which appellee contends was absolutely null and void and of no effect; and the contract of August 10, 1893, set up by Hughes in his answer, had been executed and acknowledged two months prior to the date of his deed from the Gilfillans,

and he nowhere negatives the fact of his knowledge of its existence at the time of his purchase, although the paper is introduced into the case by himself. Story, in his Equity Jurisprudence (section 299), says: "Constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted;" and in section 400 he says: "An illustration of this doctrine of constructive notice is, when the party has possession or knowledge of a deed, under which he claims his title, and it recites another deed which shows a title in some other person, then the court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it." Appellee Hughes accepts a deed from the Gilfillans, which requires him to pay, as part of the purchase price, certain mechanics' liens resting on the property purchased, which liens show on their face that they are for materials and work furnished and done upon said property for Herman Fouse, contractor, by virtue of a contract made between Herman Fouse and E. M. Gilfillan and Edward Gilfillan. This is certainly enough to put the purchaser on inquiry as to all liens that might attach to the property under said contract, or growing out of it. As stated in *Reed v. Gannon*, 50 N. Y. 349, "It was such notice as, in the language of the authorities, 'would lead any honest man, using ordinary caution, to make further inquiries.'" In the same case Justice Rapallo says: "Notice of any fact calculated to put the party on inquiry is, in the absence of explanation by him, sufficient to charge him with notice of all instruments which on inquiry would be disclosed." *Wait, Fraud. Conv.* § 373; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357, and cases cited.

Appellee's exceptions Nos. 1 to 6, inclusive, to the commissioner's report, go principally to items of account about which proof is taken, and insist that the commissioner erred in allowing credit to Fouse for any labor employed upon said building, or for materials furnished therefor, concerning which Herman Fouse testified, for the reason that said Fouse is incompetent as a witness in said cause, because of the decease of E. M. Gilfillan, under section 23, c. 130, Code 1891. Appellee cites the case of *Owens v. Owens*, 14 W. Va. 88, in support of his exceptions on this point. Judge Haymond, in discussing the question, says: "A contract, whether express or implied by law, is a transaction. And it seems to me that when one person testifies that he did work and labor for another, generally, he must be taken as testifying to a transaction, in legal contemplation, between him and such other person, within the true meaning and intent of the law now under consideration. Because the testimony of the witness tends to prove, in legal effect, not only a request to do the work, but also a promise to pay him therefor

what the same was reasonably worth, and also that he did the work in consideration of said request. The doing of the work and labor is the consideration of the contract or promise to pay, whether express or implied, and, it seems to me, cannot be separated from the contract or transaction very easily." That was an action by Miss Owens against the estate of her deceased brother for services rendered him in his lifetime, under an implied contract, if any, which she was undertaking to establish by her own testimony; and, as the judge well said, the doing of the work and labor was the consideration of the contract or promise to pay, and cannot very easily be separated from the contract or transaction; and he further (on page 95) gets at the gist of the whole matter by the question, "Does the testimony tend to prove what the transaction was?" This is the true test. In the Owens Case the circuit court had permitted the plaintiff to prove the whole transaction with the deceased, and it was not easy, by any means, to separate the doing of the work, the consideration of the contract or promise to pay, from the contract or transaction. In *Strong v. Dean*, 55 Barb. 337, where a similar question arose under the provision of the statute of New York, that a party should not be allowed to be examined as a witness in his own behalf "in respect to any transaction or communication had personally by said party with a deceased person against parties who are executors or administrators of such deceased person," it was held, "In such a case the test of the admissibility of the testimony is, does it tend to prove what the transaction was?" In *Stanley v. Whitney*, 47 Barb. 586: This was an action on a note for \$896, brought by the administrator of the obligee or payee. Defendant testified in his own behalf that the only consideration he received for the original note was the sum of \$800, paid him by one R. Held, "that this was in fact testifying to a transaction between the defendant and the deceased intestate, and that the evidence was therefore erroneously admitted." Defendant had testified that he received nothing from the intestate, except the \$800 which he received from R.; showing precisely, as stated by the court, "what the transaction was between himself and such intestate. It touched the very point in dispute, to wit, that the agreement was usurious and void." The court further say: "It was most clearly a part of the transaction between them, that no more than \$800 was advanced as the loan upon which the \$800 note was predicated. It is of no consequence what the form of the question or answer was. Evidence to rebut a legal presumption may be just as effectual and as pertinent to establish the true nature and character of a given transaction when used in a negative as in an affirmative form. The only question is, does it tend to prove what the transaction was?"

In the case of *Belden v. Scott*, 65 Wis. 425, 27 N. W. 356, upon a claim against the estate of a decedent for the value of services rendered during his lifetime in examining and correcting his books of account, plaintiff was asked: "(1) About what time did you commence to work upon those books? (2) Up to what time did you perform labor on those books? (3) What amount of time did you spend in labor on those books? (4) How much time between the 1st of June, 1879, and the 1st of September, 1881, did you spend in labor upon those books of Mr. Caswell? (5) How much time did you spend between those dates in labor upon those books when Mr. Caswell was not present? (6) What was the value of the services performed by you upon those books between June 1, 1879, and September 1, 1881? (7) What was the value of the services performed by you when Mr. Caswell was not present, between those dates?" These questions were ruled out by the trial court on the ground that they called for transactions or communications between the deceased and the party. Plaintiff then made the general offer to prove by himself, as a witness, "that the time spent upon those books between June 1, 1879, and September 1, 1881, amounted in all to about one year, and that its value was in the neighborhood of \$1,500," which was also refused on the same grounds. The court say: "There can be no question of the competency of this evidence. * * * The statute is not hostile to the proof of all just claims against estates. It was made to protect estates from claims depending upon personal transactions or communications between the claimants and the deceased, established by the testimony of the claimants in the absence of the testimony of the deceased to controvert it." In case of *Daniels v. Foster*, 26 Wis. 686, the defendant introduced a letter to himself, purporting to have been written by plaintiff's testator, acknowledging the payment of the mortgage sued upon, and stating that he had made a discharge, which he would forward, etc., which letter defendant stated he had received in the mail from the testator. The court say: "The case does not seem to come within the letter of the statute, and yet the communication was in some sense personal. But the personal transaction or communication of the statute, no doubt, means a transaction or communication face to face, or by the parties in the actual hearing and presence of each other. In every such case the statute excludes the testimony of the living party, upon the obviously wise and just ground that his adversary, whose cause of action or defense survives, and who was possessed of equal knowledge, and equally capable of testifying to what the transaction or communication really was, has been removed by death, and so cannot confront the survivor, or give his version of the affair, or expose the omissions, mistakes, or perhaps

falsehoods, of such survivor. * * * The law has, therefore, wisely excluded him." In *Stewart v. Stewart*, 41 Wis. 624, the court held that: "Though the grantees in a deed, after the death of their grantor, are not competent witnesses in their own behalf to prove any personal transaction or communication had between them and the deceased grantor, and cannot testify that he delivered the deed to them, nor state any conversation between him and themselves thereto, yet they may testify to other facts which have a bearing upon the question of delivery (as that the deed was in their possession or under their control from the day of its date until they placed it on record); and the refusal to permit such testimony in this case was error."

Fouse is a competent witness in his own behalf, under section 23, c. 130, of the Code, in this case, except only "in regard to any personal transaction or communication between himself and the deceased." The contract of June 25 and September 26, 1892, which was the only personal communication or transaction between them prior to the time that Fouse quit work on the building, was complete in itself, and was on record. And what Fouse might testify to as to furnishing labor on or material for the building could in no possible way tend to prove what the transaction was between them. I do not feel that I could go so far as the court went in *Belden v. Scott*, supra, which was a case quite similar to that of *Owens v. Owens*, supra, in which it is held "that the circuit court erred in permitting the plaintiff to testify as a witness in her own behalf as to her work and labor and services rendered for the deceased, and what things she did in and about the work and labor she claimed to have performed for the deceased in his lifetime, whilst she lived with him, and had taken charge of the household affairs of the deceased, and had sold produce and bought provisions for the house with such produce, and had nursed deceased in his sickness." Syl. point 1. In *Page v. Danaher*, 43 Wis. 221 (Syl. point 2): "In an action by executors upon a note alleged to have been executed and delivered by defendants to plaintiffs' testator, and in which he is named as payee, but which defendants allege to have been altered after execution, one of the defendants, as a witness for the defense, might properly be asked when and with what ink he signed the note, whether he struck out words in the printed form which appeared to have been stricken out, and other questions which did not call for any transaction or communication had by defendants with such testator personally."

Appellant Fred Fouse was not a party to the contract of August 10, 1893, between Herman Fouse and Gilfillan, and was not bound by the award; but he seems to have made no claim for any amount beyond what, on a fair settlement, appears to be due to

Herman, and only claims that in his bill. He contested no payments made to Herman after the contract of assignment made on December 12, 1892; and, under all the circumstances of this case, he should not recover anything more than the amount found to be due to Herman on his contract with the Gilfillans, the sum of \$1,256.02, as found by Commissioner Jackson.

The court erred in sustaining appellees' eighth exception to the commissioner's report, and in finding that the contract of June 25 and September 26, 1892, created no lien or charge upon the property, and that appellee Hughes, when he purchased the property, took it free of liens or other liability arising out of said contract, and in dismissing the bill as to said Hughes, and giving judgment for costs. Said decree of November 27, 1896, is reversed and set aside, and the case remanded, with directions to the circuit court to decree to appellants the said sum of \$1,256.02, with interest from August 10, 1893, and that provision be made in said decree for sale of the property to satisfy the same, unless the same shall be paid by a day to be named in said decree; and this cause is remanded to the circuit court of Wood county for further proceedings to be had therein accordingly.

HEBB v. CAYTON.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1898.)

MANDAMUS—PRACTICE—ELECTIONS—CANVASS—RECOUNT.

1. Mandamus lies to compel a board of canvassers canvassing returns of an election to recount the ballots between competing candidates for office on the demand of either, when they refuse such recount.

2. A candidate asking a recount of ballots need not assign errors in the first count, or give any reason for a recount.

3. Where ballots once recounted as between candidates for one office are again sealed up, that will not debar a candidate for another office from demanding a recount as to the office for which he was a candidate.

4. Where, upon a petition for a mandamus, a rule to show cause why the writ should not issue is awarded, instead of a mandamus nisi, and there is no answer to the rule raising an issue of fact, there need be no writ of mandamus nisi, and a peremptory writ issues; but where there is an answer raising an issue of fact, a mandamus nisi, embodying the facts justifying the mandamus, must be awarded, and it is treated as the declaration.

(Syllabus by the Court.)

Error to circuit court, Tucker county; Joseph T. Hoke, Judge.

Mandamus by Charles M. Hebb against the county commissioners of Tucker county as a board of canvassers. A peremptory writ issued, and William M. Cayton brings error. Affirmed.

W. E. Maxwell and C. Wood Dailey, for plaintiff in error. Dayton & Dayton and Fred O. Blue, for defendant in error.

BRANNON, P. Charles M. Hebb and William M. Cayton were candidates for the clerkship of the county court of Tucker county at the election in November, 1896. While the commissioners of the county were in session as a board of canvassers, canvassing the returns of the election, Hebb demanded a recount of the ballots for that office, which, being refused, he asked and obtained from the circuit judge a mandamus to compel such recount, and Cayton sued out the writ of error we now decide. It is urged before us that certiorari, not mandamus, is the proper remedy. The action of canvassers in counting or recounting ballots is purely a ministerial act, one which the law commands them to do. *Brazie v. County Com'rs*, 25 W. Va. 213; *Marcum v. Commissioners*, 42 W. Va. 263, 26 S. E. 281. They have no choice to do or not do it, under proper circumstances. At common law, if, having entered upon a count or recount, they commit any error, it is to be corrected by certiorari, not mandamus, as mandamus is not an appellate process. It does not lie to direct the inferior tribunal how to decide, but only to compel it to act when it refuses to act at all. *Board v. Minturn*, 4 W. Va. 300; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *Railway Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551. So, the statute giving right to Hebb to demand the performance of this ministerial act, mandamus is a proper remedy at common law. But, even if the act of recount were not ministerial in character, as chapter 25, Acts 1893, amending section 89, c. 3, Code 1891, provides that "any officer or person upon whom any duty is devolved by this chapter may be compelled to perform the same by mandamus," it would clearly warrant the use of mandamus in this case. Indeed, we held in *Marcum v. Commissioners*, 42 W. Va. 263, 26 S. E. 281, that it gives mandamus, in matters under the election law, more scope than at common law, making it applicable to such matters, whether ministerial or judicial; in other words, giving it the appellate function of certiorari. One excuse made for the commissioners in refusing Hebb's request for a recount is that they had made a recount in one district of the county between two candidates for justice, and those ballots had been again sealed, and the commissioners did not think they had right to reopen them. A strange proposition, indeed,—that because ballots of one district had been sealed after a recount between district officers, this should forbid their recount in an election between candidates for county or other officers. Strange that such sealing of ballots is a burial without resurrection to answer the loud call of public justice. And for such a proposition language of Judge Snyder in *Chenoweth v. Commissioners*, 26 W. Va. 230, is cited. He said only that after one recount the same candidate could not have another, carefully limiting his meaning to the same candidates. Those ballots, though sealed, are

there to ascertain the true result of the popular verdict as to any and all candidates voted for; to correct mistakes at the precincts. But in truth the ballots had not been actually sealed again, for the commissioners certify that while yet they were considering a ballot in the justices' recount, "and before the ballots cast in said district were resealed and the result declared, but after the ballots had been counted, the result ascertained, the ballots tied up, and were being sealed," Hebb asked the recount. The plea that there could be no recount after sealing because the ballots might be tampered with in the meantime, can in this case have no force, because they had not left the hands or eyes of the commissioners. If resealed, the mere possibility of fraud does not stifle their evidence.

It is said Hebb gave no reason for a recount,—specified no error in the first count. How could he specify? He wanted the officers of the law to examine them for error. He did not have to assign errors. He is supposed never to have seen the ballots to be able to do so. The statute gives absolute right to demand a recount, without giving any reason. The circuit judge awarded a rule to show a cause why a mandamus should not issue, and did not award a formal mandamus nisi, or, as it is commonly called, an alternative mandamus; and it is said that, treating this rule as an alternative writ of mandamus, it does not show cause for such writ. One reason given is that it recites that Hebb demanded a recount before the result had been declared, and that till then he could not do so. The statement in the rule that a "recount" was demanded implies that the ballots had been once counted; and we should not unreasonably presume that when the demand was made there had as yet been no first count. We are to understand that a table had been prepared showing result. Hebb did not have to wait for a formal declaration of result, as the Code says that, "after canvassing the returns, the board" shall recount the ballots if demanded. The only declaration of the result of the election—that is, legal declaration—is that made after canvass, and after recount, and entered of record. Code 1891, c. 3, § 69. It might be said that it is too late to ask a recount after this entry of record; but it cannot be said that it may not be demanded before such declaration. Technicality going so far should not be tolerated.

It is next insisted that no peremptory mandamus should have issued because no alternative mandamus was issued, and that under *Fisher v. City of Charleston*, 17 W. Va. 596, it is improper to substitute the petition or rule, or either of them, in lieu of the alternative writ, and no issue should have been made upon an answer to the rule. That is true when there is an answer to the rule raising an issue of fact; but there was no such answer in this case,—only a demurrer to the rule. The settled law is that when, as is

often the case, a rule to show cause why a mandamus should not issue is awarded in the first instance, instead of an alternative mandamus, and there is no answer to the rule raising an issue of fact, and that rule and the petition state facts warranting a peremptory mandamus, such peremptory mandamus at once issues upon the rule without an alternative mandamus. This is well settled. *Merrill, Mand. § 252; Fisher v. City of Charleston, 17 W. Va. 596 (Syl. point 1).* Where the use of an alternative mandamus when no answer raising an issue of fact is presented? If the petition show prima facie cause for mandamus, and it is not rebutted by fact, of course the mandamus peremptory should issue. *High, Extr. Rem. § 504.* Moreover, Cayton demurred to that rule, treating it as if a mandamus nisi, and it does not lie with him to demand in this court an alternative writ.

It is further objected that the peremptory mandamus goes further than the rule; that, whereas the rule only requires the commissioners to assemble and recount the votes, the peremptory writ requires them to recount the ballots between these candidates, and, in addition, declare the true result according to the recount, and issue proper certificate of election. Now, it is true that the command inserted in the alternative writ of mandamus must be strictly followed in the peremptory writ, and the command therein cannot be varied or modified from the alternative writ. This addition does not vary or modify the rule in legal view, as the command to recount would be enough both in the rule and peremptory writ, since it would follow as a legal duty that, after the recount, the board should declare the result, and issue a certificate. This is not the case of a command to do one thing in the rule or alternative mandamus, and to do another thing in the final writ. The addition in the final writ complained of was only to do what the court ought to do without the command made by that addition. The peremptory writ commands a recount of the ballots between the parties for the office of "county clerk" of Tucker county. It is said there is no such office, and that this is a fatal defect of the peremptory writ. Very, very technical this is. In common parlance, "county clerk" means "clerk of county court," but everything else in the record, petition, and rules and ballots, and the names of the candidates on the ballots, show that these parties were voted for for clerk of county court. Although the petition is not a pleading so the defects therein can be a ground to quash it, yet, under *Doolittle v. County Court, 28 W. Va. 158 (Syl. point 3),* the petition may be looked to for the cure of an alternative writ of mandamus. In addition, there was the rule that was part of the record that was right in this respect. The final writ stood upon it.

It may not be out of place to emphasize as a matter of practice what has often been held in this court: that the better practice is, when a petition for a mandamus is filed, to award

an alternative writ of mandamus, stating all the facts therein calling for a mandamus, as would be stated in a declaration; for this alternative writ is treated as a declaration in the action called mandamus. It is not necessary to issue a rule, for, where matters of fact come in an answer to it, it necessitates an alternative mandamus, and after that a peremptory mandamus, making three processes or awards instead of two. There is no use of a rule. The alternative writ should be resorted to in the first instance. *State v. Long, 37 W. Va. 266, 16 S. E. 578.* I cite, also, the article "Mandamus" in that great work, *American & English Encyclopædia of Pleading & Practice* (volume 13, p. 767). The article is almost an entire treatise on this important remedy. It seems to me that Hebb was denied, without any reasonable justification, of a plain right, as a citizen, under the law of the land, to have a recount of the ballots. We affirm the judgment.

GIBNEY et al. v. FITZSIMMONS et al.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1898.)

DEED—CONSTRUCTION—INTENT OF PARTIES—EVIDENCE—DESCRIPTION.

1. The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto, unless to do so will violate some established rule of property.

2. Where the description consists of several parts, and some of them are incorrect, if it can be ascertained from those which are correct what was intended to be conveyed, the incorrect parts will be rejected, and the instrument be made to take effect.

3. If the language of a deed is ambiguous, the court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used and enjoyed under the grant.

(Syllabus by the Court.)

Appeal from circuit court, Ohio county; Joseph R. Paull, Judge.

Bill by Eda Gibney and others against James Fitzsimmons and others. Decree for complainants. Defendants appeal. Affirmed.

White & Allen, for appellants. Howard & Handlan and T. S. Riley, for appellees.

McWHORTER, J. James Fitzsimmons and Mary Gibney purchased together a piece of real estate in the city of Wheeling, under the following contract: "Wheeling, July 18, 1864. Mr. James Fitzsimmons and Mrs. Mary Gibney have this day purchased from Mrs. Mary Anne Fitzpatrick Powell the house and lot northeast corner of Zane and Seventh streets, for the sum of six hundred dollars, and on the following conditions, to which all parties subscribe: Two hundred dollars to be paid forthwith, and the balance in annual sums of two hundred dollars, with interest at six per cent.; the deed to be transmitted

to the purchasers after they shall have paid in full. Hiram D. Powell. Mary A. Powell." The premises so purchased consisted of a lot designated as "lot 157," fronting 60 feet on Zane street, and 50 feet on Seventh street. Upon the corner fronting Zane street was a double frame house, 30 feet wide. At the time of the purchase, Mrs. Mary Gibney was occupying the west or corner half of the house as a residence, and continued to so occupy it until 1874; and, when she left it, she kept tenants in it, and collected the rents, until her death, in 1892; and, soon after the purchase, Fitzsimmons, with his family, moved into and occupied the east half of the house, and so continued to occupy it until about the year 1874, when he built a brick house on the east half of the lot, and moved into that, where he has remained ever since, and has continued to occupy the east half of the said frame house by tenant, collecting the rents, ever since. On the 17th day of August, 1866, the grantors, Hiram D. Powell and Mary A. Powell, undertook to convey to said Mary Gibney and James Fitzsimmons, by two separate deeds, their respective portions of said property, which deeds both bear date on said 17th of August, 1866, and were duly acknowledged and recorded on the 22d day of the same month. One of said deeds conveyed to Mary Gibney, in trust for her son John A. Gibney, "that part of lot No. (157) one hundred and fifty-seven now occupied by the said Mary Gibney, party of the second part, and fronting on Zane street thirty feet, commencing at James Fitzsimmons' line, and running thence westward to Seventh street, and running from Zane street to Arthur McGinness' line a distance of fifty feet, together with the tenement house situated thereon." The other conveyed to James Fitzsimmons, in trust for his wife, Mary Fitzsimmons, "that part of lot No. one hundred and fifty seven (157) now occupied by the said James Fitzsimmons, party of the second part, and fronting on Zane street thirty (30) feet, commencing at Mary Gibney's line, and running thence eastward, and running from Zane street to Arthur McGinness' line, a distance of fifty (50) feet, together with one-half of tenement house situated thereon."

John A. Gibney died in the summer of 1891, and Mary Gibney in October, 1892. Eda Gibney, widow, and Margaret A. Gibney, and other heirs at law of John A. Gibney, deceased, filed their bill at March rules, 1894, in the circuit court of Ohio county, against James Fitzsimmons and Mary Fitzsimmons, his wife, praying that the court appoint a discreet person as trustee in the room and place of said Mary Gibney, deceased, under said trust deed, and that said trustee, when so appointed, be directed to convey the property to plaintiffs, and that defendant James Fitzsimmons be held to account for the rents collected by him for the property since the death of said Mary Gibney, and that he be directed to interfere no further with

the rights and interests of plaintiffs in the property, and that he be required to turn over the possession of said property to said trustee. And at March rules, 1895, said plaintiffs filed their amended bill, besides the said James and Mary Fitzsimmons making all the heirs at law of Mary Gibney parties defendants, containing about the same prayer as the original bill, and that the rights and interests of the plaintiffs in the premises, and of the said trustee who might be so appointed, might be clearly fixed and defined by the court, so that the said James Fitzsimmons might be deterred and stopped from further interference with them or the property, and for general relief. James and Mary Fitzsimmons, Bridget Lantry and her husband, Catherine Gribben and her husband, the adult defendants, filed their joint answer, denying the material allegations of the bill; that Mary Gibney, either in her own right or as trustee of John A. Gibney, ever owned or occupied or claimed the whole of the property, or until the filing of the bill had they, or any one claiming under them, claimed or pretended to claim more than the part of lot 157 upon which the west half of the double house is situated, and extending back the width of the west half of the double frame house from Zane to Seventh street, along the east line of Seventh or Wood street, 50 feet to the McGinness property; and averring that, at the time of the purchase, each took possession, Mary Gibney on the west, and Fitzsimmons on the east, of said line; that the west 15 feet, on the corner, of which Mary Gibney took possession, was more valuable than the east 45 feet of said lot, of which the said Fitzsimmons took possession; that, during all the time from the purchase, all the parties, as well as Mary Gibney and John A. Gibney, well knew and understood the line to be as described, and that the Fitzsimmons occupied the said east 45 feet by right of their ownership thereof, and not, as alleged in the amended bill, with the assent and permission of said John A. Gibney or any other person, and that respondents had no knowledge of plaintiffs' claim until the filing of the bill; that from the time of the purchase, in 1864, until the present, the said James and Mary Fitzsimmons had had the open, notorious, continuous, uninterrupted, and undisputed possession of said property to said line, and paid the taxes thereon; that they not only claimed it under their deed, but their claim and right thereto was never disputed by said Mary Gibney or John A. Gibney, or any one claiming under them. Respondents aver that in the deeds from Powell and wife, of August 17, 1866, there is a material mistake in the description of the property in the deed to James Fitzsimmons, in that the distance call on Zane street is 30 feet, while it should be a much greater distance; that the mistake is shown on the face of the deed, as the deed calls for the property "now occupied by the said James Fitzsim-

mons," and, in further describing the property, says, "together with one-half of tenement house situated thereon," clearly showing that the one-half of the tenement house occupied by said Fitzsimmons was and still is on the part of said lot No. 157 conveyed to said James Fitzsimmons; that a like mistake appears in the deed under which the plaintiffs claim; that said deed conveys such part of lot No. 157 as was occupied by Mary Gibney at the time said deed was made, and conveys therewith a frame tenement house situated thereon, and calls for the line of said James Fitzsimmons, showing that it was the intention, both implied and express, in said deed, that the line between the double frame houses extended was the dividing line between the said properties, and that the use of the words "thirty feet" in said deed was a mistake and error therein, which should be reformed and corrected. Respondents deny that the property was conveyed in trust to the said Mary Gibney for her son John A. Gibney, and aver that it was purchased and improved by said Mary with her own money, and that she used, occupied, and rented it, and received the rents and profits therefrom from the time of the purchase, in 1864, until the time of her death, in 1892; that said John A. Gibney never invested a dollar in the property, or had anything to do with it, and made no claim during his life or the life of said Mary that said property was held in trust for him, and that respondents never heard of such claim until about the time of the bringing of this suit; that the deed to said Mary is in the handwriting of said John A. Gibney, and that both grantors and grantee Mary Gibney were uneducated, and could not read writing; "that said Mary Gibney did not know during her lifetime that the words 'in trust for John A. Gibney' were in said deed; that no effort was made by the said John A. Gibney during his lifetime to enforce or even claim any interest in said property, and that said words were inserted in said deed either by accident or mistake, or in fraud of the right of the said Mary Gibney." Respondents aver that said property was owned in fee by said Mary Gibney, and at her death descended to her heirs at law, as follows: One-fifth to the plaintiffs, one-fifth to respondent Mary Fitzsimmons, one-fifth to Bridget Lantry, one-fifth to Catherine Gribben, and one-fifth to the husband and children of Rose (Gibney) Oshe, deceased; and that said property should be partitioned and divided among said heirs at law; and they pray for affirmative relief,—that said line may be fixed and established along the line between said double frame house extended to the northern boundary of the lot; that the deed to Mary Gibney be construed in the light of these facts and the evidence offered, and be held to be a deed in fee, and that the said Mary Gibney held the property in fee under said conveyance; and that same be partitioned and divided among said heirs at

law, or sold, and the proceeds divided. Plaintiffs filed their special replication, traversing the material averments of the answer. The answer of the infant defendants was filed by their guardian ad litem.

Depositions were taken and filed in the cause. On the 5th of June, 1896, the cause was heard, when the court ascertained "that Mary Gibney and James Fitzsimmons, on July 18, 1864, purchased a part of lot 157, on the northeast corner of Zane and Seventh streets, consisting of 60 feet frontage on Zane street, and extending back along Seventh street 50 feet, upon which was situated a double frame house; that under said purchase Mary Gibney took possession of the west half of said double frame house and the ground belonging thereto, fronting 15 feet on Zane street, and extending back the same width 50 feet along Seventh street, and that James Fitzsimmons took possession of the east half of said double frame house, and the balance of the ground fronting 45 feet on Zane street, and extending back 50 feet to the McGinness line, and that such possessions have ever since been undisturbed and continuous; that on the 17th of August, 1866, Hiram D. Powell and wife conveyed to each of them the respective parts so occupied by deeds, which are filed in this cause as Exhibit A of Eda Gibney's deposition, and Exhibit A of answer of James Fitzsimmons and others, and that the clause in each of said deeds, 'fronting on Zane street thirty feet,' when construed with the balance of the respective deeds, and the surrounding circumstances at the time of the execution of the same, and the acts of the parties under said deeds, should be made to conform to such occupancy; that the description of the property in the said deed to Mary Gibney is as follows: 'That part of lot No. (157) one hundred and fifty-seven now occupied by the said Mary Gibney, party of the second part, and fronting on Zane street thirty feet, commencing at James Fitzsimmons' line, and running thence westward to Seventh street, and running from Zane street to Arthur McGinness' line, a distance of fifty feet, together with the tenement house situated thereon, it being part of the lot or parcel of ground conveyed to Dennie Fitzpatrick by Jno. Ritchie, Craig Ritchie, Ellen Ritchie, and Mary Anne C. Ritchie, by deed bearing date the 1st day of April, eighteen hundred and thirty-seven.' It is therefore adjudged, ordered, and decreed by the court that the said deed of Hiram D. Powell and wife to the said Mary Gibney be reformed and corrected so that the description therein of the property thereby conveyed will read as follows: 'That part of lot No. (157) one hundred and fifty-seven now occupied by the said Mary Gibney, party of the second part, and fronting on Zane street fifteen feet, commencing at James Fitzsimmons' line, and running thence westward to Seventh street, and running from Zane street to Arthur McGinness' line, a distance of fifty feet, together with the tene-

ment house situated thereon; it being part of the lot or parcel of ground conveyed to Dennie Fitzpatrick by Jno. Ritchie, Craig Ritchie, Ellen Ritchie, and Mary Anne C. Ritchie, by deed bearing date the first day of April (1837), one thousand eight hundred and thirty-seven.' And the court is further of the opinion that the said Mary Gibney died seised and possessed of the fee-simple estate in and to the above-described parcel of land, notwithstanding the provision 'in trust for her son John A. Gibney,' contained in said deed, and that the same, upon her death, descended to her heirs at law. It is therefore further adjudged, ordered, and decreed by the court that the relief prayed for by the plaintiffs cannot be granted, viz. 'that a trustee be appointed in the room and instead of the said Mary Gibney as trustee in and under said deed, and that said trustee so appointed may be directed to convey the said property to the plaintiffs by deed.' And the plaintiffs not asking or desiring a decree against the defendant James Fitzsimmons for an account for rents, issues, and profits received by him from or on account of the said part of lot No. 157 fronting on what was formerly Zane, now Seventeenth, street, fifteen feet, and running from Seventeenth street to what was formerly Arthur McGinness' line, a distance of fifty feet, and the tenement house situated thereon, the prayer of the bill for an account is therefore refused, but without prejudice to the rights of the plaintiffs to institute any proper action, suit, or proceeding for an account; and, none of the defendants asking any further decree, it is therefore adjudged, ordered, and decreed by the court that the defendants recover from the plaintiffs their costs by them about their defense expended."

From this decree the appellants obtained an appeal to this court, and assign the following errors: "(1) That the court erred in changing the description of the property different from and inconsistent with the intention of the parties, expressed in the deed which had been regularly executed to Mrs. Mary Gibney. (2) That the court erred in making a deed by its decree. (3) That the court erred in wiping out by its said decree the trust contained in the said deed to said Mary Gibney. (4) That the court erred in its opinion, as expressed in the said decree, that Mary Gibney died seised and possessed in fee simple in and to the land conveyed by said deed, notwithstanding the provision in trust for her son John A. Gibney,' contained in said deed. (5) That the court erred in deciding that the said property, upon the death of the said Mary Gibney, descended to her heirs at law; that the court erred in giving to the defendants Fitzsimmons, by its said decree, forty-five by fifty feet of the said land conveyed by the two deeds exhibited with the pleadings in this suit, and the east fifteen feet of the house which was upon the land when it was purchased. (6) That the court erred in deciding that said Mary Gibney was only entitled to fif-

teen by fifty feet of the ground, and the west fifteen feet of the house. (7) That the court erred in not appointing a trustee under the said deed in the room of the said Mary Gibney, as prayed for in the bill. (8) That the court erred in decreeing that any other than the plaintiffs in the cause were entitled to any interest in the part of the said land and the house which was conveyed to Mary Gibney."

The circuit court properly took the view that its business was in this cause to construe the two deeds dated August 17, 1866, made by H. D. Powell and wife to Mary Gibney and James Fitzsimmons, respectively. 1 Warr. Vend. c. 13, § 1, says: "It is a fundamental rule in the construction of deeds that effect must be given to the intent of the parties when it is plainly and clearly expressed, or can be collected or ascertained from the instrument, and is not repugnant to any rule of law." In *Hurst v. Hurst*, 7 W. Va. 280, 290, Judge Haymond says: "When the language used is susceptible of more than one interpretation, it has been held that courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject-matter of the instrument; and sometimes, when the words are ambiguous, the court will call in aid the acts done under it, as a clew to the intention of the parties." *Caperton's Adm'r v. Caperton's Heirs*, 36 W. Va. 479, 15 S. E. 257, (Syl. point 3). Also, in *French v. Carhart*, 1 N. Y. 96, it is held that, "if the language of a deed is ambiguous, the court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used and enjoyed under the grant." *Kinney v. Hooker*, 65 Vt. 333, 26 Atl. 690: "If a grant is ambiguous, the circumstances surrounding it and the situation of the parties are to be considered in construing it." In *Lehndorf v. Cope*, 122 Ill. 317 (Syl. point 2), 13 N. E. 505: "The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto accordingly, unless to do so will violate some established rule of property." "In cases where the language used by the parties to an instrument is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation put upon it by the parties themselves, as shown by their acts and conduct, is entitled to great, if not controlling weight." 11 Am. & Eng. Enc. Law, 518: *District of Columbia v. Gallaher*, 124 U. S. 503, 8 Sup. Ct. 585; *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057; *Railroad Co. v. Trimble*, 10 Wall. 367; *Knick v. Knick*, 75 Va. 12. In *Johnson v. Simpson*, 36 N. H. 94, at page 94, it is said: "Where the description consists of several parts, and some of them are incorrect, if it can be ascertained from those which are correct what was intended to be conveyed, the incorrect parts will be rejected, and the instrument be made to take

effect." And *Adams v. Alkire*, 20 W. Va. 490: "Where two clauses are irreconcilably repugnant, in a deed the first, and in a will the last, prevails." 2 Minor, Inst. (4th Ed.) 1059; *Blair v. Muse*, 83 Va. 238, 2 S. E. 31.

The first part of the granting clause in each deed, descriptive of the property granted, is to Mary Gibney "that part of lot No. 157 now occupied by the said Mary Gibney," and to James Fitzsimmons "that part of lot No. 157 now occupied by the said James Fitzsimmons." The first is further described as "fronting thirty feet on Zane street, commencing at James Fitzsimmons' line, and running thence westward to Seventh street, and running from Zane street to Arthur McGinness' line a distance of fifty feet, together with the tenement house situated thereon"; the second further described as "fronting thirty feet on Zane street, commencing at Mary Gibney's line, and running thence eastward, and running from Zane street to Arthur McGinness' line a distance of fifty feet, together with one-half of tenement house situated thereon." The tenement house is situated on the corner, and covers 30 feet front on Zane street, all of which house, according to the literal reading of the deed to Mrs. Gibney, is conveyed to her, and one-half of which, according to the other deed, is conveyed to Fitzsimmons. Both deeds are dated the same day, and both acknowledged and recorded on the same day, but another than the date. The evidence clearly shows that, at the time of making the deeds, Mary Gibney was in possession of, and occupied, 15 feet fronting on Zane street, and running back with Seventh street the same width with the center of the double house, and that James Fitzsimmons was in possession of, and occupied, the residue of the lot fronting 45 feet on Zane street, and running back, the western line, with the middle of the said double frame house, 50 feet, to the McGinness property.

After thoroughly reviewing the evidence, I have adopted the following views of Judge Paull, of the circuit court, expressed in his decision of the case:

"Now, the evidence in this case shows that lot No. 157, which is situated at the northeast corner of Zane and Seventh streets, in the city of Wheeling, and has a frontage of sixty feet on the former, and fifty on the latter, street, was purchased by Mary Gibney and James Fitzsimmons, jointly, from Hiram D. Powell and wife, on July 18, 1864, for \$600; that upon the payment of this sum in full, the deeds aforesaid were executed; that at this time the eastern thirty feet of the said lot was vacant, and consisted largely of an embankment six or seven feet high, but that on the western thirty feet thereof there was located a double frame dwelling house, the western half of which was occupied by Mary Gibney, and the eastern half, including the eastern thirty feet of the lot, by James Fitzsimmons; that the property continued to be

so occupied until about 1874, when the latter, having graded the eastern thirty feet of the said lot, and built a two-story brick dwelling thereon, moved into the same, where he has since resided, and the former moved to Zanesville, Ohio, where she resided until 1889, when she returned, and made her home with the said James, who was her son-in-law, until her death, which occurred in 1892; that the said James, from the time he moved out of the eastern half of the double frame house, in 1874, until the present, has continuously rented the same, collected and appropriated to his own use the rents, kept the building in repair, and paid the taxes assessed thereon; and that his right so to do was not questioned by any one until a short time before the bringing of this suit. The evidence also shows that, at the time when the deeds aforesaid were executed, the western fifteen feet of the lot were worth more than the eastern forty-five feet; that, about the same time, the joint purchasers of the lot expended jointly the sum of \$600 in repairing and improving the double frame house aforesaid; that the deeds were written by John A. Gibney, son of Mary Gibney, who was then a school boy, nineteen years of age; and that neither Mary Gibney nor James Fitzsimmons can or could read writing.

"The facts above detailed clearly warrant the conclusion, it seems to me, that the parties to the deeds under consideration intended thereby to convey to Mary Gibney and James Fitzsimmons the particular parts of lot No. 157 that they were occupying, respectively, at the time when the deeds were executed; that is to say, to the former the western fifteen feet and to the latter the eastern forty-five feet thereof. And this intention can be effectuated without violating any rule of law, as will be seen from an examination of the authorities before cited, by rejecting all of the descriptive clauses contained in each deed, except the first, which designates the property conveyed as that 'now occupied' by the grantee. The deed to Mary Gibney for her interest in this property purports to convey the same to her 'in trust for her son John A. Gibney.' The evidence, however, shows that John A. Gibney never invested one dollar in the property; that Mary never knew until some ten years or more before the bringing of this suit that the deed had been made in that form; that she then repudiated the trust, and so notified her son John; that, from the date of the execution of the deed until her death, Mary Gibney was in possession of the property, either in person or by tenants, as owner, improving and taking to her own use the rents and profits thereof, and otherwise exercising over it such acts of ownership as manifested unequivocally an intention to ignore and repudiate any rights that John or any one else might claim therein. Under these circumstances, it must also be held that Mary Gibney's possession of this property was

from its commencement, under the deed aforesaid, adverse to the rights of John Gibney. Cooley v. Porter, 22 W. Va. 121, 127, 128; Jones v. Lemon, 26 W. Va. 629; Stillwell v. Leavy, 84 Ky. 379, 1 S. W. 590."

It is insisted by appellants that, by a fair construction of the deed to Fitzsimmons, no part of the tenement house is conveyed to him; that the words "together with one-half of tenement house situated thereon," are parenthetical, and simply descriptive of what Fitzsimmons was occupying; and that, considering the two deeds together, there could not possibly be a more reasonable construction put upon it than that meaning. It is impossible, it seems to me, for an unbiased mind to read the deed to Fitzsimmons and come to the conclusion that it was not intended to include in the grant the one-half of the tenement house. The grant is of "the following described property: * * * That part of lot 157 now occupied by the said James Fitzsimmons, party of the second part, and fronting on Zane street thirty feet, commencing at Mary Gibney's line, and running thence eastward, and running from Zane street to Arthur McGinness' line a distance of fifty feet, together with one-half of tenement house situated thereon." Appellants, for the purpose of their construction, take the words "together with one-half of tenement house situated thereon" from their setting, where they can only be construed to mean a part of the grant, and place them as follows: "That part of lot No. 157 which (together with one-half of tenement house situated on said lot) is now occupied by the said James Fitzsimmons," etc., and gravely ask a court of equity to so construe the deed; and this, in the face of abundant proof that at the time of the purchase, in 1864, the east 30 feet were hardly considered worth anything, and that the corner 15 feet, with the half of the house occupied by Mary Gibney, were more valuable than the east 45 feet, including the half of the house.

Appellants contend that the trust is express in favor of John A. Gibney, and "that there is no rule of law or equity that can destroy this express trust, and transfer the beneficial ownership from the son to the mother, and there is no statute of limitation that can aid the appellees," and cite Lockhard v. Beckley, 10 W. Va. 87, in support of the first proposition, and Gapen v. Gapen, 41 W. Va. 422, 23 S. E. 579, in support of the latter. In the last-mentioned case (point 3 of syllabus) it is held that "no statute of limitations runs against an express trust, nor does lapse of time avail, until the duties are ended or the trust disavowed." In the case at bar, when the fact first came to the notice of the trustee, she was very indignant, disavowed the trust in the most emphatic terms, and always claimed and enjoyed the property as her own absolutely as long as she lived, and, when not occupying it as a residence, collected and enjoyed the rents and profits.

For the reasons herein stated, I find no error in the decree of the circuit court, and it is affirmed.

ADKINS et al. v. GLOBE FIRE INS. CO.
(Supreme Court of Appeals of West Virginia.
Nov. 30, 1898.)

BILL OF EXCEPTIONS—SIGNING—ATTESTATION BY
CLERK—FOREIGN CORPORATIONS—SERVICE OF
PROCESS—INSURANCE—PROOF OF LOSS.

1. A bill of exceptions must be signed by the judge, else it cannot be considered in the appellate court.

2. The record entered in the law order book of a circuit court must attest that a bill of exception was executed and made part of the record, else such bill cannot be considered, though inserted in the record by the clerk. (As to exceptions shown by order, where there is no bill of exceptions.)

3. A return of service of a summons in an action against a foreign insurance or other corporation upon an attorney appointed by it to accept service of process must show that he is the attorney so appointed to accept service of process. A return showing a delivery of a summons to "Alf. Paul, attorney in fact and of record for said Globe Fire Insurance Company," is bad, in not designating for what purpose he is attorney. Judgment on it is void. The return may be amended.

4. "Service accepted, Sep. 6, 1897. Alf. Paul," is a bad acceptance.

5. A policy of insurance provides that proof of loss shall be furnished in 60 days after loss, and the loss payable in 60 days after such proof furnished. The furnishing such proof is a precedent condition to action of recovery, if not waived, and the plaintiff carries the burden of showing that such proof was furnished; but he need not show it unless the defense has pleaded the failure to furnish such proof.

(Syllabus by the Court.)

Error to circuit court, Kanawha county;
F. A. Guthrie, Judge.

Action by M. A. Adkins and Nora B. Shoemaker against the Globe Fire Insurance Company. Judgment for plaintiffs. Defendant brings error. Reversed.

Adam B. Littlepage, for plaintiff in error.
L. A. Martin and J. W. Kennedy, for defendants in error.

BRANNON, P. In an action of assumpsit in the circuit court of Kanawha county, brought upon a policy of fire insurance by Adkins and Shoemaker against the Globe Fire Insurance Company, of the city of New York, the defendant not appearing in defense, a jury tried the case, and found a verdict for the plaintiffs, on which the court entered judgment. Afterwards, during the term, the defendant appeared, and moved for a new trial, but the court refused, and the defendant comes to this court for relief.

The error assigned is the refusal to set aside the verdict. The grounds on which the defendant based its motion were that the verdict was contrary to the law and evidence, and because of facts shown in a petition for a new trial, and certain affidavits to support it. The plaintiffs deny the right

of defendant to have this court consider the affidavits or the evidence on the ground, as claimed by them, that three papers printed in the record as bills of exception are not part of the record, because two of them are not signed by the judge; and that, though one is signed, there is no evidence in the record to show its execution. A bill of exception must be signed by the judge. Even if the record state that it was signed, and it is not, it is not good; for the bill is equally admissible as a part of the record on the question of signing, and it is found not signed. Without signature, how can we say that the bill was finally settled, or the truth stated therein, or the paper a genuine one? The order calls for a paper signed, and this is not, and cannot be the one called for by the order. The Code demands that it be signed. As early as *Gordon v. Brown's Ex'r*, 3 Hen. & M. 219, it was held that "a paper intended as a bill of exceptions to an opinion of the district court (two judges being present) ought not to be considered as such, if not signed by both." In *Com. v. Hall*, 8 W. Va. 259, though the record said a bill was signed, but it was not, this court held that "a bill of exceptions to the opinion of the court overruling a motion for a new trial, not being signed by the judge, does not become a part of the record, and the evidence therein cannot be examined by an appellate court." Upon a like statute with ours it has been so twice decided in Illinois. *Jones v. Sprague*, 3 Ill. 55; *Reeves v. Reeves*, 54 Ill. 332. So in various states. *Throop, Trials*, § 2807. This rule of practice is important to be observed. Let us see if there are three separate bills of exception, and two of them unsigned. We ought to give liberal construction, to give to the party his exception. It is clear that the evidence was inserted in the bill, and later other matters were introduced for new trial, and that the whole paper is but one bill, its matter put in at different times during the term, as shown by different dates of the term stated in it, and by the language in opening, "Be it remembered," and in succeeding sections, "And be it further remembered," and the fact that no section has any seal or signature, and that such signature and seal are in due form at the close. So we must consider the bill if the record attests its execution. This it must do. *Bank v. Showacre*, 26 W. Va. 49. I find an order stating that defendant moved for a new trial, and in support of his motion submitted certain affidavits and his sworn petition, and that the court refused a new trial, "to which ruling of the court the defendant objected, and prayed that said exception be signed, sealed, and saved to it, and made part of the record; which is done." This surely attests the execution of the bill of exception.

We now examine the grounds for a new trial. One is surprise. This is based on the

claim that the company had no notice of the suit, did not know that such a suit existed until the day of trial, when, after the case was called for trial, a telegram was sent from Charleston to the agent at Wheeling, informing him of the suit, and likely this did not reach the agent until the verdict had been rendered, and perhaps the judgment. Process was served in Ohio county upon Alf. Paul, as attorney in fact and of record for the company, and he accepted service besides. Paul makes affidavit that he has no recollection of service upon him, or of acceptance by him, and he is sure no copy was ever given him. The return of an officer upon process cannot be so contradicted. *Stewart v. Stewart*, 27 W. Va. 168. If we recognize this return, it follows that the alleged surprise is no ground for a new trial, as a party must not neglect or forget, but must appear and defend. His negligence and his misfortune in allowing the suit to escape his memory cannot prejudice the other party, he having done all the law required of him. *Post v. Carr*, 42 W. Va. 72, 24 S. E. 583. But is the return good on its face? I think not. It says that the summons was served "by delivering a copy to Alf. Paul, attorney in fact and of record for said Globe Fire Insurance Company." Attorney in fact for what purpose? To make a deed, or sell property, or accept service of process? The return does not say. The rule is that, where there is substitutionary service, not personal, the elements to make the service good in law must appear. If service be not on a defendant personally, but on some one for him, the return must state on whom service is made, and that the person is his wife, or member of his family, and over 16 years of age, etc. The facts making the substitute a proper person for service under the law must appear. If he is president, director, cashier, or mayor, it must be so stated. This return should have stated that Paul was attorney appointed by the company to accept service of process. The sheriff must necessarily hunt and find the proper person for service, and be able to state that he is such. This return says that Paul was attorney of record. This does not help. If attorney for any purpose, his power might be of record. We cannot assume therefrom that he was attorney to accept service. In fact, an appointment of an attorney for a foreign insurance company like this is not required, like a domestic corporation, under Code, c. 54, § 24, to be recorded, but is only "filed" in the auditor's office by chapter 34, § 15. *Frazier v. Railway Co.*, 40 W. Va. 224, 21 S. E. 723, holds that a summons against a corporation "may be on any person appointed pursuant to law to accept service," and I notice the return there so showed, and I think such is the practice. The Code, in chapter 50, § 38, which is applied by chapter 49, § 6, requires

that the return of service in suits against corporations must show "on whom" the service was. This does not mean merely his name, but his character or relation to the company to show the court that he is one who bears the relation to the company which preceding sections have pointed out as authorizing service. It must mean this, because those sections just before this pointed out the relations authorizing service. Said section pronounces a return failing to comply with it "invalid," and judgment on service not complying with said section has been held void. *Railway Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924; *Taylor v. Railroad Co.*, 35 W. Va. 328, 13 S. E. 1009. An acceptance is on the process, reading: "Service accepted, Sep. 6, 1897. Alf. Paul." Who is he? We do not know by judicial cognizance that he is this company's attorney to accept service, and he does not say so. This being a judgment by default, the return is part of the record, and for its defect the judgment could, after the term, be reversed on motion. *Midkiff v. Lusher*, 27 W. Va. 439. Of course, this defect could avail on motion for a new trial made during the term. The motion for new trial was also based "on errors apparent on the face of the record"; and there is such error in this case. The plaintiffs were present at the motion. The court, for this cause, ought to have given a new trial.

There is another reason given by counsel for a new trial. The policy was issued July 1, 1897. The house, occupied at the time as a liquor saloon, was burned on the night of July 3, 1897, at 11 o'clock, and suit was brought September 2, 1897. The policy provides that the insured shall make and furnish certain proof of loss within 60 days after the fire, and the loss shall not be payable till 60 days after such proof of loss shall be furnished. This court held, in *Peninsular Land Transp. & Mfg. Co. v. Franklin Fire Ins. Co.*, 35 W. Va. 686, 14 S. E. 237, that the furnishing such proof was a condition precedent to recovery on the policy; and *Flanagan v. Insurance Co.*, 42 W. Va. 426, 26 S. E. 513, holds that the burden of showing that such proof of loss was furnished is on the plaintiff. It is highly improbable that such proof was furnished so as to warrant suit on September 2d, according to plaintiff's own evidence. It is not shown when proof of loss was furnished. Indeed, there is nothing but hearsay to show that any was ever furnished; and that evidence, if not hearsay, would be no adequate evidence. But, as section 64, c. 125, Code, says that "if the defense be that the action cannot be maintained because of failure to perform or comply with, or violation of any clause, condition or warranty" of the policy, the defendant must plead the clause not performed, we cannot likely give defendant the benefit of this view. It might be said with some plausibility that, in the absence of such plea, the plain-

tiff need not have entered upon the matter in evidence; but, as he did, and failed to prove what is requisite, it is to go against him as if the defendant had pleaded it. We reverse the judgment, set aside the verdict, grant a new trial, and remand the cause for such trial.

On Rehearing.

In deference to counsel, I have made, on application for rehearing, further examination as to the service of process in this case. Where a statute allows service in any other mode than by actual personal service, it is called substitutionary or constructive service, and the return must show "on its face all the circumstances which authorize this manner of service" (22 Am. & Eng. Enc. Law, 182); otherwise, judgment by default is null (4 Minor, Inst. [2d Ed.] 533; Id. [3d Ed.] 646). As to corporations, they not being persons, the statute designates officers for service; and the statute must be strictly followed, else judgment by default is null. 4 Minor, Inst. 648; 6 Thomp. Corp. § 7503. "The sheriff's return should show clearly upon what officer or agent service was made, and the character of the officer or agency; * * * and, if the return fails to show that the service was upon the identical agent provided by statute, or at the place provided, it is insufficient." 22 Am. & Eng. Enc. Law, 184. The return must set out all the facts, so the court may judge of the sufficiency of the service. *Hodges v. Hodges*, 71 Am. Dec. 388. I find the authorities strict on this point, because legal notice lies at the bottom of every suit to make judgment good. In *Dickerson v. Railroad Co.*, 43 Kan. 702, 23 Pac. 936, a return that service was by "delivering a copy thereof to Mr. Fish, agent of the within railroad company," was held bad, "as it contained no description or hint of the character of the agency." The court quoted a former case, saying it did not show service on any person named as service agent appointed under statute to accept service, and saying: "For aught that appears, said March may have been an agent to purchase coal or transact any temporary business. * * *" A statute allowed service on "the nearest station or freight agent," and a return showing service on "the nearest agent" was held bad, as it must describe the agent, in the language of the act, as "the nearest station or freight agent." *Haley v. Railroad Co.*, 80 Mo. 112. Where the statute allowed service on a "regular ticket or freight agent," a return not showing that the agent was a "regular" one was held bad in *Tallman v. Railroad Co.*, 45 Fed. 156. In *Railway Co. v. Hunt*, 39 Mich. 469, the statute allowed service on a "general or special agent" of a corporation, and a return of service on "agent of within-named defendant" was held bad. Judge Cooley asked: "What sort of an agent? Was he an agent to buy wood, or employ switchmen, or keep cattle off the track, or

what was his agency?" "Service must be on the identical agent provided by the statute," says *Great West Min. Co. v. Woodmas of Alston Min. Co.* (Colo. Sup.) 13 Am. St. Rep. 204 (a. c. 20 Pac. 771). The return must state all facts to make it good, and where it departs from the statute everything is inferred against it which such departure warrants. *Bank v. Suman*, 79 Mo. 531, 97 Am. Dec. 280, note; 22 Am. & Eng. Enc. Law, 183. Hence, in this case we can fairly infer that Paul may have been an attorney in fact for other purposes than to accept service. Counsel cite *Wagon Co. v. Peterson*, 27 W. Va. 314, where the service was on the "lawful attorney" of a foreign insurance company. The court held it *prima facie* good to prevent a judgment being regarded null and void, but did not say that, if objected to before the judgment became final, or by motion to set it aside for want of legal service, it would be good. Here it is on motion to set aside the judgment before it became final. And observe in that case the service was on a "lawful attorney," which imported perhaps one appointed by law, like "state agent," in *Stone v. Insurance Co.*, 78 Mo. 655, while "agent" was not good in *Gales v. Tuslen*, 89 Mo. 19, 14 S. W. 827; but in this case it is "attorney in fact and of record,"—not saying "lawful," not importing one appointed under the statute. The words "of record" do not help, because no law required the appointment to be recorded. The service is simply and only on an attorney in fact, and it thus plainly falls under the law above that, unless the agency is defined, the service is bad.

Counsel urge that defendant appeared, not to take advantage of defective return, but to set aside judgment, and thus waived the defective return. If it had done so before trial and judgment, this would be so. *Mahany v. Kephart*, 15 W. Va. 609. But defendant had to get rid of the judgment before it could attack the process. It should have pointed out this defect, and thus given opportunity to the other side to amend it. But I do not consider this a waiver, as the plaintiff is bound to see that his process is right. After a judgment is final, such defect is availed of by motion to reverse, assigning it as error. But before the judgment is final, it strikes me that, on a motion to set aside the judgment, defendant is entitled to the benefit of the objection,—any defect in the record. I know that for defective service a judgment by default at common law is reversible by writ of error, and not by motion, and the writ and return are part of the record. *Capehart v. Cunningham*, 12 W. Va. 750; *Nadenbush v. Lane*, 4 Rand. 413; *Midkiff v. Lusher*, 27 W. Va. 439.

Counsel still insist that there is no bill of exceptions, because the record does not note it. I have shown above that it does. But suppose it does not. The order itself is sufficient to present the grounds of new trial without bill of exceptions, as it states that

defendant moved the court to set aside verdict and judgment because contrary to evidence and law, and that defendant was taken by surprise, as it did not know of the pendency of the suit, and in support of its motion filed its petition and specified affidavits; and then it says that, "after considering the affidavits aforesaid in support of said motion to set aside said verdict and judgment, and grant a new trial, the court overruled said motion and refused to set aside said verdict and judgment and grant a new trial, to which ruling the defendant objected and excepted, and prayed that said exception be signed, sealed, and saved to it; which is done." This shows the motion, and its grounds, the documents read, the action of the court, and objection and exception thereto, and the declaration of the court that such objection and exception be saved to it. What more is needed? A bill of exceptions would show no more. This is sufficient without a bill of exceptions. *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604; *Perry v. Horn*, 22 W. Va. 381; *Mitchell v. Baratta*, 17 Grat. 445.

Another reason for granting a new trial, as I am clearly of opinion upon further consideration, is surprise. An attorney had been the general counsel for the company, and after the loss by fire for which this suit is brought acted for the company in the matter. When the case was called, this attorney stated to the court that he desired to make a statement to place himself right before the court and bar; that he did not appear for the company; that he had performed service for it, at an agent's request, in the matter of this loss, and a disagreement arose between him and the agent as to the amount of pay for services, which was compromised, and he retired from the company's service; and further stated that he did not understand why defendant was not appearing, and he was satisfied that there must be something wrong, and asked the court to continue the case to a later day of the term, so that he could telegraph the company as to the situation, and he was afraid the company was depending on him, and was satisfied the company did not know of the pendency of the suit; but the plaintiff pressed a trial. He did telegraph, and was answered by the agent, "No notice of suit ever served on me," as did the general office also, and was requested to defend the suit; but the verdict and judgment had been rendered. This attorney swears that he has no doubt, from the letters, papers, etc., that the company was ignorant of the suit. The company took prompt steps, but it was too late. This appeals strongly for a new trial. The defendant has, as a matter of fact, never had a trial, and we ought to lean in favor of giving it one, as it is not a decision final in its favor, but only accords it what it should have,—a fair trial. We think that the court should have allowed a few days' time to notify the company. No longer time was asked.

STATE v. STALEY.

(Supreme Court of Appeals of West Virginia.
Jan. 20, 1899.)

HOMICIDE—VERDICT—TRIAL—COURT HOUSE—WITNESS—IMPEACHMENT—CREDIBILITY—REMARKS OF COURT—INSTRUCTIONS.

1. "We, the jury, agree and find the defendant, Virgil Staley, not guilty of murder in the first or second degree, as charged in the within indictment, but do agree and find the defendant, Virgil Staley, guilty of voluntary manslaughter."—is a verdict sufficient in form.

2. When the place of holding the courts of any county has been changed to another building in the same town temporarily, under section 7, c. 114, Code, for the reason that the court house has been destroyed, no formal ceremony or notice is necessary to authorize the holding of courts in the new court house provided upon the site of the old one, when the same is ready for occupancy and in possession of the county authorities.

3. Whenever such new court house is ready for occupancy, the reason for holding the court at such other place appointed has ceased, and the courts are properly held in the new court house.

4. Point 4, Syl., in *State v. Bingham*, 24 S. E. 883, 42 W. Va. 234, approved.

5. Point 5, Syl., in *State v. Zeigler*, 21 S. E. 763, 40 W. Va. 594, disapproved and overruled.

6. The credibility of a witness who has been impeached by proof of a former declaration at variance with his testimony may be supported by evidence of his good character for truth and veracity.

7. Where a witness is introduced by plaintiff for the first time in rebuttal, the defendant should be permitted to introduce evidence to impeach him.

8. Remarks made by the trial judge in the presence of the jury (referring to a witness who had testified for the state), as follows: "Suppose Dr. Burgess, whose integrity is not to be questioned, when placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment, and having so testified, the opposite party was to bring in two or three witnesses from another county, say, from Huntington, who were entire strangers to the people of Wayne county, and who, upon the witness stand, were to testify to their having heard Dr. Burgess, in Huntington, make statements directly contradicting those made by him on the witness stand; would it not be a reasonable and logical rule that would permit the party so calling him to introduce, upon rebuttal, witnesses acquainted with his general reputation, to testify as to his good character for truth?"—the "two or three witnesses" referred to being summoned as experts on behalf of the defendant, and so testified in the case, touching the matter of the evidence of said witness Burgess,—*held* to be error, which might prejudice the defendant.

(Syllabus by the Court.)

Error to circuit court, Wayne county; E. S. Doolittle, Judge.

Virgil Staley was convicted of voluntary manslaughter, and brings error. Reversed.

Marcum, Marcum & Shepherd and J. M. Tieleman, for plaintiff in error. Edgar P. Rucker, for the State.

McWHORTER, J. Upon an indictment against Virgil Staley in the circuit court of Wayne county for the murder of Lafe Adkins, in the form laid down in section 1, c. 144, Code, the jury returned a verdict as fol-

lows: "We, the jury, agree and find the defendant, Virgil Staley, not guilty of murder in the first or second degree, as charged in the within indictment, but do agree and find the defendant, Virgil Staley, guilty of voluntary manslaughter." The prisoner, by his counsel, moved the court to set aside the said verdict, and grant him a new trial, because the verdict is not in good form, and because it is not certain, but is uncertain and indefinite, and does not state the jury finds the defendant guilty of any offense charged against him in the indictment in the case, which motion was overruled, and exceptions taken. Appellant's counsel say this was error, and that their contention on this point is clearly borne out in *State v. Newsom*, 13 W. Va. 859, where it is held that no judgment could be entered upon the verdict in that case, because it was too vague, indefinite, and uncertain. That was an indictment under section 9, c. 144, Code 1868, for unlawful shooting, etc. The verdict was: "We, the jury, find the prisoner, James Newsom, guilty of unlawful shooting, with intent to maim, disable, disfigure, and kill, and ascertain the term of his confinement in the penitentiary at one year; and we find him not guilty of malicious shooting." It will be observed that the verdict just quoted makes no reference whatever to the indictment. In *Hoback v. Com.*, 28 Grat. 922, the verdict is in almost the precise words as the one at bar: "We, the jury, find the defendant, John Hoback, not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting with intent to maim, disfigure, disable, and kill, and fix his term of confinement," etc.,—which verdict was sustained. The whole verdict must be taken together, and being indorsed on the indictment, or referring to it, such reference applies as to the whole verdict, and there can be no uncertainty about it. Judge Moncure, in his opinion in *Hoback's Case*, says: "A verdict of a jury in a criminal case must always be read in connection with the indictment. And if it be certain, upon reading them together, what is the meaning of the verdict, it is sufficiently certain."

It is contended also, as set out in the bill of exceptions No. 10, that the court erred in refusing appellant's motion to set aside the verdict and grant him a new trial, because the trial was not commenced, held, and had at the court house of Wayne county (wherein the trial was held), and also in refusing his motion in arrest of judgment upon said verdict, as set out in his bill of exceptions No. 11. In support of his contentions, he introduced witnesses, as well as the proclamation of the governor, to prove that the court house of Wayne county, on the 6th day of March, 1896, was totally destroyed by fire, and that the lower room of the Odd Fellows' Building, in the town of Fairview, wherein the court house was located, had been by the governor of the state, under section 7, c. 114, Code,

designated and appointed as the place for holding the county and circuit courts for said county so long as the reason thereof might continue. The court house of the county had been burned, and, under the statute, temporary provision had been made for holding the courts in another building, only as long as the reason therefor continued. When the court house was replaced and fit for occupation, the reason for holding the court elsewhere continued no longer, and it appears from the record that the court was being held in the court house when the trial of appellant began, and was had and completed there. Section 11, c. 114, Code, provides that "when the place of holding any court, or the day for commencing any term is changed, * * * there shall be no discontinuance, but every notice, recognizance or process taken or returnable to the day on which the failure occurred, or to any day between that day and the next that the court may sit, or to the day and place as it was before such change, * * * shall be in the same condition and have the same effect, as if given, taken or returnable, or continued to the substituted time and place," etc. It was doubtless a notorious fact that court was being held in the new court house, the place provided especially for it, and I see no provision in the statute for any ceremony to enable the county authorities to take possession or occupy the building erected for that purpose; but, whenever it is so occupied, the temporary occupation of the substituted place has ceased, and the reason for its occupation no longer continues; and to cease to occupy for court purposes the regular court house again, no matter how informally it may have been appropriated to the use of a court house, some one of the reasons for vacating it set forth in section 7 of chapter 114 of the Code must exist, and the necessary steps taken therefor under said chapter. The trial began and was proceeded with, without objection, until its close, when, before sentence of the prisoner, he moved in arrest of judgment for that reason, which motion was properly overruled. This is a purely technical objection. No constitutional right of the prisoner was violated, nor was he in any way prejudiced by it.

Appellant's bill of exceptions No. 2 is to the giving of the state's instructions to the jury, Nos. 1 to 7, inclusive: Instruction No. 1: "The court instructs the jury that, where a homicide is proved, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of the crime; and, if the prisoner would reduce it to manslaughter, the burden of proof rests upon him." Instruction No. 2: "The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act. And if the prisoner, with a deadly weapon in his possession, without any or upon very slight provocation, gives to another a

mortal wound, the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing extenuating circumstances; and unless he proves such extenuating circumstances, or the circumstances appear from the case made by the state, he is guilty of murder in the first degree." Instruction No. 3: "The court instructs the jury that the use of a deadly weapon being proved, and the prisoner relies upon self-defense to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner, and, to avail him, he must prove such defense by a preponderance of the evidence." Instruction No. 5: "The court instructs the jury that the fact of one person having threatened to take the life of another or to inflict upon him a great bodily injury will not excuse the person so threatened in becoming the aggressor, and with deadly weapon assaulting the person making such threats, and that although the jury may believe from the evidence that Lafayette Adkins, in his lifetime, had made threats to take the life of the prisoner or to inflict upon him great bodily harm, the fact of making such threats towards the prisoner will not justify a verdict of acquittal, unless the jury further find that, at the time the said Lafayette Adkins was shot, he was making overt acts towards the prisoner, indicative of an intention to carry such threats into immediate execution, and that, by reason of such threats and overt acts, he (the prisoner) believed that it was necessary then and there to shoot with a deadly weapon the said Lafayette Adkins, in order to save his (the prisoner's) life, or to protect him from great bodily harm." Instruction No. 4: "The court instructs the jury that they are the sole judges of the weight of testimony of any witness who has testified before them in this case at bar, and that, in ascertaining such weight, they have the right to take into consideration the credibility of such witnesses, as disclosed from his evidence, his manner of testifying and demeanor upon the witness stand, and his apparent interest, if any, in the result of the case. And, if the jury believe that any witness has testified falsely as to any material fact, they have the right to disregard all the testimony of such witness so testifying falsely, or to give to his testimony, or any part thereof, such weight only as the same, in their opinion, may be entitled to." Instruction No. 6: "The court instructs the jury that after they shall have compared and considered all the evidence in the case, if they have a reasonable doubt as to the guilt of the prisoner, Virgil Staley, as charged in the indictment, they cannot convict; that by reasonable doubts is meant such doubts, based upon the evidence, as they may honestly and reasonably entertain as to any material fact essential to prove the crime charged. It must not be an arbitrary doubt, without evidence to sustain it, but must be serious and substantial in its nature, in order to warrant

an acquittal, and one which men may honestly and conscientiously entertain." Instruction No. 7: "The court further instructs the jury that, if they find the prisoner guilty as charged in the indictment, they shall further find whether he is guilty of murder in the first or second degree. If they find him guilty of murder in the first degree, they may, in their discretion, further find that he (the prisoner) be punished by confinement in the penitentiary; and, if such further finding be not added to such verdict, the judgment thereupon rendered by the court will be that the prisoner be punished with death; and, if such further finding is added, the judgment thereupon rendered by the court will be that the prisoner be confined in the penitentiary during his life. If they (the jury) find the prisoner guilty of murder in the second degree, as charged in the indictment, the punishment imposed upon the prisoner will be confinement in the penitentiary not less than five years nor more than eighteen years."

While the exceptions go to all these instructions, a careful examination of the first six fails to disclose anything objectionable or which could be prejudicial to the rights of the appellant, and no special or definite objections are raised thereto. It is contended, however, that No. 7 is clearly wrong, in that it tells the jury what penalty could be imposed upon the prisoner if they should find him guilty of either murder in the first or second degree; that the court, in using the language of the instruction, expresses its opinion as to the weight and sufficiency of the evidence in the case to warrant the jury in finding the prisoner guilty of murder in the first degree; that such a verdict, in the court's opinion, would be a proper verdict. The court only propounded the law as laid down in the statute. The prisoner was charged with murder. He did not deny the killing. He has assumed the burden of proving the killing was done in self-defense. Whether he had succeeded, or to what extent he had succeeded, was a question solely for the jury. It was entirely proper for the jury to understand what would be the result of their verdict,—what punishment would follow. The verdict itself shows that the jury were not misled by the instruction, and that they by no means took the view of the instruction as contended by appellant.

Bill of exceptions No. 3 complains of the ruling of the court in refusing to give instructions Nos. 6, 8, and 10, and each of them. No. 6: "The court further instructs the jury that if, from all the facts, circumstances, and evidence in this case, they have a reasonable doubt as to the defendant's guilt, they must find him not guilty." No. 8: "The court further instructs the jury that the law presumes the defendant, Virgil Staley, innocent until he is clearly and conclusively proved guilty beyond all reasonable doubt; and, if there is upon the minds of the jury any reasonable doubt of the defendant's guilt, the

law makes it their duty to find him not guilty; that, even if there was suspicion or probability of his guilt, however strong, such suspicion or probability would not be sufficient, even though the greater weight or preponderance of evidence supported the charge in the indictment, nor, upon the doctrine of chances, it were more probable that the defendant is guilty; but, to warrant his conviction, his guilt must be proved so clearly and conclusively that there is no reasonable theory upon which he can be innocent, for the policy of our law deems it better that many guilty persons should escape rather than that one innocent person should be convicted." As to No. 6, while it propounds the law correctly, the court had thoroughly instructed the jury on the question of reasonable doubt by giving state's instruction No. 6, and defendant's instructions Nos. 1 and 3, as follows: No. 1: "The court instructs the jury that the law presumes that the defendant, Virgil Staley, is innocent of the crime charged against him in the indictment in this case, and that such presumption follows him throughout every step of the trial; that it is incumbent upon the state to establish the prisoner's guilt by proof so clear and convincing and satisfactory in its nature as to convince the jury of his guilt beyond all reasonable doubt; that, before the jury can find the defendant guilty in this case, they must believe and be satisfied from the evidence in the case, beyond all reasonable doubt, that he is guilty; that if the jury, or any member of the jury, after having carefully weighed and considered all the evidence in the case, should entertain a reasonable doubt as to the guilt of the defendant, they cannot return a verdict of guilty." No. 3: "The court further instructs the jury that, in determining the question of the defendant's guilt or innocence in this case, it is their duty to take into consideration the good character of the defendant, as developed from the evidence in this case; and, if from such evidence, as well as from all the other evidence, facts, and circumstances in this case, the jury have a reasonable doubt as to the guilt of the defendant, they must find him not guilty."

It was not error to refuse No. 6. In *State v. Bingham*, 42 W. Va. 234, 24 S. E. 883 (Syl. point 4), it is held that, "when instructions given clearly and fairly lay down the law of the case, it is not error to refuse other instructions on the same subject. The court need not repeat instructions already substantially given." See, also, *Davidson v. Railway Co.*, 41 W. Va. 407, 23 S. E. 593 (Syl. point 2). Instruction No. 8 is also upon the question of reasonable doubt, but goes much further than the other instructions given on that point, and which fully propound the law, while No. 8 would, if given, tend to confuse and mislead the jury, and was properly rejected. It is contended that instruction No. 10, being in the exact language of point 5, Syl., in *State v. Zeigler*, 40 W. Va. 594, 21 S.

E. 763, should have been given, and that it was error to refuse it. While it is true it is so held in the Zeigler Case, yet it is in conflict with instruction 3 given for the state, which is a copy of point 1, Syl., in *State v. Jones*, 20 W. Va. 764; and it is also a fact that the opinion in the Zeigler Case quotes with approval the holding in the Jones Case, and on page 609 says: "The first instruction asked for by the prisoner was properly rejected, as it fails to state the law as laid down in the case of *State v. Jones*, 20 W. Va. 764;" and yet the said "first instruction" somehow, evidently by inadvertence, crept in as a syllabus of the case. In *Com. v. York*, 9 Metc. (Mass.) 93, it is held that "when, on a trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of the law is that it was malicious, and an act of murder; and proof of matters of excuse or extenuation lies on the defendant, which may appear either from evidence adduced by the prosecution, or from evidence offered by the defendant. But, when there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and to decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence." *Silvus v. State*, 22 Ohio St. 90; *Weaver v. State*, 24 Ohio St. 584; *State v. Willis*, 63 N. C. 28; *Hill v. Com.*, 2 Grat. 536; *State v. Greer*, 22 W. Va. 800, Syl. point 19. The court did not err in refusing said instruction No. 10, because it does not correctly propound the law.

Appellant's bill of exceptions No. 4, referred to in the fifth assignment of error, shows that, when defendant was on the witness stand in his own behalf, he was on cross-examination asked if he had not had conversations at certain times and places with certain parties named, wherein he had made threats against Lafe Adkins, which threats he denied; and the state, in rebuttal, introduced the testimony of such parties with whom he had had the conversations wherein he had made such threats, etc., and thereby contradicted said defendant as to such conversations; and the state then rested her case, when defendant offered to prove by witnesses well acquainted with defendant, and with his general reputation for truth and veracity in the community in which he lived, that he sustained a good and unimpeachable reputation for truth and veracity among all his neighbors in the county in which he lived, which evidence the defendant was not permitted to introduce. "The credibility of a witness who has been impeached by proof of a former declaration at variance with his testimony may be supported by evidence of his good character for truth and veracity." 10 Enc. Pl. & Prac. 326, and cases there cited. Evidence of the contradictory statements must actually be introduced. Merely laying the foundation is not sufficient to let in evi-

dence of good character. *State v. Cocper*, 71 Mo. 436.

Bill of exceptions No. 5 involves the same matter, and, further, defendant proposed to introduce witnesses who were neighbors and well acquainted with Thomas D. Hutchison, one of the witnesses who so contradicted defendant, and with his general reputation for truth and veracity among his neighbors, to prove that such reputation was bad, and that he was not entitled to credit as a witness, which evidence the court refused to admit for the reason stated,—that, according to the rules and practice of all courts, the rebuttal testimony by the state concluded the evidence in the case, and the defendant could not and should not introduce any further testimony in the case. If the witness proposed to be impeached had been before examined by the state on the main issue, the court would have it in its discretion to so rule when the witness was recalled in rebuttal, but, being introduced in rebuttal for the first time, the defendant should have the right to impeach him if he could.

Bill of exceptions No. 6 presents the converse of this question raised in No. 4. State's witness Shird Mullins, on cross-examination, had been inquired of as to certain conversations he had had with various persons named, relative to his knowledge of certain facts and circumstances attending the killing of Adkins, and tending to contradict the evidence given by the witness at the trial, and the defendant had introduced the said several persons as witnesses to contradict witness Mullins, when the court permitted the state to introduce witnesses to prove the general good reputation of Mullins for truth and veracity, to which ruling of the court permitting such testimony to be given defendant excepted. For the reasons before given, the court did not err therein.

The eighth bill of exceptions, referred to in the eighth assignment of error, is as follows: "Be it remembered that, upon the trial of this cause, the defendant, Virgil Staley, had caused to be summoned and sworn, as witnesses for him and in his behalf, Dr. L. J. Stump and Dr. C. C. Hogg, two regular practicing physicians residing in Cabell county, in the city of Huntington; that it was well known in the court and to the attorneys for the state that said witnesses, Stump and Hogg, had been summoned to testify upon the part of the defendant, and for the purpose of showing, or trying to show, by them, that the death of Lafe Adkins, the party named in the indictment as having been shot and killed by Virgil Staley, was not caused nor produced by the wounds alleged to have been inflicted upon his body by the said defendant, but was, in fact, caused and produced by an operation that was performed upon him, after said wounds had been inflicted, by his attending physicians, Drs. G. R. Burgess, A. G. Wilkinson, and ——— Bruns. And be it further remembered that

during the progress of the trial, and at the time when the state was offering to introduce certain witnesses for the purpose of supporting the testimony of one Shird Mullins, a witness, who had been examined on behalf of the state, and who had been contradicted by various witnesses examined on behalf of the defendant, by showing that he, the said Mullins, had made statements out of court relative to his knowledge of the facts of the killing of the said Lefe Adkins that contradicted his evidence upon the witness stand, that the defendant objected to the introduction of the evidence tending to prove the general reputation for truth and veracity of the said witness, Mullins. And be it further remembered that after the objections so made by the defendant to the introduction of said evidence had been fully discussed by counsel for the state, as well as for the defendant, that court proceeded to render its judgment or opinion upon said objection, overruling said objection, and giving its reasons at length therefor; and that, while so giving its reasons as aforesaid, the court stated, in hearing of the jury trying the case, as follows, to wit: "The question before the court is, can the state, after defendant's witnesses have testified to statements alleged to have been made by Shird Mullins out of court contradicting those made by him upon the witness stand, introduce other witnesses by way of rebuttal to prove his good character for truth? Jones, in his work on Evidence (section 847), says that one way to impeach a witness is by proving statements of the witness made out of court inconsistent with or contradicting those made by him upon the witness stand. If the witnesses so contradicting Mullins are worthy of credit, then he has made false statements as to the same subject-matter, either out of court or upon the witness stand. Now, for the purpose of illustrating, let us take Dr. Burgess. Defendant's attorneys have used him as a means of illustrating in their argument upon this question. Suppose Dr. Burgess, whose integrity is not to be questioned, were placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment, and, having so testified, the opposite party were to bring here two or three witnesses from another county,—say, from Huntington,—who were entire strangers to the people of Wayne county, and who, upon the witness stand, were to testify to their having heard Dr. Burgess in Huntington make statements directly contradicting those made by him upon the witness stand; would it not be a reasonable and logical rule that would permit the party so calling him to introduce, upon rebuttal, witnesses acquainted with his general reputation to testify to his good character for truth? Jones, in his work on Evidence, in section 871, says that the authorities in this country on this question are conflict-

ing, and in support of the rule cites a number of decisions, among which is that of *George v. Pilcher*, 28 Grat. 299. If this has been the rule in the state of Virginia, the same rule, and I think the right one, should, by inheritance, prevail in West Virginia." The said Dr. Burgess above referred to being the same Dr. Burgess who had testified upon this trial as a witness relative to the character of the wounds inflicted upon the body of the said Lefe Adkins, and as to the manner of performing the operation upon him. Which said remarks so made by the court, in the presence and hearing of the jury as aforesaid, the defendant then and there excepted to, upon the ground that said remarks so made by the court relative to the character and standing of the said witness, G. R. Burgess, as a man and a physician, tended to influence the jury in the weight to be given to his said evidence in favor of the state, and tended to the prejudice of the prisoner in weakening the evidence and the weight thereof of the physicians Hogg and Stump, which were thereafter given to the jury, and prays that this his bill of exceptions No. 8 be signed, sealed, and saved to him, which is accordingly done."

The courts have ever been exceedingly careful of the province of the jury in the trial of cases. In *McDowell v. Crawford*, 11 Grat. 406, Judge Moncure quotes approvingly 1 Rob. Prac. 338-344, where the cases are collected, and says: "They evince a jealous care to watch over and protect the legitimate powers of the jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that, when the evidence is parol, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proven, or even an intimation that written evidence states matters which it does not state, will be an invasion of the province of the jury." Judge Green, in *State v. Hurst*, 11 W. Va. 54, referring to those cases cited by Judge Moncure, says they were all civil cases, and that "there is and ought to be a distinction between the trial of civil and criminal cases in many important particulars," and continues: "If the province of the jury in a criminal case may be allowed to be invaded, the liberty and lives of the citizens would not be safe. In times of peril, when commotions in the state exist untrammelled, jury trials are the greatest safeguard of the citizens. If, in a civil case. It is error, for which the verdict should be set aside and the judgment revoked, for the court to make a remark, in the presence of the jury, calculated to mislead them, or calculated to cause them to give more or less weight to any testimony before them. for much stronger reasons would it be error to make the same remark in the trial of a criminal case." This subject is discussed at

some length by Judge Dent, in *Neill v. Produce Co.*, 38 W. Va. 228, 18 S. E. 563, and the cases there cited. The remarks made by the judge in this case, it is true, were by way of illustration; but unfortunately, for the purpose of the illustration, he named one of the state's witnesses who had been examined in the case, and referred to him as one "whose integrity is not to be questioned." Suppose that he were placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment (just as the witness referred to had testified in this case), and, having so testified, the opposite party were to bring here two or three witnesses from another county,—say, from Huntington,—who are entire strangers to the people of Wayne county, and who, upon the witness stand, were to testify to their having heard the said state's witness make statements directly contradicting those made by him upon the witness stand, etc. While the judge did not mention the names of the supposed witnesses from Huntington, yet it was a fact that defendant had two witnesses from Huntington, summoned them, and placed them upon the stand to testify in the case as experts touching the matter of the evidence given by the witness Burgess. What was necessarily the tendency of the remarks on the minds of the jury but to make an impression thereon highly favorable to the testimony of the state's witness, who was so referred to by the court as of unquestioned integrity, and, consequently, his testimony was entitled to the greatest weight, while the other witnesses were mentioned as entire strangers, brought from another county, whom the people of Wayne county did not know? The tendency of the remark would be to weaken their testimony in the estimation of the jury, to the prejudice of defendant. Whether it affected their verdict or not we cannot tell. Taking the whole record together, I am inclined to the opinion that none of the errors complained of really affected the minds of the jury prejudicially to the rights of the defendant; yet they may have done so, and, without such errors, it is possible the jury might have returned a verdict more favorable to him. For the reasons herein stated, the verdict will be set aside, the judgment reversed, and the case remanded for a new trial to be had therein.

BOARD OF TRUSTEES OF OBERLIN COLLEGE v. BLAIR et al.

(Supreme Court of Appeals of West Virginia.
April 20, 1898.)

FRAUD—EQUITY—MISTAKE—TRUSTS—PURCHASE BY TRUSTEE—REAL-ESTATE AGENT.

1. The onus probandi is on him who alleges fraud, and, if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted.

2. To entitle a plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established.

3. The general principles applicable to fraudulent representations are well settled. Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out.

4. While it is true that a trustee or agent cannot be interested in a sale made by himself, yet when he has fully discharged his trust, and sold property to a third person in good faith, having no interest in the same at the time, he may afterwards acquire the title from the purchaser; and such fact will not afford ground for avoiding the sale.

5. The agency of a real-estate agent and his duty to his principal ceases upon the delivery of the title and payment for the property.

6. After the termination of the agency, the agent has the same right as any other person to deal in the property.

(Syllabus by the Court.)

Appeal from circuit court, Doddridge county; T. P. Jacobs, Judge.

Suit by the Board of Trustees of Oberlin College against J. V. Blair, trustee, and others. Decree for plaintiff, and defendants appeal. Reversed.

Smith D. Turner, Van Winkle & Ambler, and W. P. Hubbard, for appellants. W. N. Miller, T. E. Burton, G. W. Farr, and Brown, Jackson & Knight, for appellees.

ENGLISH, J. A controversy existed between C. R. Gains, F. K. Knight, and the Trustees of Oberlin College in regard to a tract of land situated in Doddridge county, containing 330 acres. In July, 1885, said parties agreed upon a compromise whereby they should all convey to J. V. Blair the titles they had. Blair was to sell the land, and divide the proceeds between them, giving one-half to the college and dividing the other half between Gains and Knight. In pursuance to this agreement, in September, 1885, and January, 1886, the college, Knight, and Gains conveyed said 330 acres to said Blair, trustee, to sell and convey said land under direction of the grantors, and divide the proceeds as above mentioned. Blair accepted the trust, and several parcels were conveyed to different persons under it, until, in February, 1892, about 188 acres were left. The matters in controversy in this suit grow out of transactions regarding this tract, beginning in February, 1892. A suit was instituted by the trustees of said college in the United States court, and considerable testimony taken therein, when the cause was dismissed for want of jurisdiction, and, by agreement, the evidence taken was allowed to be read in the circuit court of Doddridge county, where the suit was instituted by the college trustees against J. V. Blair and others. The facts which give rise to this litigation grow out of the circumstances surrounding the sale of said residue of land by Blair, trustee. Up to the date of sale, no oil had been found in that vicinity, although great amounts of money had been expended exploring for same. At the time this suit commenced, Gains had died, and Henry Ash, as sheriff, had been ap-

pointed his administrator, and represented the Gains estate in the proceeds arising from sales of this land. F. E. Burton, a lawyer, of Cleveland, Ohio, represented the interests of Oberlin College. F. K. Knight, a former clerk of the county court, represented one-fourth of the proceeds. The bill charges that on February 18, 1892, Blair wrote to Burton and the board of trustees of the college that he had received an offer of seven dollars per acre for the land, and induced them to authorize a sale at that price, when, in fact, he was conspiring with Ash and McMillan and Percy to get the property, and thus obtained assent to the sale. The letter did not disclose that the person who made the offer was Wilkinson, an agent of the South Penn Oil Company. Blair conveyed the land at seven dollars to McMillan, for the real benefit of himself and associates, on February 23d, and practiced a fraud on the beneficiaries, Ash being Gains' administrator. The bill further charges that McMillan, in March, leased said land to the South Penn Oil Company for a bonus of \$5,500, and afterwards received rentals and royalties in large amounts; that McMillan, Ash, Blair, and Percy were advised of the value of the land as oil property, and the college, as well as said Knight, was defrauded; and the bill prayed an injunction, the appointment of a receiver, and the cancellation of everything except the lease to the oil company. Answers were filed putting in issue the allegations of the bill, and many depositions taken. On December 3, 1896, a final decree was rendered, holding that the deed from Blair, trustee, to McMillan, dated February 23, 1892, conveying 182 $\frac{1}{2}$ acres to McMillan, was procured under such circumstances as not to divest the rights of the beneficiaries, the Board of Trustees of Oberlin College, and the widow and heirs of Gains, deceased, under the trust deed executed to Blair; confirmed the lease made by McMillan to the South Penn Oil Company; and decreed that McMillan be declared to be holding the legal title to the land conveyed to him by said Blair, trustee for said college, for the widow and heirs, and their assigns, grantees, and personal representatives, of C. R. Gains, in their proportion, and upon the terms, conditions, etc., contained in the deed of trust made by complainant to Blair on September 19, 1885, and in the deed of trust made to Blair by Gains and Knight on January 13, 1896,—that is to say, in the proportion of one-half undivided interest therein to the complainant, and one-fourth undivided interest therein to said widow and heirs and their assigns; but, inasmuch as said Knight had entered no appearance and asked for no affirmative relief in the cause decreed as to the original one-fourth undivided interest held by him in said land under the trust invested in the said Blair, trustee, said McMillan holds such interest in trust for Knight and himself, and said Blair, Ash, and L. W. Percy's estate, in proportion of one-fifth of the whole estate to said Knight, and one eightieth interest each

in the whole to Blair, McMillan, Ash, and the estate of L. W. Percy, deceased, and upon the terms of the deed from Blair, trustee, to McMillan, and of the contract between Blair and others and McMillan, set forth in the bill and proceedings, to direct how the oil company should account to the parties aforesaid for royalty when the receiver was discharged and the cause finally determined; perpetuated the injunction against McMillan, etc., their agents, etc.; and directed that Blair, Ash, and the McMillan estate should be required to account as trustees to the complainant, and to the widow and heirs, the grantees and assigns, and the administrator of the estate of C. R. Gains, deceased, according to their respective rights and interests, for the amount of bonus received, and the rent aforesaid, and all other rents received or which may be received, subject to the credit of proportionate amount of the purchase money paid by McMillan to Blair, trustee, and any proper charges for taxes or otherwise chargeable against said land; and from this decree S. B. McMillan, Henry Ash, and Jackson V. Blair obtained this appeal.

The litigation in this case is manifestly the result of a train of circumstances which not infrequently occurs in this state of late years, when a few acres of barren, unproductive hill land become suddenly of immense value, by reason of the discovery of petroleum in the immediate vicinity, and the former owner finds he has been too hasty in parting with his title, and seeks some loophole by which to regain his possessions. The circumstances relied upon by the complainant to establish the fraud relied on to invalidate the sale made by Blair, trustee, to McMillan, of the land in controversy, are contained in a small compass, and cluster around the sale made in February, 1892. On the 15th February, McMillan and Percy saw Blair, and proposed to buy the land, which had been held at five dollars per acre. Blair told them that he understood that one dollar bonus was being paid, and he would not recommend a sale at less than six dollars. This they agreed to pay, and Blair promised to report the offer, but neglected to do so; which failure does not comport well with the claim of plaintiff that he meant to conspire with these parties. On February 18th, Wilkinson offered Blair seven dollars, limiting his offer until Saturday, as Blair says. Wilkinson denies the limit of time, but admits that he was to get his answer on that day. On the evening of the 18th, Blair informed Knight and Ash of Wilkinson's offer, and wrote the following letter to F. E. Burton, attorney for plaintiff, which he read to Ash, as representative of the Gains estate, and Knight: "West Union, W. Va., Feb. 18, 1892. Hon. F. E. Burton and the Board of Trustees of Oberlin College, Cleveland, Ohio—Dear Sir: I have been offered seven dollars (\$7.00) an acre for the residue of 'Spy Run' lands held by me as trustee, etc. This is \$2.00 more than we had

offered it at heretofore. The rise in price is owing to the fact that an oil well is going down at or just below Centre Point, a mile or a mile and a half of this land; and I'm informed that the drill has gone through the 'Big Injun,' in which salt water and gas were only found, but the operators are going onto the Gordon. Four other holes have gone down in this vicinity, and said to be 'dry.' The other parties in interest, Knight and the representatives of Gains' estate, say close up at once, as the 'little boom' may only last a few days. So, if you will wire me or write your approval, I can close up the sale by deed Saturday, as the bid is only given until that time, at which time I have agreed to make conveyances, with your approval. This offer is on all the balance of the land outside of the part held and claimed by Wm. E. George, as shown on the plat made for me by Sherwood & Co., of which I presume you have a copy, as I sent it to you for that purpose. Taking the George part out, will leave about 182 to 188 acres, for which I am offered the \$7.00 per acre, and which I deem best to take, as the land itself is not worth over \$5.00 per acre. Write if you get this in time; if not, wire me, using Central office, at once, and oblige, yours, very truly, J. V. Blair, Trustee." Now, while Wilkinson in his testimony denies the limit of time, yet it appears that he called on Blair on the 20th, and says he was to get his answer on that day, but that Blair had not yet received an answer from Burton. The above letter reached Burton on Saturday, February 20th, and he wired Blair to sell at seven dollars. This message was received by mail at 6 o'clock in the evening, when Wilkinson was gone. On the same day it appears that McMillan and Percy called on Blair, and asked if he had heard from Burton as to their offer of six dollars, made on the 15th, and were informed that he had failed to submit it, and had subsequently received the offer of seven dollars from Wilkinson, which he had submitted, and upon which he was expecting an answer. After the telegram was received from Burton, and Wilkinson was gone, and, as Blair understood it, Wilkinson's limit had expired, McMillan agreed to take the property at seven dollars, the same Wilkinson offered. He had not reported the name of the purchaser to Burton, and, if he had, it would not have been material, as he was authorized to sell at seven dollars, and did sell it to McMillan at that price; but, before doing so, he explained the situation to Ash and Knight, and obtained their consent to convey to McMillan. The fact that neither McMillan nor Ash were advised as to the finding of oil in the Sullivan well, or in the immediate vicinity, is shown by a transaction which occurred on the 22d of February, when McMillan leased 450 acres of land in that neighborhood to the South Penn Oil Company at one dollar per acre, and Ash, the same day, sold leases covering 1,441 acres for less than one dollar per

acre. On the 23d February, Blair conveyed to McMillan at seven dollars per acre. On the 26th he settled with the beneficiaries, and on the 29th McMillan sold to Blair, Percy, and Knight, one-fifth each, at cost price, and Knight leased his one-fifth interest to Ash. Now, if McMillan had attached any peculiar value to his land by reason of its containing oil or other mineral, how can we reconcile such knowledge with the fact that he parted with four-fifths at the same price he gave for it? And Knight certainly knew nothing of the oil value of the land, or he would not have released to Ash. Did Blair conspire with McMillan and the others to defraud the complainant? If such had been his intention, would he have failed to submit the offer to Percy, etc., for six dollars, and sought to have obtained a higher price from Wilkinson, if he were conspiring with others to cheat the Oberlin people, and was to share in the purchase? His interest surely would have directed him to buy at the lower figure. Again, if he knew the value of the property, his interest would have prompted him to secure more than one-fifth. The letter to Burton, advising him of Wilkinson's bid, was read to Knight and Ash, and they approved of it, and agreed the opportunity for selling at seven dollars should not be allowed to slip. Until February 18th, Blair, Knight and Wilkinson were seeking to sell to Wilkinson, and in that sale, of course, Blair was interested only to the extent of his commissions. Blair concealed nothing in his letter to Burton. He says an oil well "is going down at or below Centre Point, a mile or a mile and a half from this land," etc. "The others interested, Knight and the representatives of the Gains estate, say close up at once, as the 'little boom' may only last a few days." Knight admits that this letter was shown to him, and he assented to it. It could not have been written with any expectation of selling to McMillan, and, if Wilkinson had remained until the telegram came from Burton, he undoubtedly would have become the purchaser. Now, it is apparent that Burton, Knight, and the representative of Gains were willing to sell at seven dollars per acre. Burton asked no questions as to the purchaser. He thought it best his clients should sell at seven dollars. On February 23d, in pursuance of a telegram from Burton, Blair sold and conveyed to McMillan at seven dollars. On the 29th, though Knight says he never consented to the sale of his one-fourth interest to McMillan, yet, after the conveyance to McMillan, he took from him one-fifth interest in the property, instead of holding one-fourth. The sale was made to McMillan, and on the 26th Blair settled with Burton and the other fiduciaries. Now, where is the fraud which was perpetrated on Burton or his clients? They received what they were willing to sell for, and, if Blair saw proper afterwards to buy one-fifth interest in the property, it is difficult to discover why Mr. Burton or his clients

should complain. On February 27th he wrote: "Your favor of 26th inst., inclosing check for \$616.21, is at hand. Please acknowledge thanks for same. We are particularly anxious to have this paid at this time."

At the time of the sale to McMillan, so far as the evidence discloses, no one was aware of the existence of oil in the Sullivan well, except the immediate employes of the South Penn Oil Company. On February 22d, Ash and McMillan were ignorant of the existence of oil in that well, or they would not have leased for one dollar per acre or less. Wilkinson had taken particular pains to spread the report that there was only salt water and gas there. After the sale had been made to McMillan, with the consent of all, the deed made, and purchase money paid, the property was McMillan's, to do with as he pleased. He could sell to Blair or any one able to purchase it. So, in the case of *Robertson v. Chapman*, 152 U. S. 683, 14 Sup. Ct. 745, Mr. Justice Harlan, delivering the opinion of the court, said: "A real bona fide sale of the property through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee." It appears in that case that Mr. Polk wrote to Robinson as follows: "A man by the name of O'Donahoe says he will give \$4,000 for that property,—\$1,000 cash, balance in three equal payments, at 7%, secured by mortgage on that together with mortgage on other property, so that security will be ample. Not long ago he offered \$4,000 cash, but times are dull here now, and he says the time payment is the best he will do." To this letter Robinson replied in a day or so: "I am decidedly of the opinion that the property in your city should be sold, and that, too, at once. I think the offer a fair one, and you are authorized to accept the same. Please send me the mortgage and notes as soon as consummated." Polk sold to O'Donahoe, and received cash payment. Robertson made the deed to O'Donahoe, and took mortgage to secure deferred payments. Afterwards, O'Donahoe sold and conveyed the property to Polk, and the court in its opinion says: "So that, at the time Polk took the property from O'Donahoe, it was not in the power of the plaintiff [Robertson] or of O'Donahoe to rescind the contract between themselves, and Polk's agency for the sale of the property had in every material sense terminated." Again, in the case of *Walker v. Carrington*, 74 Ill. 446 (Syl. point 8), the court held that, "while it is true that a trustee or agent cannot be interested in a sale made by himself, yet when he has fully discharged his trust, and sold property to a third person in good faith, having no interest in the same at the time, he may afterwards acquire the title from the purchaser, and such fact, or the fact that his wife acquires

the title, will not afford ground for avoiding his sale." We find the law thus stated in *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068 (Syl. point 3): "The agency of a real-estate agent and his duty to his principal ceases upon the delivery of the title papers and payment for the property." Also point 4: "After the termination of the agency, the agents have the same right as any other persons to deal in the property." When we revert to the immediate circumstances surrounding this transaction, and seek among them for the motives that actuated Blair when he wrote this letter to Burton, it is found that he did not act alone in making the representations therein contained. Knight testifies that he had no understanding that he was to get any interest if the land were sold to Wilkinson. He also states that he and Ash were present in Blair's office when this letter was written; and Ash says that Blair took the letter out of his copy press, and read it over to Knight and himself, and all concurred in it. When this letter is read through, it bears none of the marks of fraud. It conceals nothing in regard to the efforts being made in the immediate neighborhood to discover oil, but states them frankly, and assigns them as a reason for the two dollars per acre advance in price. It also states truly that the other parties in interest, who were there on the ground, said: "Close up at once, as the 'little boom' might only last a few days." He was then expecting to sell to Wilkinson, and no one contends that Blair could ever have acquired any interest if Wilkinson, the agent of the South Penn Oil Company, got it. This letter was approved by Knight and Ash. None of them thought they should lose the opportunity of selling at seven dollars; and so, when Wilkinson's limitation was out, and McMillan offered to take it at Wilkinson's bid, Knight and Ash directed Blair to sell to McMillan. Burton asked no questions as to the purchaser; all he seemed to care for was the seven dollars per acre, which he got. It was sold in strict pursuance of his directions, and we cannot say, from the evidence, that Blair had any understanding or agreement with McMillan before the sale was made that he was to become the owner of any interest after it was sold to McMillan. After the sale, the entire purchase money was paid to the parties entitled thereto, Burton receiving one-half and Knight one-fourth. Knight afterwards bought back a one-fifth interest, which he leased to Ash, and he swears in his testimony that, as late as the last of March, he had no idea that there was oil on the land; otherwise he would not have leased to Ash. Blair conveyed the property to McMillan on the 23d day of February. On the 29th, Blair purchased from McMillan a one-fifth interest; and Percy, Ash, and Knight each also took one-fifth. But there is no evidence in the case that Blair contemplated becoming interested in the property at the time he made the sale to McMillan. Upon this question of

fraud this court held, in the case of *Harden v. Wagner*, 22 W. Va. 356, that "the onus probandi is on him who alleges fraud, and, if the fraud is not strictly and clearly proved, as it is alleged, relief cannot be granted, although the party against whom relief is sought may not have been perfectly clear in his dealings." Again, in the case of *Wood v. Harrison*, 41 W. Va. 886, 23 S. E. 563, this court, speaking through Judge Brannon, said: "We cannot convict her of fraud, without evidence, though she be the debtor's widow. Fraud must be proven; it cannot be presumed. Though wife, she is entitled, in a court of justice, to hold the defense of a purchaser, unless fraud is fixed upon her." In the case of *U. S. v. Hancock*, 133 U. S. 193, 10 Sup. Ct. 264, speaking of the evidence of fraud, Brewer, J., said: "Not only are not they the clear, convincing, unambiguous proofs of fraud required to set aside a patent, as declared by this court in the case of *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131, but all combined create nothing more than a suspicion. They may leave a doubt, but they do not bring the assurance of certain wrongs." Again, in *Baltzer v. Railroad Co.*, 115 U. S. 634, 6 Sup. Ct. 216, it was held that, to entitle a plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established. And in *Farrar v. Churchill*, 135 U. S. 609, 615, 10 Sup. Ct. 773, Chief Justice Fuller says: "The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out." Now, what was it Blair knew that he did not impart to Burton? The evidence clearly shows that the existence of oil in the Sullivan land was not concealed by Wilkinson, but he told every one that they had found nothing but gas and salt water. That McMillan and Ash knew nothing of the existence of oil in the Sullivan land is shown by the fact, above stated, that, on February 22d, they parted with the oil interest in their lands, amounting to 1,800 acres, at one dollar per acre; and McMillan would not have parted with four-fifths of this 182-acre tract at the same price he paid if he had known its value. Again, Mr. Burton, when asked as a witness what it was that Mr. Blair ought to have told him and did not, could only say that Blair failed to mention his own proposed share in the purchase. There is no evidence in the case to show that Blair intended to purchase when he wrote to Burton. On the contrary, the testimony shows that he expected them to sell to Wilkinson, and, looking at the entire testimony, we can find no misrepresentation made or fraud practiced upon the plaintiff, and must hold that the evidence does not establish that the defendant Blair in any manner violated the trust imposed in him. The decree complained of is therefore reversed, and the plaintiff's bill dismissed.

On Rehearing.

(Feb. 4, 1899.)

After carefully considering the petition for rehearing in this case, and the arguments advanced in the support of the same, I have been unable to reach a different conclusion from the one announced in the above opinion, which was handed down on the 20th of April, 1898, and from which a rehearing was granted on the 6th of May, 1898. I now adopt said opinion, and would add nothing thereto, but for the fact that counsel seem to consider that the questions raised by the answer and cross bill of the widow and the heirs at law of C. R. Gains, deceased, have not been given the attention to which they are entitled. As stated in the above opinion, at the time this suit was brought C. R. Gains was dead, and Henry Ash, as sheriff, had been appointed his administrator, and represented the Gains estate in the proceeds arising from the sale of this land. It appears that the land in controversy was conveyed to J. V. Blair, trustee, as the result of a compromise made July 24, 1885. This tract and some other lands had been held jointly by the board of trustees of Oberlin College, F. K. Knight, and C. R. Gains. The first named owning one-half, and the other two one-fourth, each; and they agreed to convey it to said Blair, trustee, to sell and convey, by deed, said land, under the directions of the grantors, and said trustee was to divide the proceeds among the grantors in the proportion of their respective interests therein, after paying the expense of the trust. The land was sold under the direction of the plaintiffs, the administrator of C. R. Gains, and F. K. Knight. It is claimed for the Gains estate that Henry Ash, administrator, had no right to consent to the sale made by Trustee Blair. The land, however, was articulated to be sold, and at the time of the sale must be regarded as personalty, and, being personalty, it was one of the duties of the administrator to deal with it. On this question, we find the law stated in 2 Story, Eq. Jur. § 1212, where it is said: "Another class of cases illustrating the doctrine of implied trusts is that which embraces what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal or from personal to real, so that each is considered transferable, transmissible, and descendible, according to its new character, as it arises out of the contracts or other acts or intentions of the parties. This change is a mere consequence of the common doctrine of courts of equity, that where things are agreed to be done they are to be treated for many purposes as if they were actually done. * * * Land articulated to be sold, and turned into money, is reputed money, and money articulated or bequeathed to be invested in land is ordinarily deemed to be land." See *Turner v. Davis*, 41 Ark. 270, a very similar case to the one under consideration, in which there was litigation among

heirs as to a tract of land, and, by agreement, it was conveyed to a trustee to be sold, and the proceeds divided, and it was held to be personalty. See, also, *Zane v. Sawtell*, 11 W. Va. 43.

As to the time when the conversion takes place *inter vivos*, Pomeroy, in his *Equity Jurisprudence* (section 1162, vol. 3), says: "Subject to this general modification, the rule is settled that the conversion takes place in wills as from the death of the testator, and in deeds and other instruments *inter vivos* as from the date of their execution." In the case of *Zane v. Sawtell*, *supra*, James W. Zane and wife conveyed to a trustee certain lots, "in trust that he should sell and dispose of said lots as occasion might fairly offer," etc.; and Green, J., in delivering the opinion in that case, said: "Unquestionably the deed of James W. Zane and wife, in the view of a court of equity, impressed on these 21 lots the character of personalty, and upon his death his interest in these lots would have passed to his personal representatives as personalty, and not to his heirs as realty. This is a sequence of the familiar principle that a court of equity regards land deeded or devised to be sold and converted into money, or money, either articulated or bequeathed, to be invested in land, as having the character of the property into which it is to be converted, though the actual conversion by sale or purchase has not been actually effected,"—citing *Harcum's Adm'r v. Hudnall*, 14 Grat. 369, and numerous other authorities, among them *Craig v. Leslie*, 3 Wheat. 563, which is regarded as a leading case on the question. The same principle is announced in the cases of *Ropp v. Minor*, 33 Grat. 109; *Effinger v. Hall*, 81 Va. 107. Authorities might be multiplied in support of this proposition, but these are deemed sufficient, when applied to the facts of the case, to lead to the conclusion that the conveyance made to J. V. Blair of the land in controversy converted the same into personalty, and, as such, it devolved upon Henry Ash, as administrator of the estate of C. R. Gains, to direct the sale of said tract of land, and receive and administer the proceeds as part of the personal estate of his intestate. I hold now, upon a review of the entire case, as I held in the above opinion, that the decree complained of must be reversed and the bill dismissed.

WOODS, Special Com'r, v. CAMPBELL et al.
(Supreme Court of Appeals of West Virginia.
Nov. 17, 1898.)

EQUITY—LACHES—REVIEW—APPEAL.

1. By a decree confirming a sale of land, two commissioners are appointed to collect and disburse the purchase money on the claims thereto, fixed and determined by a former decree. One of the commissioners permits the other, who is the attorney for the claimants, to collect and disburse the purchase money, while he remains passive. Ten years after the death of the active commissioner, 27 years after the date of their

appointment, and 31 years after the decree fixing the claims and liabilities, the inactive commissioner files a bill to ascertain whether any of the purchase money remains unpaid, and, if so, to resell the land, but fails to allege or show that any of the purchase money remains unpaid, or that any of the claims against the same remain unsatisfied. Such bill is demurrable for want of equity.

2. Issues not determined by the circuit court will not be considered by this court on appeal.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county; J. H. Holt, Judge.

Bill by Samuel Woods, special commissioner, against George G. Campbell and others. Decree for plaintiff, and defendants appeal. Reversed.

Samuel V. Woods, for appellants. Dayton & Dayton, Fred O. Blue, and Shelton L. Reger, for appellee.

DENT, J. On the 18th day of February, 1893, Samuel Woods, special commissioner, filed his bill of complaint in the circuit court of Barbour county against George G. Campbell and others, which, among other things, contained the following allegations pertinent to this appeal, to wit: That on the 3d day of January, 1861, plaintiff and co-commissioner, David Goff, under a decree of said circuit court, sold a certain tract of land, known as the "Gilbert Boyles Farm," to George Campbell, now deceased, and who, together with George G. Campbell, his son (defendant), as his surety, executed his three obligations of \$853¾ each, payable in one, two, and three years thereafter, with interest, which said notes remain filed in the papers of the cause, never having been drawn therefrom. Owing to the pendency of the war, said sale was not confirmed until the March term, 1866, when, by a final decree, the said commissioners who had executed a bond for the purpose were directed to collect the purchase money, and, after payment of costs, to disburse the same on the debts decreed, including a debt to George Campbell of \$843.34, with interest on \$580.86 from the 9th day of July, 1860, which would necessarily be a credit on his purchase-money note; and, on the payment of such purchase money, Samuel Woods, commissioner, was directed to make a deed to the purchaser. That about the year 1866 George Campbell died, leaving as his only heir George G. Campbell, who by his deed conveyed the land in controversy to his son, Bedford Campbell. That as plaintiff had been the attorney for Campbells, and David Goff was the attorney for those entitled to the proceeds of the sale, and who had been decreed to be paid out of the same, he left the collection of such purchase money to the said Goff. That he knows the said Goff was paid \$800 on the — day of September, 1865, and \$225 on the 7th day of December, 1865, on said purchase money; but whether any other sums were paid said Goff, he is not informed. That said David Goff died about the year 1863. That plain-

tiff received on the first note \$138.35, 13th October, 1865, and \$100, 9th March, 1866, and this was all he received on such purchase money. Plaintiff further alleges that having no certain knowledge that the purchase money due was fully paid David Goff, either as commissioner, or as attorney for A. G. Welch and others, he declined to surrender said obligations, or to convey to said George Campbell or to said George G. Campbell the legal title to said Boyles farm, and he still retains said legal title, and the vendor's lien on said farm, as incident to said legal title, to secure whatever amount of purchase money may not have been in fact paid. And he prays that the defendants may be compelled to answer the allegations of the bill under oath; that the amount remaining unpaid upon said bonds may be ascertained, and declared a vendor's lien on said Boyles farm; and that, unless the same be paid in a reasonable time, the said farm may be sold, and the proceeds applied to the satisfaction of the amount remaining unpaid upon said obligations, etc. The defendants George G. Campbell and Bedford Campbell demurred to this bill on the ground of laches, presumption of payment, and the statute of limitations; and on this demurrer the whole case depends.

The purchase-money notes were long since barred by the statute of limitations, and, about 27 years having elapsed since the final decree and the last payment on the debt that is shown to have been made, the presumption of payment undoubtedly arises, unless there is something to relieve this case from the effect of such presumption. The laches in prosecuting this matter is certainly gross, and the only excuse given therefor was that his co-commissioner, David Goff, was the proper party to receive and disburse the money; and the bill admits that he did so in part, but is not prepared to say as to the residue, having no accurate knowledge on the subject. But the bill, for other reasons, fails to make out a case justifying the aid of a court of equity. It not only fails to allege, except by mere doubtful inference, that any of the purchase money remains unpaid, but even intimates that it has been paid to the plaintiff's co-commissioner; nor does it allege that any of the parties who were entitled to receive such purchase money, after George Campbell's debt was deducted, have not been fully paid and satisfied, although as to them the presumption of payment from lapse of time and laches, un rebutted, is complete, and there is nothing in the face of the bill to show that they are setting up any claim of nonpayment. Without any allegation of the nonreceipt of the necessary amount and the nonpayment of these claims by his co-commissioner, David Goff, and in the face of the presumption raised by the lapse of time and laches, plaintiff seeks to throw upon the defendant George G. Campbell, the surety in the notes, and heir at law of George Campbell, the burden of proving the full payment thereof, although the bill

fails to show any one complaining in regard thereto, except the plaintiff, who is without personal interest, is a mere trustee, and presents no just grounds for the maintenance of his bill. The pretext is that he wants to be relieved in the premises. Relieved of what? He fails to show any liability against himself. It is true, he was to make a conveyance to the purchaser, on full payment of the purchase money. The purchaser is long since dead, and no one is seeking to compel him to make a deed, or to prosecute the claim for unpaid purchase money, or to pay any of the claims decreed over 31 years prior to the commencement of his suit. The bill, for want of sufficient equitable allegations, is demurrable.

Two other bills were pretentiously heard together with the plaintiff's bill. No decree, however, is made, granting or refusing the relief sought by them, but all the relief granted is apparently on Wood's bill alone. The original bill of Albert G. Welch and others against George G. Campbell and others was finally ended and determined by a decree entered of record in March, 1866. In January, 1887, Eberle G. Welch and others filed what they styled a "bill of review and supplemental bill," in which the only relief prayed is that a certain deed made by Samuel Woods, commissioner, be set aside and rendered null and void. Answers were filed to this bill, setting up matters in bar thereof and demurrer thereto; but such matters remain wholly undetermined, as the final decree does not notice them, other than to refuse a demand for security for costs, and to require other parties, whose names are mentioned, to be made parties thereto. Why the circuit court has not disposed of the questions raised by this bill and the answer is not disclosed in the record, and, until the circuit court does hear and finally determine these questions, this court has no appellate jurisdiction of them. For the foregoing reasons the decree complained of will be reversed, the demurrer to the bill of Samuel Woods, commissioner, sustained, and these causes be remanded to the circuit court, to be heard and finally determined according to the rules and principles of equity.

WETHERED v. ELLIOTT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 30, 1898.)

APPEAL—BILL OF REVIEW—LACHES—NEWLY-DISCOVERED EVIDENCE.

1. An error of the court in reaching a wrong conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal.

2. If a party allege the finding of a document since the decree which would have been relevant evidence for him on the hearing, and knew of its existence and contents, though he made diligent search for it before the decree without finding it, yet, if he could have proven its existence and contents by the evidence of witnesses, he should have done so, and cannot on that ground sustain a bill of review.

3. A bill of review for newly-discovered evidence will not lie where the evidence is simply

confirmatory or cumulative. It must be decisive in its character,—such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence.

4. When a bill of review is predicated on the sole ground of after-discovered evidence, and during the pendency of said bill of review more than two years elapse after the date of the decree sought to be reviewed, and said bill of review is then dismissed, an appeal from the decree sought to be reviewed will be barred.

Brannon, P., and McWhorter, J., dissenting.
(Syllabus by the Court.)

Appeal from circuit court, Braxton county; W. G. Burnett, Judge.

Bill by P. B. Wethered against C. D. Elliott and others. Decree for plaintiff. Defendant Elliott filed bill of review, which was dismissed. From the decrees he appeals. Affirmed.

W. E. Haymond, for appellant. Henry M. Russell and W. E. R. Byrne, for appellees C. B. Hart and J. N. Vance. Dulin & Hall, for other appellees.

ENGLISH, J. This suit in equity was instituted in the circuit court of Webster county by P. B. Wethered against C. D. Elliott and others on the 27th of April, 1893, for the purpose of setting aside and annulling a certain deed which purported to have been executed by said P. B. Wethered and Jonathan Bennett to C. D. Elliott on February 20, 1891, on the ground that said Elliott, acting for and on behalf of C. B. Hart, in his own right and as trustee, and J. M. Vance, on behalf of himself and said Hart and Vance, induced the plaintiff and said Jonathan Bennett to drink intoxicating liquors to such an extent that they became grossly intoxicated, non compos mentis, and totally incapacitated for the transaction of business, and, while so incapacitated, caused and procured the plaintiff and said Bennett to acknowledge a writing on that day purporting to be a deed conveying certain lands therein described to said C. D. Elliott for the purported consideration of \$5,240, by said writing acknowledged to be in hand paid. This land at the date of said writing was very valuable as coal and timber land, and was located within one mile of the West Virginia & Pittsburgh Railroad, and well adapted to agricultural purposes, and well worth \$15 to \$20 per acre, and the consideration named in said deed was grossly inadequate, to such an extent as to shock the conscience of a court of equity. Plaintiff also alleged that although said deed recited a consideration of \$5,240, and acknowledged the payment, in fact not one cent of the purchase money so recited as paid was ever paid to him; that as soon as he recovered from his intoxication, and learned that he and said Bennett had executed said writing, he notified Elliott that he repudiated said deed and the sale therein represented, and that, unless the land was reconveyed to him, he would bring suit to set aside said pretended deed and

sale; and he prayed that said writing purporting to be a deed from himself and said Bennett, dated February 20, 1891, might be set aside, canceled, and annulled, and for general relief. On the 24th of November, 1893, said chancery cause was transmitted from the circuit court of Webster county to the circuit court of Braxton county; and on November 29, 1893, the judge of said court being so situated that he could not properly preside at the hearing of said cause, W. W. Brannon was elected special judge to try the same. On the 4th of December, 1893, C. D. Elliott filed his separate answer, and C. B. Hart and J. N. Vance filed their joint and several answer to plaintiff's bill, and the plaintiff replied generally thereto. Depositions were taken in the cause, and on December 18, 1894, a decree was rendered in favor of the plaintiff, holding that the defendants Hart, trustee, and Vance were not entitled to hold said land under the deed made to C. B. Hart, trustee, by the defendant C. D. Elliott on the 14th of March, 1891, but that said Hart, trustee, and Vance were entitled to charge said land with the amount paid by them for the land conveyed by the last-mentioned deed before notice of the plaintiff's rights, after first abating the relative value of the two tracts of 106 and 66 acres conveyed by said deed upon the basis of \$7 per acre for the whole of the land conveyed by said deed, and also the relative value upon the same basis of the tract of 100 acres conveyed by Jonathan Bennett to C. D. Elliott, bearing date February 20, 1891. But such charge in their favor was made subject to the right of the defendant John D. Alderson, commissioner, to enforce his lien for purchase money upon one undivided third of said 1,310 acres. It was further held that said deed from Bennett and the plaintiff to said Elliott, and the deed from said Elliott to defendant Hart, trustee, so far as the same conveys the said tract of 1,310 acres, be canceled and annulled; and the defendant Jonathan Bennett was declared to be a trustee holding the legal title to said 1,310 acres as to two undivided thirds thereof, and the equitable title in the other undivided third for the benefit of the plaintiff, subject, however, to a charge thereon in favor of Jonathan Bennett for the amount which may have been paid by him on plaintiff's behalf on account of taxes against said land, which amount, with any other taxes assessed thereon that might be paid by him, should be payable next after the sum to be charged in favor of the defendants Hart, trustee, and J. M. Vance; and said Bennett was restrained from making any sale or conveyance of said land until the further order of the court, and an account was directed. On April 29, 1895, said Elliott asked leave to file a bill of review in said cause, accompanied by the original deed from Bennett and Wethered to Elliott mentioned in the cause, and also by several affidavits, basing his application on the ground of newly-

discovered evidence; and the plaintiff in said cause, P. B. Wethered, appeared and objected to the filing of said bill of review, and demurred thereto, in which demurrer said Elliott joined. On consideration whereof it was ordered that said bill of review be filed, and the same was remanded to rules, to be there matured for hearing as to the parties not appearing thereto, and said Wethered had leave to file his answer to said bill of review within 30 days after the adjournment of court; and Wethered was enjoined from the prosecution of said suit, and the execution of the decree to be reviewed, until the final hearing of the matters arising upon said bill of review, upon said Elliott executing bond, with good security, in the penalty of \$300, to be approved by the clerk. Wethered answered said bill of review. Depositions were taken thereon by plaintiff and defendant, and the cause was matured for hearing; and on May 5, 1897, the cause was again heard upon the bill of review, and the court dismissed said bill, dissolved the injunction, and decreed that Elliott pay the costs of the proceeding. From this and the former decree, Elliott appealed.

The appellant assigned six grounds of error, the last of which claims that the court erred in dismissing the bill of review filed in the case, and was not warranted in dismissing it by the law or the evidence, but, instead, the said bill of review should have been sustained, and said former decree reversed and annulled, and the plaintiff Wethered's bill dismissed with costs. Counsel for the appellee Wethered, on the other hand, in their brief assign as cross error the overruling of the demurrer of Bennett and Wethered to the bill of review. The only special ground assigned in the demurrer was that the bill of review did not point out in what particular the decree asked to be reviewed was claimed to be erroneous; the only allegation being that "said decree of 18th December, 1894, was erroneous because of the evidence not in the cause, which has been discovered," etc. This cross error applies to the action of the court on the 28th of August, 1895, upon the demurrer; and assignment No. 6 of appellant refers to the action of the court on May 5, 1897, when said bill was dismissed on the hearing of the cause. Counsel for the appellee insist that the decree overruling said demurrer was erroneous because the ground of demurrer relied on was not sufficient, and that it should have pointed out specifically the particulars in which it was claimed the decree was erroneous; citing 3 Enc. Pl. & Prac. 591, where the law is thus stated: "In a bill of review, it is necessary to state the former bill, and the proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law or new matter discovered upon which he seeks to impeach it." And in the note it is said, "No errors can be noticed, unless they are specifically pointed out;" citing numerous authorities,—among others,

Amiss v. McGinnis, 12 W. Va. 371, in which it was held that, "in a bill of review, it is generally necessary to state the former bill substantially, and the proceedings thereon, the decree, and the point by which the party exhibiting the bill conceives himself aggrieved." Counsel for appellee also insist that the bill of review was bad on demurrer because J. D. Anderson, a party to the original suit, was not made a party to the bill of review; citing *Nichols v. Nichols' Heirs*, 8 W. Va. 174, and 1 Bart. Ch. Prac. 205, where the general rule is stated to be that all parties to the original bill should be made parties to the bill of review. It is also urged that said bill of review was bad on demurrer because there was not filed therewith an affidavit that the matter claimed to be new could not have been used in the original cause; citing *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624, and others. An examination of the record shows that the bill of review was sworn to, and several affidavits were filed in support of said bill. The affidavit of C. P. Dorr was filed with said bill. His deposition had been taken in the original cause, and in said affidavit he states that on April 2, 1895, he found among his papers a statement of the settlement made at the time of said land sale, which was filed with his affidavit; but this statement, if material, was found nearly a month before said bill of review was filed, the same being filed on the 29th of April, 1895, and might have been obtained by due diligence on the part of the plaintiff in said bill of review. The other affidavits pertain to conversations had with said Wethered and Bennett before the deed for said land was attempted to be made, and no good reason is shown why the evidence could not have been obtained before the trial of the cause, by using due diligence; and, if the evidence indicated by these affidavits had been adduced, it must be regarded as cumulative. The reason of the rule requiring the affidavits to state the nature and character of the evidence to be filed, when the ground of the bill of review is newly-discovered evidence, is to enable the court to determine, when the bill is presented, as to whether it should be entertained or not; and, looking at these affidavits, they do not appear to have met this requirement. Neither do I think the allegations of the bill such as would entitle the same to be filed. I conclude, therefore, that this cross assignment of error was well taken.

The bill of review was dismissed at the hearing, and this brings us to the consideration of the sixth assignment of error claimed by appellant, which is quoted above. I do not deem it necessary, in considering this assignment of error, to go into an analysis of the evidence taken in support of said bill of review, but will call attention to the allegations of the bill of review as to the items of new evidence on which the plaintiff therein relies. As to the facts he expected to prove by T. M. Daly, he claims that he had ascer-

tained that he could prove said Daly collected certain drafts given by plaintiff to Bennett, which were involved in the controversy of Wethered against plaintiff, and that he accounted to Bennett therefor, and that he was not aware of what account he had rendered to said Bennett. Plaintiff also alleged that he could then prove by said Daly that he was authorized by Wethered, prior to the date of deed from Bennett and Wethered to him, to make sale of said land to him, and that in pursuance of said authority he did make the sale; but it is shown in Wethered's deposition that this evidence was irrelevant, for the reason that it pertained to a contract between Wethered and Bennett and Daly, authorizing the latter to sell the land in question, which was surrendered and canceled some time before the deed in the bill mentioned was made from Bennett and Wethered to Elliott. The same thing is shown by the deposition of Jonathan Bennett; and the plaintiff Elliott, in his deposition, says that he had Daly summoned as a witness, but was afraid to examine him, although he knew he was in possession of certain facts which he regarded as material. As to the original deed, a copy of which was filed in the original cause, and which is claimed as material, as bearing upon the question of the intoxication of the grantors, it must, when examined for that purpose, be regarded, if of any value, as merely cumulative, and for that reason could not be considered in support of the bill of review. Barton, in his *Chancery Practice* (volume 1, p. 337), in speaking of the character of the evidence which will support a bill of review, says: "The evidence must have been discovered since the decree, must appear to be material to the case, and such as would probably effect a different result; for immaterial or merely cumulative testimony will not suffice to sustain a bill of review, and if a party should be allowed to go on to a decree without looking for evidence which might be obtained by a proper search, and afterwards, upon finding the evidence, to file a bill of review, there would be no end to such bills." As to the evidence of Mollohan which plaintiff claimed to have discovered, it was irrelevant, as it applied to the sale which Wethered was seeking to effect under his contract with Daly, which the evidence shows was canceled before the deed was made by Bennett and Wethered to Elliott. As to the evidence of Reuben Weese, reference to his affidavit shows that the conversations he had with Bennett and Wethered had reference to the contract made with Daly, which had been surrendered and canceled before the date of the execution of the deed in controversy. As to the statement found by Dorr, made at the time of the sale, the drafts, and the Daly contract, if material, the plaintiff knew that said papers existed, and in whose custody they were; and, if he could not find them, he

could have proved their existence and contents by the evidence of witnesses. See *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624 (Syl. point 2.) In *Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237, it was held that: "If a party allege the finding of a document since the decree which would have been relevant evidence for him on the hearing, and knew of its existence and contents, though he made diligent search for it before the decree without finding it, yet, if he could have proven its existence and contents by the evidence of witnesses, he should have done so, and cannot on that ground sustain a bill of review." In the same case (Syl. point 2) it is held that: "A bill of review for newly-discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character,—such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence." Neither of the affidavits filed in support of the bill of review, or the depositions relied on to set aside the former decree, are decisive in their character, or such, if true, as ought to produce a different decree upon rehearing. The circuit court, in the decree rendered in the original cause, found that the deed bearing date February 20, 1891, executed by Bennett and Wethered to C. D. Elliott for the tract of 1,310 acres of land, was executed at the time when the grantors named therein were both grossly intoxicated, and totally incapacitated for the transaction of business, and that said intoxication was connived at and procured by said Elliott for the purpose of obtaining said deed. This court has held in *Dunn's Ex'rs v. Renick*, 40 W. Va. 350, 22 S. E. 66 (Syl. point 9) that "an error of the court in reaching a wrong conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal." The court in said original suit having decided that no title passed by said deed of February 20, 1891, as we have seen, the conclusion thus reached could not be corrected by bill of review. The bill of review in this case, having been predicated on the sole ground of after-discovered evidence, did not prevent the appellant from prosecuting his appeal in this court from the decree sought to be reviewed, as the questions presented to the two tribunals by the separate proceedings were entirely distinct, and no confusion could arise from their separate determination. See *Gillespie v. Allen*, 37 W. Va. 675, 17 S. E. 184. The pendency of this bill of review, therefore, did not prevent the running of the statute of limitations; and therefore on the 5th day of May, 1897, when said bill of review was dismissed, an appeal from said former decree was barred. Therefore my conclusion is that it is unnecessary to discuss the other assignments of error, and that the court committed no error in dismissing said bill of review, or

dissolving the injunction awarded the plaintiff. The decree complained of is therefore affirmed, with costs and damages.

McWHORTER, J., dissents.

BRANNON, P. (dissenting). *Nichols v. Nichols*, Heirs, 8 W. Va. 174, lays down: "Although ordinarily a bill of review will not lie where the newly-discovered evidence is simply confirmatory or cumulative, still, if the newly-discovered evidence is not merely confirmatory or cumulative, but decisive in its nature, and could not be discovered before the final decree sought to be revised, by the exercise of reasonable diligence, in such a case a bill of review will lie." This was followed in *Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237, and *Douglass v. Stephenson's Ex'r*, 75 Va. 756, is upon the same principle. I think that the evidence presented in this case as newly discovered is sufficient to call for a rehearing, under the test laid down in those cases. There is no use to detail that evidence here. I think that evidence, taken in connection with the evidence heard on the hearing of the named case, probably, ought to have called for a rehearing. My opinion is that it exculpates Elliott from the grave wrong imputed to him in the case.

KYLE et al. v. WAGNER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1898.)

CORPORATIONS — ASSIGNMENT FOR BENEFIT OF CREDITORS—SUIT AGAINST OFFICERS—PARTIES.

1. The directors of a corporation in this state have no power to direct the assignment of the entire property owned by such corporation to a trustee for the payment of its creditors, without the consent of the stockholders.

2. Where suit in equity is brought by certain stockholders against the directors, and such directors, the president, and all the stockholders are before the court, it is unnecessary to make the corporation a party by name, the object of the suit being to protect the interest of the stockholders from the unauthorized acts of the directors.

(Syllabus by the Court.)

Appeal from circuit court, Ohio county; H. C. Hervey, Judge.

Bill by Robert W. Kyle and others against Edward Wagner and others. Decree for defendants, and plaintiffs appeal. Reversed.

John J. Coniff, for appellants. T. S. Riley and Howard & Handlan, for appellees.

ENGLISH, J. On the 10th day of January, 1898, the Wood Bros. Planing-Mill Company, a corporation duly incorporated and organized under the laws of the state of West Virginia, by Thomas Johns, its president, executed a paper purporting to be a general assignment to Edward Wagner of all its property, real and personal, for the benefit of the general creditors of said company. Robert

W. Kyle and others, who claim to be stockholders of said company, filed their bill in the circuit court of Ohio county against Edward Wagner and others, attacking said deed of assignment as being illegal and void, and praying that the said Wagner, his servants and employés, be restrained and enjoined from exercising any of the powers given him by said deed of assignment, and from exercising any power, control, or possession, by sale or otherwise, over the property of said corporation under said assignment, and that said Wagner, his servants and employés, be enjoined from continuing his possession, control, and management of the affairs of said corporation, and from disposing of or using its funds or property then in his hands, until further order of the court; which injunction was refused by a judge of the circuit court of said county, and the bill, with its exhibits and several affidavits in support thereof, was presented to a judge of this court, who awarded the injunction. On April 29, 1898, the cause was heard upon the bill and exhibits, and the several affidavits filed in support of the bill, the demurrer of the defendants, and the separate answer of Edward Wagner, and upon the motion to dissolve the injunction and the agreed statement of facts; which motion, being considered by the court, was sustained, and said injunction dissolved, to which action of the court the complainants excepted, and applied for, and obtained, this appeal. The only error assigned and relied on by the appellants is that the court erred in dissolving said injunction.

Now, in order to obtain this injunction, the plaintiffs alleged in their bill that on January 10, 1898, the board of directors of said company consisted of five persons, who were also stockholders, viz. Thomas Johns, president of said board, Frank Auber, Theodore Wagner, W. W. Wood, and J. J. Fahey; that W. C. Gardner, who was not a stockholder of said corporation, was at that time secretary of the board of directors; and that on said day said secretary, by verbal notice, without authority from the president, and without having stated the purpose of said meeting to said Frank Auber, called together four members of the board of directors, omitting from the call J. J. Fahey; and that on that date the four members of said board met at the office of said company, and passed a resolution directing Thomas Johns, the president of the company, to make a deed of assignment, conveying to an assignee for the benefit of the creditors of said corporation all of its property, real, personal, and mixed, of every kind, character, and description, and authorizing him to make any and all provisions in such deed as he might deem best to protect the interests of the creditors and stockholders of said corporation, and also instructing Thomas Johns, president, to name Edward Wagner as assignee in said deed of assignment. Counsel for the appellees, in their argument, claim—I think, correctly—

that the demurrer to the plaintiffs' bill was properly sustained by the circuit court, for two reasons: First, because of the omission to make the Wood Bros. Planing-Mill Company a party defendant; and, secondly, for the reason that, although irreparable injury was alleged, no facts are set forth to constitute such irreparable injury.

Upon the question raised as to want of proper parties, while it is true that, in some instances where a suit is brought by a shareholder to protect his equitable interest in the affairs of a corporation, the corporation has been held to be a necessary party, because the legal title to the property is vested in the corporation. In the case at bar, however, all of the stockholders and directors and the president of the corporation were before the court, and in this way all the interests were represented; and under these circumstances, I think, it was unnecessary to make said corporation a party.

It is also urged as a ground of demurrer that, although irreparable injury was alleged, no facts were alleged to constitute such irreparable injury. When we look to the allegations of the bill, we find that the plaintiffs alleged that the assignee had taken complete possession and control of all the business and property of said corporation, and was completing part of the contracts which it had on hand at the time of the assignment, but had announced that he would not complete one, and was attempting to sell the contract for erecting two dwelling houses, all of which possession and control was to the exclusion of the stockholders, and, if not restrained, he would dispose of and sell all of said corporation's property. It is perceived that the acts complained of amount to an entire winding up of the affairs of said corporation, without consultation with or consent of the stockholders, which would surely be regarded as irreparable injury if the stockholders desired to continue the business; and we do not consider this ground of demurrer well taken.

The injunction in this case was awarded upon the further ground that the assignment was directed at an illegal meeting by the directors, when one of their number was absent, and had no notice of the meeting; and, although it appears that their action was ratified by a subsequent directors' meeting, the question is whether, if the first meeting of the directors had been legal and proper in all respects, said directors had the power, under the laws of this state, to direct the assignment of the entire property of their corporation. I am aware that it has been held in some states that a board of directors has the right to direct a general assignment for the benefit of creditors. 1 Mor. Priv. Corp. § 513, says: "Upon the same principle, it has been held that the directors of a corporation have no implied authority to wind up the company, or to sell any property which is necessary in order to carry on its business. Directors are merely agents, and they are appointed for the

purpose of managing the business in which the shareholders have agreed to unite. The value of this business as a commercial speculation, and the advisability of continuing it, are matters which concern those who have embarked in it, and not their managing agents. But it is the duty of a corporation to pay its debts; and they are justified in using the corporate assets for this purpose, although the company be thereby disabled from carrying on its business, provided they act in good faith, with a due regard to the interests of all the shareholders. It has been held that the directors of an insolvent corporation may convey the whole of its assets to a trustee for the payment of creditors,"—citing numerous authorities. Thompson, in his Commentaries on the Law of Corporations (volume 3, § 3986), says: "There is much authority for the view that the directors of an insolvent corporation may, without the consent of the stockholders, make an assignment in good faith of all its assets to a trustee for the payment of its creditors, though, as the exercise of this power generally has the effect of putting an end to the corporation, its existence is denied by some courts. And, clearly, the directors have no such power where the governing statute prescribes a different mode of winding up the affairs of the corporation, and liquidating its debts. The statutory mode is exclusive. The reason is that the statute forms a part of the security to the public, and one of the conditions upon which corporations subject thereto take their chartered powers." In this state we have a statute (sections 56 and 57, c. 53, Code 1891) which provides for the voluntary dissolution of a corporation by the action of the stockholders; and as these sections provide a different mode for winding up the affairs of the corporation from that of an assignment of its property, by direction of the directors, we hold that the directors in this case, even if their meeting had been properly called and held, had no authority to direct the assignment of the entire property of said corporation without the consent of the stockholders. My conclusion therefore is that the court erred in dissolving the injunction awarded in this cause. The decree complained of is therefore reversed, with costs, and the cause remanded.

POWELL et al. v. DAWSON, Secretary of State.

(Supreme Court of Appeals of West Virginia. Jan. 19, 1899.)

MANDAMUS TO SECRETARY OF STATE—INCORPORATION OF CHURCH.

1. The secretary of state will not be compelled by mandamus to issue a charter of incorporation to several persons who agree to become a corporation by the name of the "Baptist Missionary Society of West Virginia," for the purpose of promoting religion by aiding in the support of Baptist ministers engaged in preaching the gospel, and by aiding in the erection of houses of

worship on missionary fields in West Virginia, and by collecting and disbursing funds for these purposes.

2. Granting a certificate of incorporation upon the presentation of such an agreement would, in effect, be incorporating the church the parties represent, and contrary to the provisions of the constitution and statute.

(Syllabus by the Court.)

Application by W. E. Powell and others for a writ of mandamus against W. M. O. Dawson, secretary of state. Writ denied.

Dave D. Johnson and Merrick & Smith, for petitioners. Edgar P. Rucker, Atty. Gen., for respondent.

ENGLISH, J. On the 13th day of January, 1898, W. E. Powell and six others entered into a written agreement in the form prescribed by section 32 of chapter 54 of the Code, for the purpose of forming a corporation by the name of the "Baptist Missionary Society of West Virginia," for promoting religion by aiding in the support of Baptist ministers engaged in preaching the gospel, and by aiding in the erection of houses of worship on missionary fields in this state, and by collecting and disbursing funds for these purposes, which corporation was to keep its principal office at Parkersburg, W. Va., in the county of Wood, and the same was to expire on January 1, 1940, which agreement set forth the amount subscribed to be \$450, and that \$45 had been paid in, and stated that the subscribers desired the privilege of increasing the capital, by the sale of additional shares from time to time, to \$50,000 in all, the shares to be \$50. This agreement was properly signed, sworn to, and acknowledged, and filed in the office of W. M. O. Dawson, secretary of state, on January 20, 1898. On the 28th of January, 1898, said secretary of state refused to issue the charter applied for, stating that he was advised by the attorney general that it would be illegal to issue a charter on said agreement. On February 8, 1898, said W. E. Powell and six others presented their petition to this court, verified by affidavit, together with exhibits, praying for a writ of mandamus to be directed to the Honorable W. M. O. Dawson, secretary of state for West Virginia, to require and compel him to issue to said petitioners a certificate of incorporation declaring them to be a corporation in the name of the "Baptist Missionary Society of West Virginia"; and it appearing to the court that the petitioners had on January 20, 1898, filed with said secretary of state the agreement above mentioned, and had requested him to issue to them a certificate of incorporation as therein set forth, which he had refused to do, a mandamus was awarded, to which said W. M. O. Dawson, secretary, etc., filed his answer, in which he admitted the facts above stated as to the filing of the agreement by said parties in his office for the purpose of obtaining a charter, which agreement com-

plied with the statute, sworn to and acknowledged, but that he was advised, believed, and so answered that he has no authority, under the constitution and laws of this state, to issue a certificate to the petitioners for the purposes set forth in said agreement, but is advised and so answers that the issuing of such a certificate of incorporation is in plain violation of the constitution of West Virginia, as particularly set forth in section 47 of article 6, and that it is by reason of the inhibition of the constitution aforesaid that he refused to issue said certificate. He admits that he did on January 28th refuse to issue said certificate, and still refuses, because it would, in his opinion, be contrary to the constitution of the state so to do; wherefore he prayed judgment, and that he might be hence dismissed, and not required to perform the mandate of the alternative writ of mandamus aforesaid.

The question presented by this record is whether the secretary of state was warranted in refusing the certificate of incorporation applied for by the petitioners. Can we sanction his action under section 47 of article 6, which provides that "no charter of incorporation shall be granted to any such church or religious denomination," or under section 8 of chapter 54 of the Code, which provides that "this chapter shall not be construed to authorize the incorporation of any church or religious denomination, or of any company the object, or one of the objects of which is to purchase lands and resell the same for a profit"? The proposed corporation was to be known as the "Baptist Missionary Society of West Virginia." Its object, as set forth in the agreement, was to promote religion by aiding in support of Baptist ministers engaged in preaching the gospel, and by aiding in the erection of houses of worship, etc., and by collecting and disbursing funds for these purposes. Now, can we regard this in any other light than an attempt on the part of the Baptist Church to do indirectly through others what the constitution and law expressly inhibits? There is no purpose expressed in this agreement which can be regarded otherwise than one of the prime objects of the Baptist Church. The first purpose is to promote religion by aiding in the support of Baptist ministers engaged in preaching the gospel. That this is one of the main objects of the Baptist Church, and in fact any other church, with respect to its ministers, needs no argument to sustain it. The church must have ministers, or it cannot prosper. The next purpose is to aid in the erection of houses of worship in missionary fields; and it is at once conceded that any denomination must have houses of worship, where its members may assemble and hear the gospel proclaimed; otherwise, its work languishes and its success is defeated. The last object mentioned in said agreement, and perhaps not the least, has for its purpose collecting and disbursing funds for these pur-

poses, and then the agreement expresses the general purpose of promoting religion.

Counsel for the petitioners, in their brief, state that petitioners are not a church or religious denomination, though they do not seek to hide the fact that their work is to be solely in the interest of the Baptist denomination of the state, and state that, under Baptist church government and polity, there is no church organization or authority beyond the local church, each local society being entirely independent. Conceding this to be so, let us inquire what would be the effect if six or seven of the members of each local Baptist church should enter into a similar agreement to the one presented by petitioners to the secretary of state, and, on presentation, a charter should be granted them. Is it not apparent that in this way the Baptist Church in the state of West Virginia, through the intervention of such stockholders, would indirectly be allowed to do what, under the constitution and the statute, it is not allowed to do directly, and the spirit and intent of the law be thus evaded and defeated? Corporations thus formed could be regarded in no other light than the agents of the Baptist Church, and each local Baptist church, the members of which were thus incorporated, so far as benefits and privileges were concerned, would occupy precisely the same attitude and derive the same advantages as if the local church itself were incorporated. In the case of *Gallego's Ex'rs v. Attorney General*, 3 Leigh, 450, Tucker, P., after reviewing the history of legislation with reference to church property and charitable bequests, on page 477 says: "No man at all acquainted with the course of legislation in Virginia can doubt for a moment the decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked by counsel, that wealth is power. Hence the provision in the bill of rights; hence the solemn protest of the act on the subject of religious freedom; hence the repeal of the act incorporating the Episcopal Church, and of that other act which invested the trustees appointed by religious societies with power to manage their property; hence, too, in part, the law for the sale of glebe lands; hence the tenacity with which applications for permission to take property in a corporate character (even the necessary ground for churches and graveyards) have been refused. The legislature seems to have been fearful that the grant of any privilege, however trivial, might serve but as an entering wedge to greater demands."

The law under which this controversy arises descended to us from the state of Virginia. In the constitution of that state (Const. 1851, art. 4, § 32) it was provided that

"the general assembly should not grant a charter of incorporation to any church or religious denomination, but might secure the title to church property to an extent to be limited by law"; and the same, in substance, is found in the constitution of this state (article 6, § 47). It is not our province to pass on the propriety of the law, but to construe and apply it as we find it. It is contended that a corporation formed for the purposes set forth in the agreement signed by the petitioners would be neither a church nor a religious denomination; but if they assume the duties of the Baptist Church in their locality, promote religion by aiding in the support of Baptist ministers engaged in preaching the gospel, by aiding in the erection of houses of worship, and by collecting and disbursing funds for these purposes, it makes little difference what name they may assume; they take upon themselves the main duties, responsibilities, and avowed objects of the church, and thus become the right hand of the church they represent. In my opinion, if the charter they ask for were granted, it would afford this church and every other church, of whatever denomination, an easy means of evading the law, and would, in effect, be granting a charter to the church. For these reasons, the peremptory mandamus is refused, and the petition dismissed.

CARTER v. TYLER COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Jan. 25, 1899.)

OIL LEASE—TAXATION—REALTY—PERSONALTY.

1. Where a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one-eighth of the oil produced as royalty, the oil while it remains in situ must be regarded as realty, and as remaining the property of the lessor until brought to the surface.

2. The prospective production of oil from such well cannot be properly charged to the lessee, on the personal property books of the county.

3. Under chapter 29 of the Code, which provides for the assessment of taxes, the words "personal property," as therein used, shall include all fixtures attached to the land, if not included in the valuation of such land entered in the proper land book.

(Syllabus by the Court.)

Error to circuit court, Tyler county; T. P. Jacobs, Judge.

Application of John J. Carter to the county court of Tyler county for relief against erroneous assessment. From the judgment, petitioner brings error. Modified.

John H. McCoy and Robert McEldowney, for plaintiff in error. Anthony Smith, for defendant in error.

ENGLISH, J. John J. Carter gave notice to the prosecuting attorney of Tyler county that on the 17th day of January, 1894, he would apply to the county court of said county, under sections 94, 95, 96, and 97 of chapter 29 of the Code, for relief against an

erroneous assessment on the personal property books of said county, in which he claimed he was erroneously charged with oil at a valuation of \$81,000,—90 oil wells,—and that he would introduce evidence of such charge, and move said county court to enter an order granting him relief from such erroneous assessment. In pursuance of said notice, Carter presented his petition, specifying therein that he was assessed with 90 oil wells, at a valuation of \$81,000, and with \$72,000, as the value of capital used by him in his business, also setting forth therein the reasons why said assessments were illegal and erroneous. The prosecuting attorney objected to the consideration of so much of the applicant's petition as referred to the assessment of the item of \$72,000, value of machinery, etc., as stated in column 18 of said personal property book, upon the ground that no notice of the intention of said petitioner had been given him that he would ask the court to be released from the payment of taxes upon said item, to which objection the petitioner replied generally. As to this objection the record shows that due notice of the said petition was given the prosecuting attorney, and that he appeared on behalf of the state, and objected to the consideration by the court of so much of the applicant's petition as refers to the assessment of the item of \$72,000, value of machinery, etc., as stated in column 18, and agreed that the said petition be continued until the 6th of February, 1894, which had the effect of waiving the notice required by statute, the only object of which being that the interest of the state, county, and district might be represented in the matter. Now, it appears that the sum of \$72,000 was assessed upon the engines, boilers, rigs, and appurtenances, such as casing, etc., belonging to the 90 wells in the proceedings mentioned. This machinery and the appliances connected therewith were in use by the petitioner, Carter, in the production of oil from the wells he had leased; and, in determining whether this property was properly placed upon the personal property books of said county, we must determine whether they should be classed as realty or personality.

I am not unaware of the diversity of opinion expressed by text writers, and the almost irreconcilable conflict of decisions by the different courts, which would necessarily be encountered in investigating the question as to when machinery and appliances used by tenants in the prosecution of the various industries and mining operations upon the lands of their lessors are to be considered personality, and when realty; but we are spared the labor and perplexity attending this investigation by our statute, which provides (Code, c. 29; § 46) that the "words 'personal property' as used in this chapter shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book." The ma-

chinery and appliances about these 90 oil wells appear to have been assessed to the petitioner, Carter, at \$800 each, or \$72,000 for the whole. The question as to whether such assessment was excessive or not was a question of fact, which was passed upon by the county court after hearing testimony in behalf of both parties, the court finding that the property was not excessively valued for taxation. The evidence was certified, and the case appealed to the circuit court, and the finding of the county court was affirmed by that court; and, while there may be some slight conflict in the testimony as to the valuation of the property, this court would not undertake to disturb the finding of the county court, or to place a proper assessment of valuation on said property, especially when the county court was confronted with the witnesses and heard their testimony. The ruling of the county court and circuit court, therefore, as to this property being properly placed on the personal property book, and the assessment not being excessive as applied to the machinery and appliances, is affirmed.

The prosecuting attorney also objected to the consideration of an affidavit presented with said petition, made by one S. G. Pyle, who stated therein that in the spring of 1893 he assisted J. K. Smith, assessor of Tyler county, W. Va., in making out said assessor's books, and extending levy on same, and that it was his information that the several oil wells in and about the town of Sistersville, consisting of rig, engine, boiler, casing, and other appurtenances thereto for the purpose of operating for oil, were assessed at \$800 each respectively, for the purpose of taxation, and, in addition thereto, the several wells south of said town of Sistersville, Tyler county, aforesaid, within said county, producing petroleum oil, were assessed upon a production of 10 barrels per day from the 1st of April, 1893, for the said assessment year, beginning at 10 barrels on April 1, 1893, and running down to nothing on April 1, 1894, or an average of 10 barrels per day for six months, and 15 days at an assessed value of 50 cents per barrel. The wells north of said town were assessed at a daily production of 15 barrels per day, on the same basis as the 10-barrel wells, at the same rate per barrel, and for the same length of time. Which objections of the prosecuting attorney were sustained, and thereupon the court proceeded to hear the evidence of said S. G. Pyle, which was reduced to writing, and signed by him, which fact makes it unnecessary for us to pass upon the propriety of the action of the court as to the exclusion of the affidavit of said Pyle.

The depositions of John Carter and other witnesses were taken in open court, and the petitioner, by his attorneys, moved the court to strike from said personal property book the entry of the assessments against Carter for the year 1893; which motion, being ar-

gued and considered by the court, was overruled, the court holding that said property was not excessively valued for taxation, and that it belongs on the property books. To this opinion of the court the petitioner, by his attorneys, excepted, and, on his motion, the court certified all the evidence taken in the case; and from these proceedings of said county court, on March 15, 1894, John J. Carter obtained an appeal to the circuit court of Tyler county. On the 15th of August, 1894, the appellant, John J. Carter, by his attorney, filed, with the papers of the cause, a copy of the entry of the personal property of said Carter on the property books of Tyler county for the year 1893; also 44 copies of certain oil leases, deeds, and assignments of oil leases, which are copied in the record. On the 17th of December, 1894, said appeal was heard by the circuit court, and the judgment of the county court appealed from was affirmed, and from this judgment of the circuit court this writ of error was obtained.

Did the circuit court err in affirming the judgment of the county court, and thereby holding that the property of the plaintiff in error, consisting of the prospective product of 90 oil wells for the year 1893, was not excessively valued for taxation, and that the same was properly placed on the personal property books? In determining this question, it is proper that we should first consider the nature and character of the contract between the lessor and the lessee. One of the main features of the contract embodied in these leases is that the lessee shall put down the wells and bring the oil to the surface; and, when thus produced, the landlord is to have one-eighth as rent or royalty, and the lessee seven-eighths. While the oil remains in the cavities of the rocks in situ, this court has held, in *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, and *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 486, that it is part of the realty. The lessee may drill the well to the sand or rock in which the oil is contained; but the oil does not change its character from realty to personalty, or any portion of its ownership, until it is brought to the surface, and then seven-eighths of it becomes the property of the lessee.

Can we say that the commissioner of the revenue of Tyler county, on the 1st of April, 1893, in assessing the prospective product of the 90 wells as the property of the lessee, John J. Carter, was right? While he was the owner of the wells that had been drilled in the rocks, they were merely the conduit through which the oil might be drawn to the surface, and he had the privilege of pumping it to the surface; but the oil in its place among the rocks was not his, and might possibly never be. See *State v. Oil Co.*, 42 W. Va. 102, 24 S. E. 688. Again, it is part of the history of this oil territory that what might be a productive, playing well this week or this month may not be worth pumping next week or next month. Aside from all

this, said Carter, on the 1st of April, 1893, was the owner of no oil, the product of the year commencing on that day; and he could not be assessed on property that he had not yet acquired, and it would be too speculative to assess him on property that he might thereafter acquire by future exertion. Now, the duty which the assessor attempted to perform in this instance is required by section 54 of chapter 29 of the Code, which provides that "it shall be the duty of the assessor, as soon as possible after the first day of April in each year, to ascertain all personal property subject to taxation in his district with the value thereof and the name of the person to whom the same ought to be assessed, and to make proper entry thereof in his personal property book." If the assessor, in pursuance of this statute, had gone to John J. Carter on the 1st day of April, 1893, and required him to return a list of his personal property under oath, he surely could not have returned one gallon of oil as the prospective product of said 90 wells for the year commencing April 1, 1893, and ending April 1, 1894, for the plain reason that no portion of the oil underlying his leases, while it remained beneath the surface, was his property. Section 40 of chapter 29 of the Code provides that "as to real property the person who by himself or his tenant has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation." See, also, opinion of Holt, J., in *State v. Oil Co.*, 42 W. Va. 102, 24 S. E. 688, and *United States Coal, Iron & Mfg. Co. v. Randolph County Court*, 38 W. Va. 201, 18 S. E. 566 (Syl. point 2). We are not, however, required to pass on the question as to what party should be assessed with the oil in situ in this case, but do hold that it is not assessable as personalty. I therefore hold that the assessor of Tyler county improperly placed upon the personal property books of said county, as the property of said John J. Carter, 90 oil wells, valued for the year commencing April 1, 1893, at \$87,750, and that the county court erroneously held that said property belongs on the personal property books. I am further of opinion that the circuit court erred in affirming the judgment of said county court. The judgment complained of is therefore reversed so far as it holds that said Carter was properly assessed with the item of \$87,750 as the prospective product of said 90 wells as personal property.

STEWART v. NORTHERN ASSUR. CO.
(Supreme Court of Appeals of West Virginia.
Dec. 17, 1898.)

FOREIGN CONTRACTS—INVALIDITY—GARNISHMENT
—PAYMENT BY GARNISHEE—EFFECT.

1. While the judgment of a competent court of any state that has jurisdiction over the person or subject-matter is conclusive upon the merits of the controversy in every state, a court of another state has not the power, without service of process or voluntary appearance, to ren-

der a judgment on a contract that is absolutely void, under the statutes of the state where it is made.

2. If such a void contract is sued on by a foreign attachment in a foreign jurisdiction, the garnishee must make defense to the action, or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, that such creditor may make such defense; otherwise, a judgment rendered by default will not protect the garnishee when sued by his creditor.

Brannon, P., dissenting.

(Syllabus by the Court.)

Error to circuit court, Hancock county; H. C. Hervey, Judge.

Action by Mary A. Stewart against the Northern Assurance Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Erskine & Allison, for plaintiff in error.
Huff & Donehoo, for defendant in error.

McWHORTER, J. Mary A. Stewart, a married woman, was the owner of an hotel and furniture in New Cumberland, Hancock county, which was insured by the Northern Assurance Company of London, England, which had its central or principal office in the United States, at Cincinnati, Ohio. A loss occurred by fire, which was duly adjusted at \$1,700; and, before the money was paid to the assured, Porter & Co., a corporation doing business at New Cumberland, brought an action before Louis Hauser, a justice of the peace, at Cincinnati, Ohio, on a store account against Mary A. Stewart, and sued out an attachment against the property of said Stewart, and cited the said assurance company to answer as garnishee, as the debtor of said Stewart. In obedience to the summons duly served on it, the company appeared and answered, admitting its indebtedness to Stewart, when the justice heard the case, rendered judgment against the defendant, and issued an order against the garnishee requiring it to pay \$251.07, the amount of Porter & Co.'s judgment, which it did on the 16th of June, 1892. On the 27th of July, 1892, Mary A. Stewart brought her action against said assurance company in the circuit court of Hancock county, upon her policy of insurance, to recover the said sum of \$1,700. The defendant appeared, and filed a special plea in writing, setting up the payment made by it under the said proceedings in Cincinnati of \$251.07, and paid into court the residue of the \$1,700, with its interest; to the filing of which special plea plaintiff, by counsel, objected, which objection was by the court overruled, and the plea allowed to be filed, and leave was granted to plaintiff to file a special replication thereto by the 1st of April, 1893. To the special plea of defendant, plaintiff tendered her special replication, in writing, averring that at the time the contract mentioned in said special plea, and upon which the alleged judgment of Porter & Co. was recovered, was made, plaintiff was, and still is, a married woman, under coverture, domi-

ciled and resident in the state of West Virginia, and then and ever since and there living with and not separate from her husband, William Stewart, and the said contract was made in the state of West Virginia, while she was so under coverture, domiciled, resident, and living with her husband as aforesaid, and this she was ready to verify, wherefore she prayed judgment, etc., to the filing of which special replication the defendant objected, which objection the court overruled, and permitted the same to be filed, to which ruling of the court defendant excepted. On the 15th day of May, 1897, the case being called, and neither party requiring a jury, by consent the matters arising on the issue were submitted to the court in lieu of a jury; and the court, having considered the evidence adduced and the arguments of counsel, rendered judgment for the plaintiff for the said sum of \$251.07 and costs of the action. The defendant moved to set aside the finding and judgment, and grant it a new trial, on the ground that the same is contrary to the law and evidence, which motion the court overruled, and the defendant excepted. The bill of exceptions shows that the proceedings before Justice Hauser were regular, and the transcript thereof properly attested, certified, and proved, and it was agreed by the parties that the transcript should not be copied into the record, and that, as proven, it established and proved every allegation of fact contained in defendant's special plea as to the proceedings in said action and the judgment by Justice Hauser against defendant, as garnishee, and the payment by it, in obedience to the order of said justice, on June 16, 1892, of \$251.07. It was also agreed that it was proven that defendant, at the time it was proceeded against as garnishee, had complied with the laws of the state of Ohio with respect to foreign insurance companies doing business in that state, and was subject to be proceeded against in the courts of said state as provided by the laws thereof applicable to foreign insurance companies doing business therein, and which evidence was by the court not copied into the record. It was also agreed that the plaintiff proved by witnesses all the matters of fact alleged in her special replication. The facts and allegations both of the special plea of defendant and plaintiff's special replication thereto were admitted by both parties to be proved at the trial, all of which is set forth in the bill of exceptions. Defendant applied for, and obtained, a writ of error, making the following assignments: First, because the circuit court should have rejected the special replication of the plaintiff to the defendant's special plea, or should have sustained the demurrer to said replication; second, because the court erred in giving effect to said replication, and in treating the facts therein set up as affecting the jurisdiction of Justice Hauser to render the judgment pleaded in

the defendant's special plea; third, the court erred in overruling defendant's motion for a new trial.

Appellant's counsel, in their brief, say: "The fact that Mary A. Stewart was a married woman, residing and contracting in a state where the laws at the time held her personal contract void, would, if it had been pleaded in the Ohio court, have been a complete defense to the action of Porter & Co., because the courts everywhere, in the exercise of their undoubted jurisdiction, give force and effect to the *lex loci contractus*." They further say: "There is no evidence that the garnishee knew that she was a married woman, and the law did not require it to be concerned with any fact not affecting the jurisdiction of the court,"—and cite *Black, Judgm. § 595*, in support of their proposition. Their position is correct to the extent said section goes, but, by their proposition that the law does not require the garnishee to be concerned with any fact not affecting the jurisdiction of the court, they assert that the garnishee owes no duty to its own creditor in the premises, which is untenable. In *Pennoyer v. Neff*, 95 U. S. 714, 727, Justice Field, in delivering the opinion of the court, says: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken when property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." It is presumed that, when property in the possession of an agent is seized on legal process, the fact is known to the agent; and in case of garnishment of funds in the hands of a debtor of the defendant who is a nonresident, and not served with process, it is clearly the duty of such garnishee, if practicable, to notify his creditor of the proceedings, that he may make such defense therein as his rights and interests may require. Appellant's special plea alleges that the process was served on it on May 2, 1892, requiring it to make answer on the 5th day of the same month, which answer it filed on said last-mentioned day, when, "it appearing that the summons has not and cannot be duly served on the defendant in this county, this cause is continued to June 15, 1892, at nine o'clock a. m., for publication of notice," which is the entry made by the justice, as alleged in the special plea; that notice was duly published, and, at the time mentioned, Porter & Co. appeared, and proved their claim, and judgment was rendered against the defendant, who failed to appear, and also an order was issued on the garnishee to pay the said judgment and costs, which order was delivered

to the constable; and that in obedience thereto, on the 16th of June, 1892, the garnishee paid same. In its special plea, defendant wholly failed to allege that it had notified, or attempted in any way to notify, the plaintiff, its creditor, of such proceeding. For want of such allegation, the plea was not sufficient in law, and the objection thereto should have been sustained. In *Morgan v. Neville*, 74 Pa. St. 52 (Syl. point 3), it is held that "a garnishee in foreign attachment, to protect himself, must give notice to his own creditor"; and this is manifestly right. *Pierce v. Railway Co.*, 36 Wis. 283 (Syl. point 1); also 8 Am. & Eng. Enc. Law, 1234, and cases there cited; *Martin v. Railroad Co.*, 50 Hun, 347, 3 N. Y. Supp. 82.

It is admitted by appellant that if plaintiff had appeared and pleaded the statute of her state as it then existed, in the action before Justice Hauser, the claim of Porter & Co. must have been defeated; and yet with the full knowledge of the proceedings against her, and that she had no notice thereof, and could not be served with process, it stood by, and meekly paid out her money, in obedience to the justice's order, without even attempting, so far as the record shows, to notify her of the jeopardy of her property in its hands, all of which "smacks" strongly of collusion. Appellant cites *Virginia Fire & Marine Ins. Co. v. New York Carousal Mfg. Co.* (Va.) 28 S. E. 888, in support of its special plea, the court there holding that "it is a settled rule, founded upon obvious principles of natural justice, that a garnishee cannot be lawfully compelled to pay the same indebtedness twice. Nothing can be more clearly just than that a person who has been compelled by a court of competent jurisdiction to pay a debt should not be compelled to pay it over again. Consequently, where he is in such a situation that, if charged as garnishee, this would be the result, he will not be charged, unless his situation is due to his own fault or neglect." In that case it is shown that the garnishee was guiltless of any fraud or collusion. It took all the necessary steps to prevent a recovery in a suit pending in a North Carolina court for the same debt, pleading the garnishment in the Virginia court, but to no avail. The North Carolina court refused the plea, and rendered judgment, and issued execution, and collected the money. When it pleaded the North Carolina judgment, execution, and payment in answer to the garnishment in the Virginia court, that court rejected the plea, and rendered judgment, which was properly reversed by the supreme court.

Appellee insists that Justice Hauser was without jurisdiction in the case, because of the facts set up in her special replication, and that the judgment rendered by said justice is void, and not entitled to the "full faith and credit" provision contained in section 1, art. 4, Const. U. S. The appellee cites the case of *Bowler v. Huston*, 30 Grat. 206, where it is claimed the

question is thoroughly discussed; but it cannot be said to cover the question raised in the case at bar. That was an action to enforce a personal judgment rendered by a New York court against Bowler, wherein there had been neither service of process nor appearance in person or by attorney. So, there was nothing upon which to found a judgment, and the record was an absolute nullity, and no question was raised of a judgment in rem, or involving a garnishee or substituted service in the case; and yet, under the statutes of New York, the judgment was a valid personal judgment as far as Bowler's interest was concerned in the firm with which he was surety. In *Cooper v. Reynolds*, 10 Wall. 308, in discussing the question of jurisdiction, Justice Miller says: "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. * * * While the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. * * * So, the writ of garnishment or attachment or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court." Under the statutes of the state of Ohio, Justice Hauser had general jurisdiction, within the limitations and restrictions contained in such statutes, in all cases of the nature of this proceeding before him based on legal and valid contracts and transactions.

While a judgment of a competent court of any state that has jurisdiction over the person and subject-matter is conclusive upon the merits of the controversy in every state, I question the power of the court of another state, without service of process or voluntary appearance, to render a judgment on a contract that is absolutely void under the laws of the state where it is made, and upon which contract a judgment rendered by a court of such last-mentioned state is void, even upon process duly served. In *D'Arcy v. Ketchum*, 11 How. 165, it was held that "congress did not intend by the act of 1890 to declare that a judgment rendered in one state against the person of a citizen of another, who had not been served with process or voluntarily made defense, should have such faith and credit in every other state as it had in the courts of the state in which it was rendered." That case was based on the statute of New York which provided that when joint debtors were sued, and one was brought into court on process, if judgment should pass for plaintiff he should have

judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it should not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court.

It could never have been contemplated by the framers of the constitution of the United States to include among judgments entitled to "full faith and credit," under section 1, art. 4, a judgment obtained upon a contract absolutely void under the laws of the state where it was made, and upon substituted process. It may be said, then: Where is the protection afforded the garnishee in such case? On the other hand, what protection has the defendant, the creditor of the garnishee, in such a proceeding? The garnishee has better facilities for protecting his interests than the defendant. He is served with process. He knows of the proceeding. He can readily advise the defendant, his creditor, thereof, and make his defense sure, if any there be; while without such notification the defendant remains in profound ignorance of the proceeding until his property is taken from him, may be on a valid, just claim or demand, possibly by the connivance of the plaintiff and the garnishee, on a void or illegal claim. In *White v. Manufacturing Co.*, 29 W. Va. 385, 1 S. E. 572 (Syl.), it is held that "a judgment rendered by a court of common-law against a married woman, either in her own name or in the name of a company under which she does business, upon a contract made during her coverture, is absolutely void; and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose, and such judgment may be assailed collaterally in proceedings upon a suggestion thereon." I fail to see any error in the judgment, and the same is affirmed.

NOTE BY McWHORTER, J. Since the foregoing opinion was handed down, I find the case of *Railroad Co. v. Nash* (Ala.) 23 South. 825, decided in June, 1898, the syllabus of which is as follows:

"(1) The courts of one state have no jurisdiction to attach and condemn a debt due to and payable to a nonresident where he resides, by service of process on his debtor as garnishee, in the absence of personal service on the creditor within the state of the forum, or his voluntary appearance.

"(2) The payment by the garnishee of a judgment rendered for a debt against a nonresident without personal service within the state of the forum, or voluntary appearance, constitutes no defense to a subsequent suit by the judgment debtor against the garnishee.

"(3) The constitutional provision that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state' does not apply to a judgment against a nonresident debtor, in the absence of personal service upon him within the state of the forum, or a voluntary appearance."

BRANNON, P. (dissenting). This case is important in principle, and, regarding the de-

cision in it as plainly erroneous and contrary to the right of the defendant under the constitution of the United States, I must dissent.

My position is: The justice in Ohio had jurisdiction and authority under the law of Ohio to render the judgment against the garnishee. This is not denied. This judgment had the effect there to protect the defendant against a suit by Mrs. Stewart to make him pay the money again. Having this force in Ohio, it must have the same force in every state, under the United States constitution, providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and the act of congress under it that judgments in a court of one state "shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." We do not go behind the Ohio judgment to see on what contract in favor of the creditor it was rendered, whether good or bad, void or not, because the only question is: Had the court jurisdiction, and did it give judgment protecting the garnishee there? 1 Greenl. Ev. § 548. "It is a question of constitutional obligation, not of state policy, whether our courts will enforce a judgment of another state court of competent jurisdiction, having jurisdiction in the case. When a judgment or decree of the court of another state is sought to be enforced in a court in this state, the court in this state may inquire into the jurisdiction of the court which rendered the judgment or decree; and, if it appears that such court had no jurisdiction, the judgment or decree is void, but, if it had jurisdiction, the judgment or decree is valid and binding in this state." *Stewart v. Stewart*, 27 W. Va. 167. "The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, what is its effect in the state whence it was taken? The effect which it has there is precisely the effect which must be accorded to it in every other state. It must not be given any greater effect than it had in the state wherein it was rendered. If the judgment appear on its face to be harsh and erroneous, it must be received and enforced, irrespective of its harshness. The pleas which might be made to it at home, and those only, can be made to it in any other part of the Union." 2 Freem. Judgm. § 575. The law is that it is not the domicile of the owner of the debt garnished that tests the place of jurisdiction for garnishment, but the question whether the court had control over the garnished debtor within its territory. *Mooney v. Manufacturing Co.*, 34 U. S. App. 582, 18 C. C. A. 421, and 72 Fed. 32; *Douglass v. Insurance Co.*, 138 N. Y. 209, 33 N. E. 938.

Mrs. Stewart could sue the company in Ohio, and therefore it could be garnished there. "Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against

them in the courts of this state to recover the debt in respect to which the garnishment process is served. * * * A foreign corporation doing business within the state may generally be made a garnishee in that state when, by the laws of the state, service of process may be properly made upon it therein; when, according to the jurisdictional rule, the debt is payable within the state, or the corporation has within its control property belonging to the principal defendant." 2 Shinn, *Attachm.* § 493. "When there is seizure of the defendant's property at the commencement of the action, or, in garnishment, what is equivalent to seizure at that time, namely, service of process upon the garnishee, accompanied in both cases by publication or other form of substituted service against a nonresident defendant, it is well settled that such process is due process of law in attachment suits, and that a judgment so rendered will divest the defendant of his title to such property, and will protect the garnishee from the danger of double payment." *Reno, Nonres.* § 241. See *Molyneux v. Seymour*, 76 Am. Dec. 671. 2 Black, *Judgm.* § 852, says: "The judgment of a foreign court of competent jurisdiction, in a proceeding in the nature of a garnishment, is binding and conclusive, and affords a complete protection to the garnishee, and the money paid under it cannot be recovered back by the original owner of the debt in any action in another country." Garnishment is a proceeding in rem, binding everywhere (2 Shinn, *Attachm.* § 496; 76 Am. Dec. 671; 1 Greenl. Ev. § 543); at least so far as the property garnished and its owner are concerned. "The liability of property belonging to nonresidents to be attached and sold under legal process is determined by the law of the state in which the property is actually situated, and from whose courts the process issues, and is not determined by the law of the state in which the owner resides. Hence, in case of conflict between the laws of these two states, the law of the former governs." *Reno, Nonres.* § 148. "Where, however, the garnishee is a resident of the state, the fact that the principal debtor is a nonresident will not affect the validity of the garnishment proceedings, because attachments are permitted against nonresident debtors. And the fact that the principal defendant is served by publication only has no effect upon the jurisdiction of the court, when the property or debt is within the power of the court; that is to say, where the property is within the jurisdiction of the court, or the debt is payable therein." 2 Shinn, *Attachm.* 861. But the opinion by Judge McWhorter says that the contract of a married woman was void in West Virginia when this one was made. That is no matter. The question is the force of the Ohio judgment in Ohio. *Rev. St. Ohio*, §§ 4906, 5319, authorize judgments on married women's contracts. Thus, the judgment is not void there. The position of Judge McWhorter is answered by many authorities. Our own court, in *Black*

v. Smith, 13 W. Va. 780, held: "When a court of law in the state of Maryland, having jurisdiction of the subject and person of the citizen, renders judgment in a cause therein pending, against such citizen for money, the validity of such judgment rendered by such court cannot be questioned in the courts of this state; nor will the courts of this state look into the transaction upon which the Maryland judgment is founded, in order to ascertain if that judgment ought not to have been rendered by the court." Johnson, P., in *Stewart v. Stewart*, 27 W. Va. 173, said: "But it is not on the ground that such suits have been maintained in many states that we would enforce a decree for such cause in our own courts, nor would we sustain it because it agreed with our policy, nor refuse to enforce it here because it is hostile to our policy. The reason why we would enforce a decree rendered by a court of competent jurisdiction in another state is the fact that the constitution of the United States requires us to do so. For the wisest purposes, the states, when they formed and adopted the constitution, provided, in section 1 of article 4: 'Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' If this clause had not been inserted in the constitution, and rigidly enforced by the judiciary in all the states, our relations as states to each other would have been anything but harmonious. Citizens, by passing from one state to another, could escape the effect of their contracts and obligations. It is not a question of state policy whether we will or will not give effect to the judgments of courts of competent jurisdiction of other states. It is a question whether we will in good faith live up to the constitutional obligations which we have assumed." In *Gilchrist v. Land Co.*, 21 W. Va. 115, we decided that, "where a judgment rendered in another state is sought to be enforced in a court in this state, our courts may inquire into the jurisdiction of the court which rendered it, and, if it appear that the court which rendered the judgment had no jurisdiction, the judgment or decree is void, but, if it had jurisdiction, it is valid and binding in this state; that, in deciding what effect a judgment rendered in another state is to have in this, it must be regarded as well settled that it must have the same effect here as it had in the state where it was rendered. It is not an open question whether we will enforce the judgments and decrees of another state rendered by courts of competent jurisdiction having jurisdiction to render such judgment or decree. The general rule is as we have stated it. If there are any exceptions, I have not been able to find them. I do not say there can be none. If the court of common pleas of Columbia county had jurisdiction to pronounce the decree rendered there, and sought to be enforced here, we must give full faith and credit to it, and enforce it here." 2 Black, *Judgm.* § 888, reads: "As to whether the per-

sonal disability of the defendant, at the time the judgment was rendered against him, is a good defense to an action on such judgment in another state, the question depends upon the status of the judgment in the state of its rendition. Its validity must be tested by the laws of that state. If the coverture, infancy, or insanity is regarded, in the state where the judgment is rendered, as making the judgment absolutely void, that invalidity may undoubtedly be shown against it in any other jurisdiction. If, on the other hand, the rendition of a judgment against such a person is regarded, in the state where it is given, as a mere irregularity or error in fact, having no greater effect than to make the judgment voidable on a proper direct proceeding for that purpose, then it will not be a good defense to an action on the judgment in another state. This rule is illustrated by a case ruled in Iowa. * * * The defendant answered that the judgment was void because rendered while he was a minor. * * * The chief justice said: 'If there was error in fact in permitting defendant to appear by attorney when a minor, it was an irregularity, and, as such, no more affected the validity of the judgment than if it had been an error in law. In either case the error, whether of law or fact, does not render a judgment void; but a party may have his remedy in the state where the judgment was rendered, either in the same or an appellate tribunal. The defense cannot prevail here; for, until set aside, the judgment would have full force and effect in Ohio, and is entitled to the same here. The error does not go to the jurisdiction of the court.' " And the theory that the debt of the married woman is void will not sustain this decision. It is void, it is true, in West Virginia, in a court of law, and only there; for it is a valid debt in equity, binding her separate estate. The money garnished for it was separate estate, and bound for this debt, under our own law. A court of equity would, in this state, make it liable therefor. A justice in Ohio exercises law and equity jurisdiction, and his judgment binds that estate for this debt as a decree in equity would here. Do not think that I assert that the personal judgment against Mrs. Stewart in Ohio binds her. I mean that it binds her as to the debt, so as to protect the garnishee from second payment. I do not mean that it would further bind her.

I would much prefer that the court should give, as the reason for its decision, the reason given in *Pierce v. Railway Co.*, 36 Wis. 288, and *Morgan v. Neville*, 74 Pa. St. 52,—that garnishee, to be protected, must notify his creditor,—than to place the decision on the untenable ground it does; though, with *Thomp. Homest. & Ex.* § 864, I do not think notice necessary, as I have not found it suggested in other cases. Publication, as dictated by the law of Ohio, is legal warning. Nor did the company have to plead that by the law of West Virginia the contract was void.

No evidence shows that it knew she was a married woman. In its widespread business, why require it to inquire? If the state seize the debt in its hands, shall it go further? Shall not Mrs. Stewart bow to the majesty of the republic, which makes that seizure valid? Shall she assume to question the power of the republic, though she suffer from it, if she could suffer in paying a just debt for groceries, making her life and the lives of those dear to her to subsist? *Id.* §§ 864, 866, shows this to be an unreasonable requirement. Nebraska and Wisconsin require that a garnishee shall plead that the debtor has a right to the garnished debt as an exemption, but other authorities deny it. *Moore v. Railroad Co.*, 43 Iowa, 385; *Jones v. Tracy*, 75 Pa. St. 417; *Conley v. Chilcote*, 25 Ohio St. 320; *Railway Co. v. May*, *Id.* 347. I hold that this state, through this court, should give to the defendant the protection which the constitution of the republic designed to give to all citizens alike. No mere sympathy should defeat this high behest of the highest municipal law.

NOTE BY DENT, J. The assurance company doing business in the state of West Virginia must be presumed to know the laws thereof, and, having insured the separate property of Mary A. Stewart, a married woman, must be presumed, after the custom of insurance companies, to know that she was a married woman, and what were all her rights and liabilities with regard to said property under the laws of said state, and therefore must be presumed to have known that her separate property was not subject to her husband's control, nor liable for the payment of his debts; and, being under his coverture, she was entitled to be supported by him, and that any simple contract debt made in relation to such support was void as to her, and binding on her husband alone, and could not in any wise affect her separate property, as the laws of West Virginia then stood. *Porter & Co.*, being residents of the state of West Virginia, must also be presumed to be fully cognizant of these matters, and that their alleged claim was no debt against Mrs. Stewart, but binding on her husband alone. Knowing this, they seek a remote foreign tribunal, and upon a false and fraudulent affidavit, for they knew they had no debt which was enforceable against the separate estate of Mrs. Stewart; they invoke its aid to secretly seize and wrongfully appropriate her property, without her knowledge. She is given no notice of these proceedings, as such would be fatal to them, but publication is made in a local paper, which she has no chance of seeing; and thus her separate property is fraudulently seized and appropriated without her knowledge, and her debtor, the garnishee, presumably with full knowledge of her rights and the fraudulent purpose of the plaintiffs, *Porter & Co.*, and with its agencies in the state of West Virginia, makes no effort to defend the action, as it had the right to do, or to notify her thereof, that she might interpose her defense. Why did the garnishee thus remain silent? There can be but one answer, and that is that it was colluding with *Porter & Co.* to unlawfully apply Mrs. Stewart's separate estate on a debt for which it was not liable, and thus perpetrate a fraud upon her without her knowledge. The justice was not to blame in the matter, for he was imposed upon by the fraudulent conduct of the plaintiff, aided and abetted by the silence of the garnishee. The "constitution and majesty of the great republic" was never intended to be a cover for such fraudulent practices, and permit persons,

by collusion, to wrongfully appropriate the property of another by deceit and stealth. This judgment against the garnishee, under the circumstances, should be regarded as though procured by itself. *Smith v. Dickson*, 58 Iowa, 444, 10 N. W. 850. The suppression of the truth oftentimes operates to perpetrate a fraud as completely as the utterance of a falsehood, and no one should be permitted to take advantage of a wrong in which he participates. The garnishee had the plaintiff's separate property, and it was in duty bound to defend it from the wrongful appropriation of others to debts to which it was exempt, or notify her of such wrongful attempt. Having failed to do either, it is no more than right that it should bear a loss incurred, to say the least, by its own indifference. Of two innocent parties, the one whose negligence occasioned the loss should bear the burden thereof. I concur in Judge McWHORTER'S opinion, for the foregoing reasons.

ROE v. TOWN OF PHILIPPI.

(Supreme Court of Appeals of West Virginia.
Jan. 20, 1899.)

MUNICIPAL CORPORATIONS — IMPROVEMENTS — INDEBTEDNESS — MANDAMUS — EVIDENCE — RECORDS — OBJECTIONS.

1. When an incorporated town has contracted for work to be done upon its streets, which work is done as provided in the contract, accepted by the town, and orders issued upon its treasury for the amount agreed to be paid therefor, such orders being presented and payment refused, and the holder of the orders sues out an alternative writ of mandamus, and defendant files his return and answer, offering no defense, except that, for the same year in which the contract was made and the work done, it had already, prior to the making of the contract, created a greater amount of indebtedness than the amount of the levy it was authorized to make upon the taxable property and persons and all other sources of revenue of the town to pay it, for such answer to be sufficient to defeat recovery it must show clearly that it had created such indebtedness to the full extent of its authority to levy before it made the contract with plaintiff, or, if its said prior indebtedness had not reached the full limit allowed by law, it should have shown that it had actually paid, on account of such contract for which said orders were issued, the amount the plaintiff could be entitled to receive out of such levy.

2. The certificate of a recorder of an incorporated town, stating facts which appear upon the records of the common council of said town, and not certifying copies from such records, is not admissible as evidence.

3. The question of the admissibility of such certificate as evidence when filed as an exhibit with the return and answer to an alternative writ of mandamus is properly raised upon motion of plaintiff for his peremptory writ, notwithstanding the answer.

(Syllabus by the Court.)

Error to circuit court, Barbour county; J. H. Holt, Judge.

Petition by Joseph A. Roe, suing for the use of the Merchants' & Mechanics' Bank of Grafton, against the town of Philippi, for mandamus. From a judgment dismissing the petition, petitioner brings error. Reversed.

J. Hop Woods, for plaintiff in error. W. T. Ice, for defendant in error.

McWHORTER, J. On September 13, 1892, the town of Philippi, by its mayor and com-

mon council, contracted with Joseph A. Roe to macadamize a certain portion of Main street, in said town, according to the specifications prepared therefor by said mayor and council, at the price of \$1.89 per perch of 25 feet, which was to be done in sections, and when each section should be completed for travel, and when so completed and approved and taken up by the superintendent to be designated by the town, the section so completed was to be paid for, less 20 per cent. thereof, which should be retained until the last section should be completed and accepted, when all should be paid in full. The work proceeded, and orders were drawn upon the treasurer of the town in favor of Roe from time to time, until the whole was completed, in December following, when it was accepted by the mayor and council, and drafts or orders made for the balance due said Roe, including two orders for \$275 each, upon the treasurer of said town, which orders were dated December 30, 1892, and payable to J. A. Roe or order, out of the levy of 1892, signed by the mayor, and countersigned by the recorder of said town, by order of the council, which orders, on the same day of their date, were presented to the treasurer for payment, and by him indorsed "No funds." Roe afterwards, for valuable consideration, indorsed and assigned said orders to Merchants' & Mechanics' Savings Bank. The same still remaining unpaid, the said bank, on the 2d of September, 1896, before the levy for that year was made, presented the orders to the town's treasurer, George E. Grant, and requested payment, or that provision be made for payment out of funds unappropriated, or out of the levy for the current year, etc. Payment was refused, and there was also a refusal to make provisions for such payment. On the 20th day of September, 1896, Joseph A. Roe, suing for the use of the Merchants' & Mechanics' Bank of Grafton, filed his petition in the circuit court of Barbour county, praying for a mandamus, requiring the said town of Philippi, which is an incorporated town, in the state of West Virginia, to levy a tax upon the taxable property in said town, and appropriate the same sufficient to pay off and discharge the said two drafts of \$275 each, with interest from said 30th day of December, 1892, and the costs of the proceedings, or show cause, if any it could, why it should not be required to do so. An alternative writ of mandamus was issued returnable to October term of said court, 1896, and duly served. Defendant appeared, and moved to quash the writ, which motion, being considered by the court on February 18, 1896, was overruled, and the defendant given 60 days in which to file its return thereto. On the 25th day of May, 1896, defendant, the town of Philippi, tendered and offered to file its answer and return to the writ, to which return plaintiff objected, and moved the court to reject the same, because it was not filed within the 60

days allowed, which motion was overruled, and the return ordered filed, and the plaintiff was given leave to further except, demur, or plead thereto, or to move for the peremptory mandamus, as he might deem proper. On the 18th of November, 1897, plaintiff replied generally to the answer and return, and moved the court to award the peremptory writ of mandamus prayed for, notwithstanding the answer; and the matters of law and fact arising upon the record were, by consent of the parties, submitted to the court. Upon consideration thereof, the court found for the defendant, and overruled the motion for the peremptory writ, and dismissed the petition, and gave judgment for costs against the plaintiff, from which judgment plaintiff obtained from this court a writ of error and supersedeas, assigning as errors the dismissing of the writ, and refusing to award the peremptory writ of mandamus.

The answer admits the town of Philippi to be an incorporated town, created by special act of the general assembly of Virginia in the year 1844, which act was amended by the legislature of West Virginia in 1871; that, by virtue of its said incorporation and the general law of West Virginia for the incorporation of cities, towns, and villages, it has power to improve its streets, to provide a revenue and appropriate the same, to make an annual assessment of taxable persons and property therein, to appoint a sergeant, a commissioner of revenue, and a treasurer, and to define their powers and prescribe their duties, to adopt rules for its own government and the transaction of its business, to give an additional license, and require a tax on the same, for anything for which a state license is required to be done within said town, to adopt and enforce all needful ordinances not contrary to the constitution and the laws of the state, and to impose and enforce fines and penalties, to order an annual levy of \$2 per head upon all male persons within said town over the age of 21 years, and \$1 on every \$100 of value of real and personal property therein assessed with state taxes, and to collect the same; that, in pursuance of such power so vested in defendant, it entered into the said contract for the macadamizing of Main street in said town with stone, as set out both in the petition and answer; admits the performance of the work; that it was completed December 24, 1892; that during its prosecution the defendant issued orders to plaintiff in part payment thereof, payable out of the levy of 1892; and that on the 30th of December, 1892, it issued the two orders or drafts, of \$275 each, numbered, respectively, 212 and 214, which constituted part of the aggregate sum of \$2,135.04 agreed to be paid for said work; but denies the allegation in the petition and writ that on the 18th of September, 1892, it had only issued drafts and made contracts of indebtedness to the

extent of \$606.60, and was only indebted in the sum of \$166.92 on account of deficit of preceding year; but, on the contrary, alleging that, previous to the 13th of September in said year, it had contracted work to be done on the streets, alleys, and sidewalks of said town to the aggregate amount of \$3,031.72, and filed a certificate made by the recorder of said town, marked "Exhibit Z," with said return, which is simply a list of orders issued by said town, under the following caption: "I, L. D. Robinson, recorder of the town of Philippi, do certify that the contracts for which the following drafts were issued were made prior to the 13th day of September, 1892, as appears from the records of said town: No. 76, John Hulderman, work on street, \$4.80,"—the beginning of the list, and followed by 138 other orders, running consecutively from said No. 76 up to 187, thence, with several breaks in the numbers, up to 263, many numbers being left out. The amounts of said several orders are mostly small, ranging from 30 cents up, only four being over \$100, and aggregating the sum of \$2,864.80. Said Exhibit Z closes with, "I further certify that the amount of indebtedness for 1891, which the council of 1892 was to provide for, was \$166.92," which, added to the aggregate of said orders, makes the sum of \$3,031.72 claimed in the answer to be the indebtedness of said year 1892, created by contract prior to the 13th day of September, 1892, the date of contract with plaintiff. Said certificate (Exhibit Z) is dated and signed by the recorder on the 10th day of March, 1896. There is nothing in this certificate except the inference to be drawn from the last clause, certifying the amount of the deficit from the year 1891, when any contract was made, out of which the orders grew contained in the list Z. There is not a date to a single one of the orders showing when it was issued or authorized. The recorder certifies "that the contracts for which the following drafts were issued were made prior to the 13th day of December, 1892, as appears from the records of said town." He fails, however, to show how long prior thereto the contracts were made or the drafts issued,—whether within the year 1892 or some previous year.

It is insisted by appellant that this certificate of the recorder (Exhibit Z) is not competent evidence; while appellee contends that, no objection having been raised to its competency in the court below, it is too late to raise it in this court for the first time. Under the rule in *Wells v. Town of Mason*, 23 W. Va. 456, the question was properly raised on plaintiff's motion for the peremptory writ of mandamus, notwithstanding the answer. As to the sufficiency of the answer, chapter 130 of the Code provides that certificates of certain officers mentioned, of facts shown by the records in their keeping, or of what such records fail to show concerning assessment of lands, etc., may be used as evidence when filed in the

suit in which it is proposed to be used as evidence, and notice thereof given to the opposite party or his attorney, as provided by said statute. And, while properly authenticated copies from the records of an incorporated town could be used as evidence, I am not aware of any authority for admitting as evidence a certificate of the recorder of such town certifying the facts that may appear on such records; and the answer cannot be supported by said Exhibit Z. The only defense set up in the answer is that the defendant had already, prior to the contract with plaintiff, created indebtedness within the corporation year of 1892 to a greater amount than it was authorized to levy for in that year. It is admitted that the contract was made; that it was within the scope of defendant's powers and its corporate duties to provide proper streets, etc.; that the work was completed according to contract; and that defendant enjoyed the benefits arising from such improvements. Did the answer show that, at the time the contract was made, the defendant had already gone beyond the limit allowed by law?

It appears from the record that the resources of the town from "all sources" for the year 1892 amounted, in the aggregate, to the sum of \$2,953.78, which was the amount it could properly levy, collect, and appropriate for that year. It is admitted there was a deficit from 1891, which had to be provided for, of \$166.92; and, according to plaintiff's showing, orders had been drawn on the funds prior to his contract, aggregating \$616.60. The record shows that on May 21, 1892, the town contracted with G. W. Gall, Jr., for 2,100 feet of curbing, at 15 cents per foot, to be delivered on or before the 1st day of July, 1892, and at the same time authorized the purchase of 10 gallons and a barrel of gasoline oil. On the 6th of July, it accepted the bid of S. T. H. Holt to furnish and lay 9,000 hard-burnt brick, for sidewalks, at 36½ cents per foot for 6-foot walk, and 32 cents per foot for 5-foot walk. The record also shows that there was afterwards allowed to said Gall, for curbing, \$290.02, and to said Holt, for laying brick pavement, \$401.41, making the aggregate sum of \$1,474.95, which is shown to be proper to be provided for in the levy of 1892 at the time the contract was made with plaintiff to do the work he contracted to do. There are other items allowed in the meantime, "For work on streets," etc., but nothing to show when it was contracted for, and whether it would be right to pay it, to the exclusion of the money owing to plaintiff. This would leave a balance of \$1,478.83 of the levy of the year 1892, which could or should be applied to the indebtedness of the town to Roe on his contract. The exhibits properly authenticated from the records of defendant, and filed with the return to the writ, show orders allowed to plaintiff on account of his contract in all to amount to \$1,850.83; but the return fails to show that

any of these orders were ever actually paid to plaintiff, or to any one for him. The orders sued upon were assigned, and the suit is brought for the benefit of the assignee; and, after notice of assignment, they should be the first paid of all that should remain unpaid at the time of such notice of assignment. To make a sufficient return to defeat recovery, defendant should have shown clearly that it had created indebtedness to the full extent of its authority to levy before it made the contract with plaintiff, or, if its said prior indebtedness had not reached the full limit allowed by law, it should have shown that it had actually paid, on account of such contract for which said orders were issued, the amount that plaintiff could be entitled to receive out of the levy. The judgment will be reversed and annulled, and the case remanded, with directions to the circuit court to award the peremptory writ of mandamus as prayed for.

STYLES v. LAUREL FORK OIL & COAL CO. et al.

(Supreme Court of Appeals of West Virginia.
Nov. 26, 1898.)

CORPORATIONS—SUIT TO WIND UP—APPEAL—PRESUMPTIONS—SERVICE OF PROCESS—ORDER OF PUBLICATION.

1. In a suit to wind up the affairs of a defunct corporation, the stockholders are necessary parties.

2. Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that "process was duly served" or "order of publication was duly executed as to the defendants," it will be presumed that it was so served or executed.

3. But when the record shows the process or order of publication, and shows clearly that process was not served or order of publication executed as to any particular defendant, such declaration in the decree will not raise such presumption as to such defendant.

4. An order of publication as follows: "West Virginia, to wit: At Rules Held in the Clerk's Office of the Circuit Court of Wood County on the First Monday in January, 1897. Robert G. Styles, Administrator of the Estate of W. C. Styles, Jr., Deceased, Complainant, vs. Laurel Fork Oil and Coal Company, a Corporation, and Others, Defendants. In Chancery. The object of this suit is to recover from the defendant the Laurel Fork Oil & Coal Co., a corporation, \$26,646.10, interest and costs, to dissolve and wind up the affairs of said corporation, and distribute the proceeds of sale of property of said corporation, to attach and subject to sale the tract of — acres of land owned by said corporation, to have a receiver appointed for the assets of said corporation, and for general relief; and it appearing by affidavit filed that L. C. Gratz, H. S. Gratz, Ella Fell, Mrs. H. A. Styles, John Scott, and S. G. Rosengardner are not residents of this state, on motion of the complainant, by counsel, it is ordered that said absent defendants do appear within one month after the first publication of this order, and do what is necessary to protect their interests in this suit, and that a copy of this order be forthwith published and posted according to law. (A copy. Teste.) O. M. Clemens, Clerk."—is not an order of publication against the defendant corporation, under the statute.

(Syllabus by the Court.)

Appeal from circuit court, Wood county; L. N. Tarenner, Judge.

Bill by Robert G. Styles, administrator of W. C. Styles, against the Laurel Fork Oil & Coal Company and others. Decree for plaintiff, and defendants appeal. Reversed.

Merrick & Smith, for appellants. V. B. Archer, for appellee.

McWHORTER, J. Robert G. Styles, administrator of the estate of W. C. Styles, deceased, who was a stockholder and creditor of the corporation sued, at the January rules, 1897, filed his bill in equity, at the clerk's office of Wood county circuit court, against the Laurel Fork Oil & Coal Company, a corporation, L. C. Gratz, H. S. Gratz, Ella G. Fell, Mrs. H. A. Styles, executrix of the last will and testament of H. A. Styles, deceased, James Scott, S. G. Rosengardner, and others, whose names were unknown, and who were stockholders in said corporation, for the purpose of winding up the affairs of the defendant corporation, upon the ground that the charter of said corporation had expired, and for the recovery of a money demand against same. A summons in chancery was issued against said defendants, but not served on any of them, and was returned by the sheriff that "the within-named Laurel Fork Coal Company not found, and no president or other chief officer or other person found in Wood county, on whom service may be made." On the 6th day of January, 1897, plaintiff made and filed an affidavit setting up a claim for \$26,646.10, against the said defendant corporation, and stating that said defendant's charter expired May 8, 1889, and that it had not appointed any one its attorney in fact on whom process could be served, and there was no person in West Virginia on whom process could be served as to said corporation, and that the other defendants to said suit were nonresidents of West Virginia, and sued out an order of attachment, which he caused to be levied on 774 acres of land, the property of said corporation. Plaintiff also filed an affidavit, under the statute, to the fact that said defendant corporation was a corporation, and that no person could be found in Wood county upon whom process could be legally served in said cause, and, further, that L. C. Gratz, H. S. Gratz, Ella G. Fell, Mrs. H. A. Styles, James Scott, and S. G. Rosengardner were nonresidents of this state, and sued out at January rules, 1897, an order of publication against the said nonresident defendants. On the 12th day of January, 1897, on motion of the plaintiff, the court appointed Samuel B. Styles special receiver of the property of said defendant corporation, consisting of lands in Wood and Ritchie counties, and also of two producing oil wells therein. On the 19th day of February, the defendants Lewis C. Gratz, Henry S. Gratz, Ella G. Fell, and James P. Scott—all the defendants except S. G. Rosengardner and Mrs. H. A. Styles, executrix, against whom the order of

publication was made—appeared and filed their general demurrer to the bill, which, having been considered, was overruled by the court, and said defendants were required to answer within 30 days from that date; and on the 8th day of May, 1897, said defendants, by leave of the court, filed their answer, not waiving any exceptions to the bill on account of any errors therein. On the 28th of August, 1897, plaintiff filed in open court his answer and special replication to said answer; and, on the 4th day of the following month, the cause was heard as set out in the decree, "upon the order of publication duly executed as to the defendants, upon the bill and exhibits therewith filed, and cause regularly set for hearing at the rules, upon the answer and cross bill of Lewis C. Gratz, Henry S. Gratz, Ella G. Fell, and James P. Scott, filed May 8, 1897, and upon the special replication and answer of the plaintiff to said answer, upon depositions and arguments of counsel," when, on motion of plaintiff, the cause was referred to a commissioner of the court, with directions to take, state, and report to the court: First, a settlement of the accounts between the plaintiff and the Laurel Fork Oil & Coal Company; second, what liens attached to the real estate owned by the corporation, and the nature, amount, and priority thereof; third, the debts, if any, by simple contract of said corporation; and, fourth, the names of the stockholders of said corporation, with the amount of stock held by each, and any other matter deemed pertinent by himself or required by any party in interest,—under which decree, W. W. Jackson, commissioner, made and filed his report, to which the responding defendants filed four exceptions. And on the 5th day of January, 1898, the cause was heard, the exceptions to the commissioner's report were overruled, a decree entered in favor of plaintiffs against the defendant corporation for \$5,230.18, with interest from date of decree, and providing for the sale of defendant's lands to pay the same, unless the same should be paid within 30 days from that date, and a commissioner appointed to make sale of said land; from which decree the defendants Lewis C. Gratz, Henry S. Gratz, Ella G. Fell, James P. Scott, and Mrs. H. A. Styles, executrix of the last will and testament of Henry A. Styles, deceased, appealed to this court.

Was the demurrer properly overruled? The bill in this cause is filed by a stockholder and creditor for the purpose of not only enforcing the collection of his claim, but for the further purpose, as alleged in the bill, and as prayed for, of winding up the affairs of the corporation by decree in the suit. The bill names the known stockholders, "and others, whose names are unknown, who are stockholders in the Laurel Fork Oil & Coal Co.," as defendants. In a suit to wind up the affairs of a corporation, the stockholders are proper and necessary parties to the suit, being interested, and entitled

to the assets after the payment of the debts of the corporation, and the stockholders should be parties in order to a proper distribution of the assets; and, the only ground of demurrer urged in this case being for want of such parties, the demurrer was properly overruled, because the stockholders were made parties by the bill naming them in the caption, and the summons was issued against them.

Was the case properly matured when the court heard the cause, and referred it to the commissioner for account? Was the defendant corporation then or since before the court, by any process known to the law? A sufficient affidavit was made upon which to award an order of publication against all the defendants named in the bill, except the parties designated as "unknown stockholders." The order of publication was taken, however, only against the defendants L. C. Gratz, H. S. Gratz, Ella Fell, Mrs. H. A. Styles, James Scott, and S. G. Rosengardner, as nonresidents of the state, who, on motion of plaintiff by counsel, were ordered to appear within one month after the first publication of the order, and do what was necessary to protect their interests in the suit. No order of publication was awarded or published either against the defendant corporation or the "unknown parties." No process was served on the corporation, and it entered no appearance.

Appellee insists that "counsel cannot be heard to say that this cause was not matured for hearing as to all the defendants, as the decree made in the case on September 4, 1897, adjudicates this matter as follows: 'This cause came on this day to be heard upon the order of publication duly executed, as to the defendants,'" and that "want of publication or service as to any party cannot now be questioned,"—and cites *Shafer v. O'Brien*, 31 W. Va. 601, 606, 8 S. E. 298, as "directly in point here." Let us see. In that case the court says: "It does not appear whether the company was served or not, except from the decree, which declares that process was duly served." The record failing to show whether there was service or not, and the decree declaring that "process was duly served," it was presumed that the proper service was had; but in the case at bar the record shows the order of publication, and shows that it was duly published and posted as to the defendants against whom it was taken, but it shows also upon its face that the defendant corporation was not included among the defendants who were ordered to appear. In the absence from the record of the process, in view of the declaration in the decree that "process was duly served," or that "order of publication was duly executed," the presumption would be that it was so; but when the process or order of publication, with the evidence of its service or execution, is shown in the record, and from which it clearly ap-

pears that the order was not taken or published as to the defendant corporation, the decree raises no such presumption. The statute (chapter 124 of the Code) provides how nonresident defendants or unknown parties or corporation defendants, when no person can be found in the county upon whom process can be legally served, shall be brought before the court by order of publication; and, in order to have such party proceeded against properly before the court, the statute must be, at least, substantially complied with. Neither the defendant corporation nor all the stockholders thereof were before the court; and, as held in *McCoy's Ex'r v. McCoy*, 9 W. Va. 443, "no decree should be rendered affecting the interest of an absent defendant, unless it appear—if he be not otherwise brought before the court—that he has been regularly proceeded against by order of publication"; and it is there further held that "the objection for want of due publication against the absent defendant may be taken by other defendants who may be affected by the decree against him, and, if made in the appellate court, will prove fatal, though the absent defendant was not a party to the appeal. The cause not having been ready for hearing in the court below, in the absence of parties who had a right to be heard upon all questions affecting their interests [especially the corporation defendant, upon which no process was served, and for which no appearance was entered, and against which no order of publication was awarded or published or posted], it is in no condition for the appellate court to adjudicate any of the principles of the cause."

The decree of January 5, 1898, is reversed, and the cause remanded to the circuit court of Wood county, that proper process may be taken to bring the parties before the court, and the cause heard and decided according to the rights of the parties.

ATKINSON v. PLUMB et al.

(Supreme Court of Appeals of West Virginia.
Dec. 14, 1898.)

EQUITY—FALSE EVIDENCE.

The evidence of parties who attempt to impose on a court of equity by false statements, manufactured accounts, or like deceptive practices, should be rejected on the hearing of the cause.

(Syllabus by the Court.)

Appeal from circuit court, Wood county;
A. I. Boreman, Judge.

Bill by W. F. Atkinson against D. S. Plumb and others. Decree for defendants, and plaintiff appeals. Reversed.

James A. Hutchinson and W. E. McDougle, for appellant. R. B. Graham and Casto & Fleming, for appellees.

DENT, J. The history of this case is as follows: Some time in the 70's, D. S. Plumb,

a mechanic,—a house painter and paper hanger,—with little capital, but lots of pluck, as it afterwards turned out, began business as a green grocer in a little old frame building down on Ann street, in the city of Parkersburg; his wife, Mary Jane Plumb, at about the same time running a restaurant, both working together for mutual benefit,—not an uncommon occurrence for husband and wife; not a thing to arouse unwarranted suspicion or to create alarm. Being good Baptists, they made the acquaintance of the plaintiff, W. F. Atkinson, who was also a good Baptist, and regular attendant at church. Brother Atkinson was a notary public, a real-estate agent, and money lender, and at one time was engaged with witness Piersol in running a tow show boat along the Mississippi river and its tributaries,—Piersol running the boat, and Atkinson furnishing the means. This latter is cautiously revealed on cross-examination, and is a matter that should have its due weight in this controversy. Church acquaintance ripened into very warm friendship between the parties, and through the advice of Brother Atkinson Brother Plumb purchased a small stock of goods and groceries of one Stagg, who wanted to retire from business, situated on the corner of Market and Third streets. Brother Atkinson moved his safe and desk into Brother Plumb's store, and the latter went into business on a much larger scale. To procure money, or meet bills, notes were given to the bank, which, as Brother Plumb states, Brother Atkinson indorsed readily without the asking. The building in which the store was situated belonged to one Mum Jackson, but this probably had little effect on the transactions between the parties. Business was moving along prosperously, at least seemingly, when Brother Atkinson suggested to Brother and Sister Plumb that they should buy a home, and put it in the wife's name. A suitable property, with the aid of Brother Atkinson, was found, and purchased for \$1,130, on credit, and to pay the purchase money, after some intermediate transactions, finally a loan was negotiated with the Traders' Building Association, and a deed of trust executed on the property to secure the same, originally \$1,200, now about equaling the market value of the property, at least exclusive of the improvements afterwards put upon it. This is the property now in controversy. At length Brother Plumb's notes and bills began to mature rapidly, and he sometimes imbibed too freely, and became prostrated. Brother Atkinson continued to sign notes for discount, until, becoming a little weak in the knees, and Sister Plumb being in poor health, he induced her to make a will giving her property to Brother Plumb, that in case of her death he could be secured as indorser of notes. Creditors becoming importunate and threatening suit, Brother Atkinson's faith gave way entirely, and, becoming aroused and alarmed, he figured up

Brother Plumb's liabilities, and found them much larger than had entered into his dreams. He at once insisted on Brother Plumb confessing judgment to him for \$1,516.18 as of July 8, 1891, and \$14.10. There being already a judgment in favor of Shattuck & Jackson, this latter straw broke the camel's back, and the store was taken possession of and closed by a constable. A sale followed, and, although the services of the best auctioneer that could be found were procured, a stock of goods valued by Brother Plumb at \$2,100 was sold out at about \$500. Hats that he had paid \$12 a dozen for were sold for 25 cents apiece, and fur caps, costing \$15 to \$18 per dozen, at 37 cents apiece. In Brother Plumb's own language: "They were literally thrown away. They piled them up in heaps, and asked a man what he would give for them." So, after the expenses of sale and prior execution were satisfied, nothing remained for Brother Atkinson, although his claim for rent, for which he was liable, and the judgment, amounted to about \$2,000. Brother Atkinson asked Brother Plumb to get his wife to give him a deed of trust on her property to secure him, as she had always promised that he should not lose anything. Brother Plumb suggested the matter to Sister Plumb, and she was thunderstruck, and did not know what to make of it. After she recovered sufficiently, she said she would not give a deed of trust on her property if it was to her own father. Brother Atkinson, thus brought roundly to a standstill, was also thunderstruck, and rushed off to consult James Hutchinson, Esq., a learned attorney at law, since deceased, who, having listened to the tale of woe poured into his listening ears, advised an appeal to the courts, where justice is unerringly administered. A bill was filed, and the Plumbs summoned, and brotherly kindness no longer existed between the parties. The defendants employed another, as prominent and equally learned, attorney at law, to aid them in frustrating the unconscionable schemes of Atkinson to deprive Mrs. Plumb of the little home she had so long been in securing. Thus ensued the battle of legal giants. Day after day it was waged with ceaseless vigor and tireless energy. Witness after witness was placed on the witness stand, and examined, cross-examined, re-examined, and recross-examined, etc., amid the objections and cross objections, criminations and recriminations, and masterly debates of the learned counsel, duly interpolated in the depositions, and reported by the patient stenographer, until a large volume, consisting of 480 pages, at a cost for transcript of \$162, and printing, \$365.32,—about the size of Watterson's History of the Spanish War,—is produced of the story, complete in one volume, of the Plumb family in relation to its dealings with W. F. Atkinson, for the consideration, information, and assistance of the court in determining which of the parties is the true aggressor against the

other, that equal justice may be meted out without fear, favor, or affection. Mrs. Plumb, in her deposition, is made to detail her history, beginning way back in the 50's, when she was an unwedded maiden, in the sweet teens, teaching her first school in the state of New York, earning \$40 per month for four months in the year. At this time she first met Plumb, who was in the blush of early manhood, engaged in business as clerk in a grocery store. They were mutually attracted towards each other,—a thing not of rare occurrence. An attachment followed, which, in 1857, was consummated by marriage. She then immediately began to keep an account against him, and loan him money, to be some time afterwards repaid to her in a home. She kept this up all throughout her married life, and throughout their various changes of location and fortune. The money so loaned was her early school money, and various sums she had received from her father and sister, and earnings on her farm. Although her source of income was inconsiderable, according to Plumb's statement, her pocketbook, like the widow's cruse of oil, was never empty. She always had money ready to loan to him, and he was always a willing borrower. Some time after marriage they moved to Indianapolis, then to Chicago, and just before the great fire they moved to Wood county, and resided with her brother, John S. Meade. In 1874 she bought a farm for \$1,000, paid the first payment on it, and in about five years surrendered it for the unpaid purchase money. She continued to rent it until they moved to Parkersburg, when her husband says she had saved over \$1,000 clear out of corn, wheat, butter, eggs, chickens, and cattle, which she loaned to him at various times. She could have paid for the farm, but concluded to give it up, and move to Parkersburg, where she had succeeded in starting him in business. She exhibited a little book containing this account, with which she continually refreshed her memory, and which she says she began to keep way back in 1857. When, however, she was cross-examined about this book rather severely by Mr. Hutchinson, she became quite sick, and her statements became rather wild and wandering. Her counsel insisted that she was too ill to go on with the examination, and that he had a certificate of a physician to that effect that he had not intended to show, and of which opposing counsel was aware. After some further altercation between counsel, the taking of her evidence was adjourned until another day. The witness was finally compelled to admit that the first statements about the book and the account contained therein were untrue, caused by her failure of memory, loss of sight, and ill health. It clearly appears that this account in this book was fixed up by the defendants after the institution of this suit. A part of the early account is as follows, beginning a few days after marriage:

Olean, N. York, Oct. 8, 1857.

M. J. Plumb, in Acct. with D. S. Plumb.

D. S. Plumb, Dr.

1857.				
Oct. 8.	To cash	\$	75	00
" 18.	"		22	00
Nov. 1.	"		50	00
Dec. 12.	"		5	00
" 20.	"		10	00
" 27.	"		10	00
1858.				
Jan. 12.	"		19	00
1859.				
Aug. 18.	"		95	00
Jan. 2.	"		150	00
1863.				
Aug. 6.	"		125	00
1864.				
Feb. 4.	"		44	00
June 10.	"		35	00
1865.				
July 13.	"		100	00
1866.				
Apr. ".	"		2	00
Apr. 5.	"		5	00
Oct. 29.	"		100	00
1867.				
Mar. 9.	"		28	40
June 3.	"		75	00
1868.				
Jan. 6.	"		35	00
Apr. 8.	"		25	00
			<u>\$1,010</u>	<u>40</u>

D. S. Plumb, Cr.

1857.				
Dec. 14.	By cash	\$	9	00
1859.				
Sept. 9.	"		55	00
1863.				
Aug. ".	"		100	00
1864.				
Sept. 5.	"		22	50
1865.				
Sept. 6.	"		35	00
1867.				
Aug. 16.	"		37	00
1866.				
Dec. 10.	"		85	00
1868.				
June 13.	"		20	00
			<u>\$363</u>	<u>50</u>

—Etc.

The sources from which she received most of her money are detailed as follows:

Received for teaching school.....	\$120	00
1856	120	00
1856.		
Jan. From Brother Dorm.....	75	00
1859.		
Sept. From father.....	100	00
Oct. " ".....	20	00
1860.		
Apr. " ".....	20	00
1861.		
June. " ".....	25	00
1862.		
Sept. " ".....	50	00
1863.		
July. " ".....	5	00
1864.		
Oct. " ".....	10	00
1865.		
Jan. " ".....	20	00
1868.		
Dec. 19. Sister Maude.....	350	00
	<u>\$915</u>	<u>00</u>

The account is exhibited as carefully and accurately kept beginning back in 1857, and ending with the bringing of this suit, and, being balanced, shows Plumb, after all his

payments on the property, repairs, etc., in debt to Mrs. Plumb \$1,601.79,—a little in excess of plaintiff's judgment. This whole account, except that she may have received the money, was undoubtedly manufactured for the purpose of this suit by collusion between the defendants, and entirely discredits their testimony. There are many other things detailed by these defendants as to their money dealings with one another, especially the accuracy with which every dollar of account between them was carefully kept and accounted for, so different from the ordinary relations existing between husband and wife, when the wife imposes such implicit trust and confidence in her husband, as represented by them, that render their statements improbable, and deprive them of any weight in the determination of this cause. Casting their evidence aside, the other facts and circumstances show that whatever interest they, or either of them, have in the property in controversy, or in the improvements put thereon, came from the husband's business. Atkinson was fully aware of what was going on all the time, and connived at it, but, as a brother in the church, he had no idea that those who were in such close communion with him would deceive or attempt to defraud one of the chosen band of Gideon. They might despoil the gentiles, but not the elect; and they undoubtedly humored him in this belief, for Sister Plumb was very careful to assure him that he should not suffer, when he was about to start to New Orleans to see about his show boat. But, while it was the hand of Esau, it was the voice of Jacob, and the mess of pottage did the rest. His confidence was abused under the guise of friendship, which blinded his eyes, and he was despoiled by those of his own household; and with the earnest plea for retribution he seeks justice against his despoilers. What we have we freely give unto him.

This case is governed in all respects by the principles settled by this court in *Miller v. Cox*, 38 W. Va. 748, 18 S. E. 960, *Brooks v. Applegate*, 37 W. Va. 373, 16 S. E. 535, and other cases to which reference is made therein. All appellant can subject to his debt, however, is the equity of redemption in the property in controversy. The building association has a prior lien, which, at the commencement of this case, amounted to \$1,040.76, and the defendants had at that time ceased to pay anything thereon, so at the present time the debt must amount to about the full value of the property. The appellant's costs, except expenses of sale, must yield in priority to the association lien, and therefore he may have had his trouble for his pains, and this litigation prove abortive, except the satisfaction of personal triumph over a faithless religious brother, who, under the cloak of piety, won his love, only to shake his confidence in all professions of friendship. The suit appears to be a contest over a bag of wind, and this court might

affirm the decree without, probably, inflicting pecuniary loss or gain to any one; yet as a court of equity it should not hesitate to rebuke those who attempt to impose upon it by false statements, manufactured accounts, or other deceptive practices, for the purpose of deterring future attempts of like nature. For these reasons, the decree complained of is reversed, and the cause remanded for further proceedings, according to the rules and principles governing courts of equity.

WELTON v. BOGGS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1898.)

LIMITATIONS—PLEADING—PERSONAL PRIVILEGE—RIGHTS OF STRANGER.

1. Where a suit in equity is brought by a judgment creditor to subject the lands of the debtor to the satisfaction of his judgment, and the plaintiff in the bill sets forth the fact that there is another judgment against the same defendant, older in point of time, but which has not been kept alive by issuing executions as required by statute, but the defendant is in life, and does not plead the statute of limitations as to said older judgment, the plaintiff in said suit in equity has no right to file or rely on such plea.

2. The plea of the statute of limitation is, in general, a personal defense, to be made by the party against whom the demand is asserted.

3. A mere stranger to the claim, as a creditor, although he may be injuriously affected by his debtor's failure to set up the statute, cannot either set it up himself, or compel his debtor to do so, as in such case the privilege is personal. (Syllabus by the Court.)

Appeal from circuit court, Pendleton county; R. W. Dalley, Judge.

Bill by S. A. Welton against E. W. Boggs and others. Decree for defendants, and plaintiff appeals. Affirmed.

F. M. Reynolds and L. J. Forman, for appellant. George A. Blakemore, for appellees.

ENGLISH, J. At the May rules, 1894, for the circuit court of Pendleton county, S. A. Welton filed a bill against E. W. Boggs, W. S. Boggs, trustee, I. P. Boggs (since deceased), Solomon Cunningham, M. Manzy, and J. W. Warner, in which she alleged that on the 16th day of April, 1886, she obtained a judgment against the defendant E. W. Boggs in said court for the sum of \$522.33, with interest thereon from that date, and costs; that on the 25th day of May, 1886, said judgment was duly docketed in the judgment lien docket of said county; that execution was issued on said judgment on April 23, 1886, and placed in the proper officer's hands, returnable to July rules, 1886, which execution was duly returned: "No property found to levy on to satisfy this execution, or any part thereof. June 29th, 1886;" that no part thereof had been paid; and that said judgment constituted the first lien on the real estate of said E. W. Boggs, which is described in the bill. It is also alleged in plaintiff's bill that from the records of said county it appears that on the 15th of May, 1879, judgment was rendered

against said E. W. Boggs and Solomon Cunningham in favor of David Goff, commissioner, use of William Adamson, for the sum of \$549.37; that execution was issued on said judgment on June 17, 1879, returnable to the 1st day of August, 1879; that the records do not show any return of said execution, but that no execution has issued thereon since, and that said judgment is barred by the statute of limitations, and constitutes no lien on the real estate of said E. W. Boggs mentioned in the bill; that there was no personal property of the defendant Boggs out of which her judgment could be made; and that the real estate of said Boggs would not rent in five years for a sufficient sum to pay off her judgment and costs. The plaintiff charges that her judgment aforesaid is the first lien on all of said real estate, and should first be paid out of the proceeds arising from the sale of said real estate; that the judgment aforesaid in favor of Goff, commissioner, use of Adamson, is out, by the statute of limitations, and constitutes no lien on any of said real estate; and that said Goff judgment should be credited by several payments, the amount of which was not known to plaintiff. And she prayed that her judgment lien might be enforced against said land. On the 15th of June, 1894, the bill was taken for confessed as to the other defendants, except E. W. Boggs, who appeared and demurred to said bill. Demurrer was overruled, and cause referred to a commissioner to ascertain the real estate owned by the defendant Boggs, its character and location, its value, annual and absolute, and the liens binding the same, whether by judgment or otherwise, and their priorities. Said commissioner returned his report, giving the real estate owned by Boggs, and ascertaining that the plaintiff's judgment described in her bill was entitled to the first place in point of priority of lien against said real estate, and the deed of trust executed by Boggs and wife to W. H. Boggs, trustee, to secure to William Adamson said judgment for \$549.37, costs, and interest, subject to a credit of \$300 paid February 27, 1894, was entitled to the second lien on said land. This report was excepted to by J. P. Boggs, executor of the will of William Adamson, deceased, for the reason that it gave priority to the lien of S. A. Welton over the lien of William Adamson; the deed of trust lien having been taken to secure the payment of a judgment obtained long prior to the judgment of S. A. Welton, and said judgment of Adamson being, at the time said trust deed was taken, alive, and on the lien docket of said county. On the 11th day of April, 1896, the cause was heard, and said exception to the commissioner's report was sustained, and the court decreed that said deed of trust was entitled, as a lien, to priority, and that the plaintiff Welton's judgment constituted the second lien on all the real estate aforesaid, and directed a special commissioner therein named to sell said real estate in the manner and upon the terms therein prescrib-

ed. From this decree the plaintiff, Welton, obtained this appeal.

The appellant made four assignments of error, all of which apply to the action of the court in sustaining said exception to the commissioner's report, which may be considered together.

Did the circuit court err in holding that the deed of trust, or the judgment it was executed to secure, was entitled to priority over the plaintiff's judgment? Now, while it is true that the plaintiff in her bill claims that she kept her judgment alive in the manner prescribed by the statute, and that the defendant Adamson allowed his judgment to expire, by neglecting to comply with the statutory requirements, yet the first question we encounter in considering this case upon the questions raised by the exception to said commissioner's report is whether the plea of the statute of limitations has been interposed in this case by any person entitled to the benefit of said plea. Can this plea be successfully relied upon by a co-creditor in a suit pending against a live debtor? Or is it a personal plea, which the judgment debtor alone could make available? Wood, in his valuable work on the Statute of Limitations (volume 1, p. 96), under the head of "Personal Privilege," thus states the law: "The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant, or asserted, at his election. * * * A cestui que trust may set up the statute whenever his trustee might do so, * * * and generally any person in privity with the claim sought to be enforced may set up the statute in bar thereto, as an executor, administrator, assignee, trustee, or any person who can be said to stand in the place and stead of the person for whose benefit the statute inures; but a mere stranger to the claim, as a creditor of such person, although he may be injuriously affected by his debtor's failure to set up the statute, cannot do so himself, or compel his debtor to do so, as in such cases the privilege is personal, and one which the debtor may avail himself of, or not, at his election." In the case at bar the debtor has seen proper to exercise his election by declining to interpose the plea (which in my opinion would have been effective, and given the judgment of the plaintiff the priority); and, having made such election, could the plaintiff file the plea herself? A question similar to this was presented to this court in the case of *Lee v. Feemster*, 21 W. Va. 108; and it was there held that: "The plea of usury is a defense personal to the debtor. Therefore in his lifetime his creditor cannot plead it to defeat the claim of another creditor in whole or in part." *Johnson, P.*, in delivering the opinion of the court, said: "In *Woodyard v. Polsley*, 14 W. Va. 211, we held that after a man was dead, and his estate was being distributed among his creditors in a court of equity, a creditor might rely on the statute of limitations to defeat the claim of another creditor. But this

was put upon the principle that it was then impossible for the debtor to plead the statute of limitations; his voice was hushed; the law made it the duty of his personal representative to plead the statute of limitations, and, if the personal representative did not do it, the creditors might do so, as against each other. With a living man, it is altogether different. The law does not compel him to plead the statute of limitations. It is a personal privilege, that he can avail himself of, or not, as he pleases." It is true that was a usury case, and these remarks were presented by way of illustration; but the analogy is strong and apparent, and, in my opinion, the plea of usury being a personal plea, the same rule applies with regard to the plea of the statute of limitations. Again, in the case of *Clayton v. Henley*, 32 Grat. 72, *Staples, J.*, delivering the opinion of the court, says: "The court is further of opinion that the plea of the statute of limitations is, in general, a personal defense, to be made by the party against whom the demand is asserted, or to be waived by him, if he desire so to do." "If a debtor, recognizing the indulgence of his creditor and the justice of his demand, is unwilling to plead the statute, it is difficult to tell upon what ground a third person, who merely asserts the title to the property, can be permitted to do so." In the case under consideration, the defendant *E. W. Boggs*, for some reason known to himself, has not filed his personal plea, or in any manner raised the question as to the validity of the judgment of *William Adamson*; and my conclusion from the authorities above quoted is that the exceptions filed by the executor of *William Adamson* to the commissioner's report were properly sustained by the circuit court. The judgment complained of is affirmed, with costs and damages.

On Rehearing.

After a careful consideration of the briefs of counsel for the appellant, and examination of the authorities cited, I find no cause to change the opinion above quoted; and the same is hereby adopted, and the decree complained of is affirmed.

NOTE BY BRANNON, P. In *McClougherty v. Croft*, 43 W. Va. 270, 27 S. E. 246, we held that parties privy in estate with the debtor, as heirs, alienees, or mortgagees, owning or entitled to charge the very land, might plead the statute of limitations against other creditors, to defend their estates. I refer to former cases, leaving open the question involved in this case, whether one having a mere general lien, not being a specific lien on the land, could do so. And I put it as a quere in the *Croft* Case. Our cases settle that creditors of a dead man, or of an insolvent partnership, may plead against other creditors the statute, there being a fund belonging to all. But unless we are ready to abolish the old rule, that limitation is a plea made only for the debtor, which he may waive, I do not see how we can hold otherwise than as Judge *ENGLISH* holds in this case. The statute pleads the bar in favor of a dead man's estate, and therefore creditors may do so, but no statute compels a living debtor to plead it. I make

this note to call attention to the Croft Case and Conrad v. Buck, 21 W. Va. 396, in addition to Lee v. Feemster, cited by Judge ENGLISH.

CRUMLISH'S ADM'R v. SHENANDOAH VAL. R. CO.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. SAME.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1898.)

RES JUDICATA.

If a party who would be entitled to the benefit of a decree as res judicata to the prejudice of another afterwards make an admission of record in the case, inconsistent therewith, detracting from his right under said decree, and such admission is the truth, he cannot rely on such decree as res judicata.

(Syllabus by the Court.)

Appeal from circuit court, Jefferson county; E. Boyd Faulkner, Judge.

Bills by H. H. Crumlish's administrator against the Shenandoah Valley Railroad Company and the Fidelity Insurance, Trust & Safe-Deposit Company against the same defendant. From a decree settling the accounts of one McDonald, receiver of an intervening creditor, he appeals. Affirmed.

Daniel B. Lucas and A. W. McDonald, for appellant. F. P. Clark, for appellee.

BRANNON, P. It seems useless to write an opinion in this case, as it involves only the construction of a contract, and no legal principles of guidance to the public. But it is customary. The Shenandoah Valley Railroad was under a decree of sale for its indebtedness. A part of such indebtedness was a recovery in the name of McDonald, receiver of the Central Improvement Company, against the Shenandoah Valley Railroad Company, amounting, February 10, 1891, to \$791,338.09; but that was subject to a prior lien. There was danger that the debt of the Central Improvement Company would be lost under the prior lien by failure of the railroad to sell for enough to pay both debts; and Moore, Lucas, and others, representing \$128,000 out of \$138,000 stock of the Central Improvement Company, made an arrangement with certain parties acting under the name of the Memphis & Atlanta Construction Company, to bid, at the coming sale of the road, a sum sufficient to pay the debt of the Central Improvement Company, and for making such bid agreed to pay said Memphis & Atlanta Construction Company \$160,000. Afterwards, by a written contract, dated September 27, 1890, between Lucas, Moore, and McKechn, attorneys for stockholders owning said \$128,000 stock of the Central Improvement Company, of the one part, and the Norfolk & Western Railroad of the other part, the said attorneys sold to the Norfolk & Western Railroad, for the consideration of \$500,000, said

\$128,000 stock. The Norfolk & Western Company was already the owner of \$362,136.48 of \$381,996.71 of the indebtedness of the Central Improvement Company. Thus the Norfolk & Western Company owned \$128,000 out of \$138,000 of the capital stock of the Central Improvement Company, and \$362,136.43 indebtedness against it. By said agreement the Norfolk & Western Company agreed to purchase at the coming sale of the Shenandoah Valley Railroad at a price large enough to cover the claim of the Central Improvement Company, and it did later buy the property, and paid to McDonald, receiver, \$50,000, retaining in its hands the balance of the sum for which it purchased the property, it being thought by the parties useless to require the Norfolk & Western Company to pay the full amount, since it owned the bulk of the stock and of the indebtedness of the Central Improvement Company; and, if it had paid the whole, it would be decreed at once back to it on account of its ownership of debts and stock. After these transactions, Scott, Jewett, and McFadden, claiming to be owners of stock of the Central Improvement Company, came into this litigation asking to be permitted to participate in the fund going to the Central Improvement Company as such stockholders, and the litigation touching them resulted in the disallowance of the claims of Scott and Jewett as stockholders, and the allowance of the claim of McFadden to the extent of $\frac{4}{138}$ of the stock. This will appear from a former decision of this court in this case, found in 40 W. Va. 627, 22 S. E. 90, where facts will more at large appear. Some time after the agreement of September 27, 1890, when the Norfolk & Western acquired the \$128,000 stock of the Central Improvement Company, and before our said former decision, the Norfolk & Western Company bought in from Hunt and Hilliard \$6,000 of stock of the Central Improvement Company, and was thus the owner of \$134,000 of the \$138,000 total stock, McFadden owning \$4,000. When the cause went back to the circuit court, an order was made referring the cause to a commissioner to settle the accounts of McDonald, receiver, and upon his report a decree was entered requiring him to pay, as the balance in his hands, \$22,947.94, and from this decree McDonald appealed.

McDonald complains that the circuit court rejected certain credits claimed by him. I shall therefore take them up for consideration. One is the sum of \$11,594.20, claimed by the receiver as paid McDonald, Moore, and Lucas, attorneys, as $\frac{10}{138}$ of the \$160,000 expended in procuring the Memphis & Atlanta Company to make the by-bid above spoken of. The court, in 40 W. Va. 627, 22 S. E. 90, held said \$160,000 to be a proper expenditure so as to enable those stockholders of the Central Improvement Company who incurred the expenditure to charge other stockholders outstanding, and not concurring

in the expenditure, with a portion thereof, conforming to the amount of their stock. It expressly decreed that McFadden should be charged therewith. The question, then, is, did the court properly reject the said credit of \$11,594.20 so paid by McDonald for the portion of the \$160,000 as chargeable to the Hunt and Hilliard stock and the McFadden stock? It is claimed that out former decision, holding that outstanding stock should be charged to contribute to pay said \$160,000, is *res judicata*, and concludes the question in favor of the said credit. It clearly would compel Hunt and Hilliard, if they yet owned the stock, to pay their portion; but the Norfolk & Western Company owned the stock at the time of our decision. That decision was in a contest between the stockholders of the Central Improvement Company—that is, the Norfolk & Western Company, as purchasers of the \$128,000 stock, and Scott, Jewett, and McFadden, who were outstanding stockholders, not consenting to the expenditure of the \$160,000—as to whether said outstanding stockholders should be let in as stockholders, and, if so, whether they should be charged with a portion of the \$160,000; whereas we now have in hand a contest between the Norfolk & Western Company and those parties who acted as attorneys, selling to it \$128,000 stock of the Central Improvement Company, under the contract of September 27, 1890, as to whether they shall charge against the Norfolk & Western Company a portion of the \$160,000; whether the receiver could pay them, and get credit for so doing. It is not, therefore, *res judicata* as to this credit. The question now is upon a settlement between receiver and depositor. The question then was, not shall the Norfolk & Western Company, as owner of the Hunt and Hilliard stock, be charged with contribution to reimburse the expenditure? but that is the question now. The decision would not bind Hunt and Hilliard. Though they had sold their stock to the Norfolk & Western at the date of the former decree; yet what that company should pay for such contribution on the Hunt and Hilliard stock, or whether anything, was not an issue, and was not decided. The said contract of September 27, 1890, was then in evidence in the case, but its construction was not in issue. Its construction, as between the parties to it, was not passed on. I did say in argument that I did not think that contract forbade those stockholders who paid \$160,000 from charging other stockholders with contributions, but I said nothing as to the rights under that contract of the parties to it between themselves. We are thus called on to construe that contract. By it Lucas, Moore, and McKechn, attorneys for certain stockholders of the Central Improvement Company, sold, for \$500,000, \$128,000 of the \$138,000 stock of that company. Now, after this sale I take it that these attorneys or stockholders could not have maintained any suit to demand of the Norfolk & Western

Company any part of the \$160,000; nor could they have maintained any suit against Hunt and Hilliard, nor against McFadden, for their right on account of having paid that \$160,000 was not such as could constitute the basis of a suit. True, if they had remained stockholders, and Hunt and Hilliard or McFadden had applied for admission as stockholders to the fund going to stockholders, they could have compelled them, as a condition of admission, to abate from their stock its ratable contribution to reimburse those stockholders who had incurred the outlay; but they had sold their stock to the Norfolk & Western Company. Had they any longer any right to demand anything of Hunt and Hilliard? Their right as stockholders had passed to the Norfolk & Western Company, and, if anybody had right to demand contribution, that company had, as purchasers of the stock. I do not see that, after such sale, those former stockholders had any longer any right under their expenditure of the \$160,000. The Norfolk & Western Company acquired the Hunt and Hilliard stock after the sale of the \$128,000 stock to the Norfolk & Western Company, and it seems to me that thereafter there remained not a vestige of demand which could be set up by those stockholders who had sold against Hunt and Hilliard or the Norfolk & Western, their assignee. So much for the force of the mere sale itself. But, in addition to the mere force of the sale itself, let us consider other positive provisions of the contract of September 27, 1890. By its fourth clause the said sellers of the stock became responsible for all prior costs in the litigation, "and the counsel and receiver in these cases agree to relinquish all claims for fees or commissions, except such as is paid them out of the \$500,000 they may now or they may hereafter have for fees or compensation of any nature"; and one of the attorneys agreed to continue in the litigation for the Norfolk & Western without further pay. Does not this mean that the sellers would not hold the Norfolk & Western Company, their vendee, responsible for any further demand for fees, commissions, or "compensation of any nature"? This broad language evinces a purpose to sell the Norfolk & Western all their interests and rights outright when they sold the stock. The words "compensation of any nature" would seem aptly to fit the demand for compensation for the money they had paid out in the expenditure of \$160,000. At any rate, the language and spirit of the contract manifest a purpose to sell all their interest outright to the Norfolk & Western Company, free of further demand from them. It seems neither equitable nor within the letter of this stipulation that they should now demand of the Norfolk & Western Company a large contribution on account of the Hunt and Hilliard stock, afterwards acquired by it. I think they are estopped by the very meaning of that contract. All their rights were embodied in the consideration paid for this stock.

That was to pay them in full. The writing breathes and speaks this meaning.

Appellant McDonald also complains that the court below rejected a credit claimed by him of \$8,695.62 as paid himself (McDonald), Moore, and Lucas, attorneys,—the portion of the \$200,000 attorneys' fees charged upon the \$6,000 of the Hunt & Hilliard stock acquired by the Norfolk & Western Company after agreement of September 27, 1890. I need say nothing further as to this item than what I have said above. The fourth clause relinquishes all claim to attorneys' fees. The former decision of this court as to the McFadden stock denied the right to charge it for its fractional share of \$200,000, and directed that it be charged only with a reasonable sum; and how, under that ruling, the receiver could pay those attorneys, he being one of them, $\frac{6}{138}$ of \$200,000 for attorneys' fees against the Hunt and Hilliard stock, I cannot see. If charged at all, it would only be a sum fixed by the circuit court, as held in said former decision; and it has refused to allow anything, and properly so, because these attorneys relinquished all claim of further fees against the Norfolk & Western Company by said agreement. The court decided in 40 W. Va. 627, 22 S. E. 90, that stockholders whose stock was held by the attorneys and sold to the Norfolk & Western Company could charge other stockholders with a fair sum for attorneys' services, but we did not decide that the attorneys could charge the Norfolk & Western Company for attorneys' services rendered on stock then bought by it from them, or on stock which it might acquire from others. The rights of the parties under that agreement were not before the court. It was only said that it did not debar those stockholders who had paid attorneys' fees from claiming from other stockholders contribution therefor. So far that contract was construed, but no further. Whether it debarred the attorneys from claiming fee against their vendee, the Norfolk & Western Company, was not before us. And then, again, this receiver had no right to pay this sum to himself and others without specific orders from the court. We agree with the circuit court in denying this item of \$8,695.62.

We also agree with the circuit court in denying the credit for \$713.56, his receiver's commission on the Hunt and Hilliard stock. The reasons are: (1) McDonald was a co-attorney with Lucas and others, and as an individual knew all and assented to the whole agreement whose fourth clause relinquished commissions. (2) He signed a memorandum on the said contract of September 27, 1890, binding him to become jointly responsible with other parties of its first part for the guaranty of the fifth article, and thus knew of and assented to the fourth clause. He thus became a party to it. The clause says that "the counsel and receiver in these cases agree to relinquish all claims for fees and commissions." What receiver? None other than

McDonald. What counsel? None other than he and others, his associate counsel. It estops the receiver and attorneys from claim for receiver's commission and attorneys' fees. It is in the case, and we must give it effect thus far.

For similar reasons we agree with the circuit court in disallowing credit for \$289.84, receiver's commission on McFadden's stock.

We agree with the circuit court in disallowing credit for \$10 for copying petitions for Scott and Jewett's appeal, and \$16.50 for a copy of Judge Brannon's opinion. We see no need of them such as to charge the fund. The receiver was not called upon to defend the claim of Scott and Jewett, and, if he wanted these documents to use for himself and other attorneys, they are not chargeable to the fund.

Having disposed of the objections to the decree made by appellant McDonald without finding any error, I come to complaints against it made by the Norfolk & Western Company. It claims that the sum of \$6,646.02, paid by the receiver to satisfy the McFadden recovery, should not have been allowed McDonald. The former decree entitled McFadden to it as against the Norfolk & Western Company, and it was right to pay it out of the fund. The Norfolk & Western Company claims that by reason of clause 5 of said contract of September 27th McDonald cannot be credited this \$6,646.02, as by it Moore, McKeehn, McDonald, and Lucas indemnified the company against the appearance and allowance of any outstanding stock not participating in the agreement. This fifth clause says: "The parties of the first part further agree to, and do hereby, indemnify it against any demands which may be established against it before any court by reason of this agreement at the suit of any holders of stock in said Central Improvement Company who are not represented by the parties of the first part." We have concluded that as Lucas, Moore, and McKeehn are not in any way parties to this clause, and McDonald not as an individual, we cannot construe that fifth clause, or say what are the rights or obligations of any of the parties under it. We could not decree against McDonald on it in this case, because it is not involved in the pleadings, and we could not decree against him, or fix any liability on him, without Lucas, Moore, and McKeehn as parties. Therefore the question whether the Norfolk & Western has the right to hold them responsible under it to indemnify it because of the allowance of the McFadden stock or the Hunt and Hilliard stock is left open for any other suit or proceedings, if any shall be instituted, without prejudice to any party from this decision. Hence we cannot reverse the circuit court's action in allowing McDonald, as receiver, credit for said \$6,646.02.

The Norfolk & Western complains that McDonald was allowed credit as receiver for \$1,100 as paid for attorneys' fees to himself,

Lucas, and Moore for attorneys' fees charged for the McFadden stock. We think it was improperly allowed, because waived by said fourth clause. It was right to abate it from McFadden, but its abatement inured to the benefit of the Norfolk & Western Company.

In view of the contention of the attorneys for the Norfolk & Western Company that a decree of September 28, 1893, is res judicata, and that McDonald must be chargeable by it, it may be proper to refer to this subject. That decree, upon the admission of McDonald that there was in his hands, as receiver, \$61,940.03 directed that McDonald pay out of it certain costs, and then pay to the Norfolk & Western Company $124/138$ of the residue, which would amount, as claimed, to \$59,063.41. I feel the force of the argument of res judicata made by the counsel, but the truth is that that result was attained by a statement made by a commissioner, which has not been further acted on in the case, based on the debit charged to the receiver of the whole purchase money for which the Norfolk & Western Company purchased the railroad; whereas the truth is that no money but \$50,000 ever went into McDonald's hands, as I have above stated, and the Norfolk & Western Company made the solemn admission in the subsequent decree of November 5, 1896, that the sum paid McDonald, out of which that company was asking a decree against him, was \$50,000; and therefore I think this binds the company, and breaks the force of the argument of res judicata. Anyhow, it is just to charge McDonald with only \$50,000. As the company was the party retaining the money, and was allowed to do so at its request, it would be against equity to allow it, with all the money over \$50,000 in its pocket, to charge McDonald more than he received. It asked to retain all over the \$50,000. and, if we tolerate this argument of res judicata, and compel McDonald to pay beyond \$50,000, we would allow the Norfolk & Western Company to recover for money which it itself retained. It is estopped from so doing by its own act. The true balance due from Receiver McDonald was \$24,022.94 on December 14, 1896, the date of the circuit court's decree, instead of \$22,922.94, as found by said decree.

NOTE BY DENT, J. In concur in the conclusion reached in this case, but not with portions of the argument contained in the opinion in so far as it is an attempt to construe the provisions of the bond of indemnity given by Lucas, Moore, and McKeehn, and indorsed by McDonald. Such bond has never been brought before the court on an issue or pleadings, nor have the parties thereto been summoned and impleaded in any manner. The bond was introduced as a mere incidental part of the evidence. The present litigation is narrowed down in fact as being between the Norfolk & Western Railroad Company on the one side and Charles McFadden on the other. As between the company and its guarantors, at present there is no litigation pending, and it is improper and coram non iudice now to decide, as between them, as to who is entitled to the pro rata contributions of the receivers,

commissioners', and attorneys' fees, and the \$160,000 by-bid expenditure. The company should be allowed to retain them with all ultimate legal rights thereto reserved. If they are covered by the bond of indemnity, this leaves them where they properly belong; and, if not, and other persons, not parties to the cause, think they are entitled to them, and that they can recover them notwithstanding the bond of indemnity, they should be at liberty to do so; and, not being before the court properly, they are not bound by a judicial determination made in their absence. The decree of the 13th December, 1895, should be so modified as to allow the \$1,100 attorneys' fee deducted from Charles McFadden to remain under the control of the Norfolk & Western Railroad Company, along with the Hunt and Hilliard and other fees. If the attorneys or receiver deem themselves entitled to them notwithstanding their bond of indemnity, they have their action at law; and if the Norfolk & Western Railroad Company deems itself entitled to recover from its indemnifiers the amount paid Charles McFadden, or for the Hunt and Hilliard stock, it has its remedy on its bond. And

"Let the poet resume his pen,
And prove himself the best of men."

HURXTHAL'S EX'X v. HURXTHAL'S HEIRS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 10, 1898.)

RIPARIAN LANDS—COVENANTS RUNNING WITH THE LAND—FIXTURES—MORTGAGES—JUDICIAL SALES—MODE OF SALE.

1. Where a party to a deed agrees to pay to the other party the sum of \$75 per annum for keeping up a certain dam, necessary to the mill property of the obligor, and that the obligation to pay the same, in addition to being a personal one, "shall be a covenant running with the land, and binding upon the Ronceverte Flour Mills, race, and water power, into whosoever hands they may pass," he thereby creates a lien on such mill property, which, duly recorded, has priority over subsequent liens.

2. If machinery under mortgage is placed in a mill already mortgaged, it becomes subject to the realty mortgage, to the extent that is necessary to keep the security thereof unimpaired, so far as the personalty mortgage is concerned. If such machinery is mortgaged to its full value, and it will not damage the mill property by its removal, the mortgagee or purchaser may remove the same; otherwise, he must make good the damage caused by such removal.

3. When a mill and its machinery are subject to separate mortgages, and are sold under decree of court, they should be offered for sale both separately and together, and then sold in whichever way they will bring the larger sum.
(Syllabus by the Court.)

Appeal from circuit court, Greenbrier county; J. M. McWhorter, Judge.

Suit between the executrix and the heirs of Ben Hurxthal, deceased, and others. A decree was rendered from which an appeal was taken. Reversed in part, and modified.

John W. Harris, for appellants. L. J. Williams, for appellees.

DENT, J. In the case of Josie M. Hurxthal, administratrix, against Christine H. Hurxthal and others, on appeal from the circuit court of Greenbrier county, two questions are presented to this court:

1. Whether the following provision in a

deed duly recorded creates a lien on the property involved, in favor of the St. Lawrence Boom & Manufacturing Company, to wit: "That the said party of the second part agrees to pay to said party of the first part the sum of seventy-five dollars per annum, to be paid on the first day of January in each year; and the obligation to pay the same shall, in addition to being a personal one, be a covenant running with the land, and binding upon said Ronceverte Flour Mills, mill race, and water power, into whosoever hands they may pass." This question is fully met and determined in favor of the lien in the case of *Parsons v. Association*, 44 W. Va. 335, 29 S. E. 990. The appellant's claim for this charge at the date of the allowance thereof, to wit, November 1, 1897, amounting to the sum of \$324.75, should have been decreed as a lien fourth in priority on said property.

2. Whether the court erred in holding that Nelson White, appellee, by virtue of a deed of trust executed thereon prior to its being fixed in the mill in controversy, held a lien on the machinery prior in right to the lien of the appellant Bryanna Hurxthal, secured to her by a prior deed of trust on the mill property. The authorities on this subject widely differ. The true equitable rule is stated in the case of *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, to wit: "A chattel mortgage is effectual to preserve the character of the mortgaged chattels, as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate, or the buildings thereon. If the detachment would occasion some diminution in the value of the realty, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case." This rule is said to be firmly established in the interest of trade. That the realty mortgagee's security is kept whole is all that he can ask, as against the property of third parties. When the mortgaged personal property is attached to the realty, the mortgagor has only an equity redemption therein, to which the mortgage on the realty at once attaches. *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279; *Eaves v. Estes*, 10 Kan. 314; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377; *Sword v. Low*, 122 Ill. 487, 13 N. E. 828. In the present case, Bryanna Hurxthal had a lien on the mill property amounting to about \$5,000; the mill being fitted up with the old burr system when the proprietor purchased of Nelson White the machinery in controversy, giving him a deed of trust thereon, and then placed it in the mill in lieu of the old system, so far as the flour part thereof is concerned, while he continued the burr system as to the corn and feed. The mill had to be changed some to suit the new machinery, or roller system. What became of

the old machinery is not shown in the evidence, unless it was retained for the corn and feed part. No damage is shown on account of the change. It is claimed that the removal of the machinery will damage the mill. To what extent, there is no evidence. Nor can it be ascertained, until sale is effected, that the equity of redemption in the machinery is of any value. It devolves on the mortgagee to identify the property covered by his lien. If he is unable to do so, he cannot have the benefit thereof. This is admitted by his counsel. The court in its decree provided that the "special commissioners, or the one acting, shall sell the said machinery named and set forth in the said deed of trust, except said Case Purifier, on the same terms as the real estate, with privilege to the purchaser to remove the said machinery from the mill building with as little damage thereto as possible." This decree does not protect the realty mortgage from the damage that may accrue from a separate sale of the properties involved. The machinery and the mill may both bring a better price, if sold together; and the mill may be greatly damaged, or may be benefited, by the removal of the machinery. The court should have directed the commissioner to offer them for sale both separately and together, and sell in the way in which they would bring the larger sum. If together they bring a larger sum than when offered separately, the difference between the two sums will show the amount to which the realty mortgagee would be damaged by a separate sale, while the personal mortgagee would be only entitled to what the personal property would bring if sold separately, because such is the extent of his mortgage. If they sell for more separately, it will show the extent of the damage they are to each other; while, if the mill should sell for less separately than when sold in connection with the machinery, it will show to what extent the removal of the machinery causes loss to the realty mortgagee, who is entitled to be made whole out of the personalty; otherwise, she would be damaged by the removal of the machinery without recompense, contrary to the law as before settled.

The decree complained of will be reversed in so far as it fails to allow the St. Lawrence Boom & Manufacturing Company its lien for the sum of \$324.75, fourth in priority on said mill property, and amended so as to direct the special commissioners, in making sale of such mill property, to offer the same as a whole, and also the mill and machinery separately, and to sell the same in whichever way it will bring the largest sum; and in all other respects it is affirmed, and the cause is remanded for further proceedings. Bryanna Hurxthal, not having asked for the sale of the property as a whole in the circuit court, but asking it for the first time in this court, will pay the costs of this appeal.

DAVIS v. BAKER et al.

(Supreme Court of Appeals of West Virginia.
Dec. 3, 1898.)

DEPUTY SHERIFF—BONDS—BREACH—DISCHARGE—
COMPENSATION—SET-OFF—STATUTE OF
FRAUDS.

1. In an action of debt upon a bond executed by a deputy sheriff to his principal, which bond, on its face, as a part of the condition, recites that said deputy is to act as such during the term of said sheriff's office, which bond is accepted by such sheriff, and such deputy proceeds to perform the duties of his office under said bond, and continues to perform said duties during the entire term of said sheriff's office, said bond must be considered as a contract between said sheriff and his deputy.

2. Where such action is predicated on a claim that the defendant has failed to comply with the conditions of his bond by paying over and accounting for all money which may come into his hands by virtue of his office, the defendant may prove and have allowed, as a set-off against said claim, such amount as he may be entitled to for his services as such deputy, if the same are set forth and described in the bill of particulars filed with his plea.

3. If the sheriff, during his term of office, and after said deputy has served two years, relieves him of a portion of the duties originally assigned to him, against his protest, but does not remove him, and no change is then made as to the original agreement for compensation, the fact that the labors of such deputy are thus diminished will not necessarily reduce his compensation.

4. If it appears from the evidence that such deputy, during the four years of his service, performed the portion of the duties of the office of sheriff of Jefferson county which he contracted to do, for the compensation he was to receive under the original agreement, by retaining his pay for such services out of money collected by him, he committed no breach of the conditions of his bond, as he in this manner accounted for the money that came into his hands.

5. The statute of frauds does not apply, under the circumstances of this case, to defeat the claim of the defendant for his services.

(Syllabus by the Court.)

Error to circuit court, Jefferson county; E. Boyd Faulkner, Judge.

Action by Albert F. Davis against Eugene Baker and another. From a judgment for plaintiff, defendants bring error. Reversed.

George Baylor, for plaintiffs in error. Forrest W. Brown, for defendant in error.

ENGLISH, J. Albert F. Davis brought an action of debt against Eugene Baker and W. A. Morgan in the circuit court of Jefferson county, returnable to April rules, 1896, on a bond executed by said Baker to him as deputy sheriff, with said Morgan as his security. The defendant Baker cravedoyer of the bond, and pleaded conditions performed and conditions not broken, and set-off, and filed with his last-named plea his bill of particulars of set-off, to which pleas the plaintiff replied generally. Defendant pleaded payment, and issue was joined thereon. Defendant also gave notice to plaintiff that on the trial he would offer, in recoupment of plaintiff's claim, evidence sustaining the items contained in said bill of particulars of set-off. A jury was waived, and the case submitted

to the court upon the issues joined; and the court, having heard the evidence, found for the plaintiff, and assessed his damages at \$1,531.58, with interest from June 2, 1897. The defendant moved the court for a new trial, and in arrest of judgment, which motion was overruled. Now, the bond sued on was a private bond, and the gist of the action is the breach of the condition; in other words, in order that the plaintiff should recover in this case, it was incumbent on him to show that the defendant did not faithfully discharge and perform the duties of said office of deputy sheriff during his continuance therein according to law, and pay over and account for all money which might come into his hands, and make settlements of his actions as such deputy, as was required by law for sheriffs to make, or whenever required to do so by said Davis, and make a final settlement of all his actions within two years from the expiration of said term of said office. The controversy in this case arose from the following facts: The plaintiff, Davis, was sheriff of Jefferson county, and, by arrangement and agreement between him and his deputies, the work of the shrievalty of the county was apportioned between them and him in the same manner as it had been apportioned by the former sheriff. The defendant by this agreement was to perform the work in Charlestown and Middleway, and, as compensation, was to receive one-third of the commission. Under this arrangement the defendant acted as deputy for the plaintiff for two years, performing the duties required of him in said two districts, and receiving the compensation agreed upon. At the end of that time the plaintiff took from defendant the books of Charlestown district, leaving him only the books of Middleway district, against which action on the part of said Davis the defendant protested. Said defendant continued to ride and perform the duties of deputy sheriff in Middleway district until the end of the term.

At the time the books of Charlestown district were taken away from defendant, nothing was said about changing the original contract. This is shown both by the testimony of plaintiff and defendant. When the defendant Baker paid over to plaintiff the money remaining in his hands at the end of the term, he retained his commissions which he claimed to be entitled to under the original agreement, and paid the plaintiff the balance. If the defendant was entitled to do this he committed no breach of his bond. In the case of Jackson v. Hopkins, 92 Va. 601, 24 S. E. 234, it was held that, "in an action on a bond with collateral condition, the breach of the condition is the gist of the action, for without the breach there is no cause of action." Was the defendant entitled to retain the pay for his services under the original agreement? No one questions the right of the sheriff to remove his deputies, but that was not done in this case. The plaintiff, in his testimony, says the defendant rode two districts for two

years, and then he told him he could take Middleway district; that defendant protested against it, but nothing was said about commission, and not one word about changing the original contract. Defendant continued to act as deputy. The plaintiff only gave him less labor to perform for the last two years. Counsel for the plaintiff claims that the defendant's contract was void, under the statute of frauds, because it was a verbal one, which could not be performed according to the intent of the parties within a year from the time of making. This statute, it seems to me, has no application to this case. Here a bond was sued on, with a collateral condition. It was executed by the defendant, and accepted by the plaintiff. By accepting it, the plaintiff adopted as his the contract. See 2 Am. & Eng. Enc. Law (1st Ed.) p. 460, where the law is thus stated: "It is essential to the validity of a bond that it be accepted by the grantee. There is no delivery without acceptance." It appears on the face of the bond sued on that the defendant Baker was appointed as one of the plaintiff's deputies, to act during his term of office, for four years, and the same is averred in the declaration; and it does not appear that he was ever removed as such deputy by the plaintiff. It was, then, a part of the contract between plaintiff and defendant that defendant was to serve as such deputy for four years, and, while it is true the plaintiff had the power to discharge him, he never exercised that power. Baker, then, acted as such deputy under this contract, his work and the compensation therefor being fixed by verbal agreement. Thus, the duration of the performance of his services was fixed by the bond, and the value of the services and their compensation by verbal agreement. It is shown by the evidence that said Baker for the years 1889-90 collected three-sixths of the county and state levies, or one-sixth each year more than he was required to do under his contract; so that although he was only allowed to collect one-sixth each year for 1891 and 1892, yet during the entire four years he collected at the rate of one-third each year,—that is, performed the work that would entitle him to full pay under his contract, so that on the quantum meruit he was entitled to the amount he retained for his services.

A question is raised on the argument as to whether he would be entitled to set off his claim because the same was unliquidated. I cannot think there is anything in this objection, for the reason that the account claimed as a set-off grows out of the same transaction. In the case of *De Forrest v. Oder*, 42 Ill. 500, it was held that unliquidated damages which do not grow out of the contract or cause of action sued upon are not a proper subject of set-off. They must grow out of the transaction upon which the suit is brought. The claim asserted in this plea of set-off certainly grows out of the transaction upon which the suit was brought. Again, our statute is

very liberal in its provisions on this question. Code, p. 812, c. 126, § 4, provides that "in a suit for any debt the defendant may at the trial prove and have allowed against such debt, any payment of set off which is so described in his plea or in an account filed therewith as to give the plaintiff notice of its nature but not otherwise." This provision seems to have been fully complied with in this case. The plaintiff insists that the defense should not prevail, because the money in defendant's hands was the proceeds of taxes, and cites the case of *Miller v. Wisner*, 30 S. E. 237, lately decided by this court, which merely holds that a party owing taxes cannot set off his private demand against the sheriff in payment thereof, and does not apply. When we look again to the facts of this case, it is apparent that the contract between the plaintiff and said Baker was not terminated by his discharge or removal, the only thing done being to relieve him of a part of his duties he was required to perform. What motive actuated plaintiff in taking this step, we cannot say. It may have been that he was not satisfied with the manner in which he was accounting for the collections placed in his hands; but, if so, why did he still allow him to collect in Middleway district? It may have been that he was aware that the defendant had performed more than his proportion of the work during the years 1889-90, and it may have been that he wanted to give his son employment. But, let the motive be what it may, the defendant protested against his labor being reduced, and signified his willingness to continue. It appearing from the evidence that, at the time the books of Charlestown district were taken from the defendant, no change was made in the contract in regard to compensation for services, and it further appearing that, taking the entire four years of the sheriff's term into consideration, the defendant performed one-third of the services, I hold that the court erred in overruling the motion of the defendant for a new trial. The judgment is therefore reversed, the finding of the court set aside, and a new trial awarded.

STATE v. HULL.

(Supreme Court of Appeals of West Virginia.
Jan. 14, 1899.)

CRIMINAL LAW—INCOMPETENT EVIDENCE—RAPE—
OPINION EVIDENCE.

1. Where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudices such party; and if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment; but, if it clearly appear that it could not have changed the result if it had been excluded, it will not be cause for reversing the judgment.

2. A medical witness, who is examined as an expert in the trial of an indictment for rape, after stating that he had been called upon to examine the prosecutrix, and the result of his examination, will not be allowed to express the

opinion to the jury that no girl would have voluntarily submitted to the suffering necessary to have brought about this result.

3. Where an injury relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible.

4. While the admission in evidence of the opinions of experts necessarily gives rise to very nice distinctions between facts and findings, it nevertheless does not annul the rule of law, axiomatic with reference to them, as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus usurp the peculiar province of the jury.

(Syllabus by the Court.)

Error to circuit court, Berkeley county; *E. Boyd Faulkner*, Judge.

Grant Hull was convicted of crime, and brings error. Reversed.

Flick, Westenhaver & Baker, for plaintiff in error. Edgar P. Rucker, Atty. Gen., and U. S. G. Pitzer, for the State.

ENGLISH, J. On the 13th day of September, 1898, Grant Hull was indicted in the circuit court of Berkeley county for the crime of rape, charged to have been committed upon one Ella May Glessner. The plea of not guilty was interposed, and on the 16th day of September, 1898, a jury was sworn in the cause. On the 17th of the same month they found the prisoner guilty as charged in the indictment, but recommended that he be punished by confinement in the penitentiary, and, thereupon, the prisoner moved the court to set aside the verdict, and grant him a new trial, which motion, after consideration, was, on the 4th day of October following, overruled; to which action of the court the prisoner by his counsel excepted, and moved the court to set aside the evidence. Judgment was rendered upon the verdict, and the prisoner was sentenced to seven years' confinement in the penitentiary; and thereupon the prisoner applied for, and obtained, this writ of error. The errors relied on by the prisoner are as follows: (1) The circuit court should have set aside the verdict on the ground that the corpus delicti was not sufficiently proved. (2) The circuit court admitted improper testimony, against the objection of the defendant, materially prejudicial to the defense, and for this, on motion, should have set aside the verdict. (3) The circuit court should have set aside the verdict of the jury, and awarded the defendant a new trial, on the ground that the verdict was against the clear preponderance of the evidence.

Upon the question raised by the first assignment of error, as to whether the corpus delicti was sufficiently proved, the state necessarily relied upon the testimony of Ella May Glessner, who is discredited by her own story of the transaction; whose want of truthfulness appears to have been so notorious that her own mother would not believe her, as is shown by the letter written by her to Mrs. Hayes, in which, after speaking of the complaints her daughter had made against her, she says: "I

want you to come immediately to see me. I want this talk stopped. I want the straight side of the story. * * * I want you to come right away, and tell me the straight thing of it. I know you will tell me the truth." The whole story of the alleged crime, as detailed by witnesses for the state, abound in inconsistencies and improbabilities. The girl who prefers this charge, and seeks to consign her stepfather to the gallows, or a long term of confinement in the penitentiary, out of spite, which appears to have been engendered by a letter written by her mother, exposing some of her falsehoods and fabrications in regard to the treatment she had received at the hands of the parties with whom she was making her home, begins her testimony with a statement which, although it may be immaterial, was regarded as important by her, which was that nobody started away from the prisoner's house with her; that the prisoner had gone away from the house to look at his potato patch,—he said he was going to look at it; she saw him go; was standing on the porch when he went out. On cross-examination she says: "I did not start with Grant. It was four o'clock when I started." She also says: "Grant asked Frank to go with him when he left. He said, 'No; I will go to the doctor's with you.' That was a half hour before I went to the house." This testimony is directly and plainly contradicted by several witnesses. First, Mrs. Mary Hull, the mother of the prisoner, testifies as follows: "I have made my home with the prisoner for several years. Was living there on Sunday, July 24th. It was 20 minutes past four o'clock when I came out of Mrs. Hull's room, and Ella left about four minutes after I came out. Grant and Ella went away together. He was a couple steps ahead." Mrs. Glessner also, in her testimony, says: "I was at Hull's house on the Sunday in question, and Ella was there also. It was something after four o'clock when she left the house to return home. I was on the porch when she left. I didn't know who left first. Mr. Hull said, 'I will go a piece of the way with you,—as far as my potato patch.' She and he left together. I cannot say which was first." Frank Glessner, in his testimony, also says: "I was on the porch when they left [speaking of prisoner and Ella], and they went together." The only motive we can ascribe for this deliberate falsehood on the part of Ella is that she had accused the prisoner of making a similar assault upon her a year previous, and claimed to be afraid of prisoner on that account, and may have thought the story of former assault would be detracted from by her action in being too sociable and friendly with the prisoner. But, let the motive have been what it might, she stands flatly contradicted by three witnesses.

Following the testimony of this prosecuting witness, she says: "I met Grant the first time after leaving the house at Hedges' orchard. I went catty-cornered through

the cornfield to the road, and Grant was in the road where it runs to the woods. The summer before this, Grant came down to Mrs. Hayes', and asked her if I could go up with him. He took me up through Ropp's woods, and tried to do the same thing. I hollered, and my mother came running up. He gave me a quarter, and I gave it to my mother." Now, when we turn to the testimony of Mrs. Grant Hull, she says: "I have heard the story of what Ella says happened a year before this occurrence. It is not true. Nothing of the kind ever happened. I never heard anything of this kind." This witness says she told Mrs. Hayes about two months afterwards, but Mrs. Hayes, when on the witness stand, does not confirm her. Now, it is apparent that this story, which was brought out on cross-examination, was fabricated and detailed to account for the remarkable conduct on her part, which was described by her in detailing her evidence in chief. She says: "I met Grant near the end of Hedges' orchard. He was in the road. I shook hands with him, and give him good-bye, and asked him over. That was a field and a house distant from Grant's house. He said, 'All right'; he might be over in a few weeks. He went on towards his home, and I went in the opposite direction." Now, after this friendly parting, the prisoner taking the road towards home, it is somewhat remarkable that in a few minutes afterwards he should be found pursuing her in McDowell's woods, and halting her in a threatening manner; telling her, if she did not halt he would kill her; and that she should take off her hat, and start to run fast. Would it not be more reasonable to suppose that if the prisoner had any such designs upon this girl, he would have walked along with her to McDowell's woods, instead of telling her good-bye, and starting on the road leading to his home? And even if he had pursued her, as she said he did, would he, after his recent friendly parting with the girl, have accosted her in the rude and threatening manner testified to by her? Such conduct would be not only unnatural, but foolish and unaccountable.

Coming next to the story this witness tells of what transpired in McDowell's woods, can you say it bears the impress of truth? She says: "He says, 'Come here!' and I says, 'No, sir.' I told him I must go home. And he walked up, and caught me by the arm, and says, 'Come up here in the woods; I have something pretty to show you.' And I says, 'No, sir.' And so he took me up in the woods, and done what he pleased. He caught hold of my dress sleeve, and pulled me along. I pulled, and tore my dress sleeve. I hollered 'murder!' I jerked, and tried to get away from him, but he would not let me go. * * * He was about half an hour doing it. He just took and done what he pleased, and he tore all my underclothes." Now, that this story was neither true nor

well considered is apparent when we recur to the fact that she left the house of prisoner at 4 o'clock and 25 minutes. Mr. John D. Smith, in his testimony, says: "We left Spring Mills about five o'clock in the evening. She [Ella May] met us about one hundred yards below the cross roads at Spring Mills. We had started without her, and she met us." From Grant Hull's to Spring Mills, according to the testimony of Hunter Harlan, is one mile and a half, and the witness Decatur Hedges calls it two miles. It is a matter of common observation that a person walking in an ordinary gait will not walk more than three miles an hour. If, then, we consider the distance from the prisoner's to Spring Mills to have been one mile and a half, it would have taken the witness half an hour to have walked it; and, if this be so, how can we reconcile it with her story that she was detained in McDowell's woods for half an hour with the prisoner, or that she was detained there at all? This witness not only states that she was detained in McDowell's woods, by the prisoner for half an hour, but Mrs. Hayes states that she told her on Thursday that prisoner had taken her in the woods, and kept her there a half hour, and what he had done to her. This witness also stated that Ella's dress was torn under the arm, and her underclothes were not very clean,—they had blood on them. No other part of her clothing was torn, which is another flat contradiction of Ella's testimony. Again, can we reconcile the deportment of this girl after she meets with the Smiths near Spring Mills, and proceeds on her way home with them, with the alleged fact that she had just been subjected to one of the grossest outrages that can befall women? The witness John G. Smith testifies that: "On the return trip home she acted the same as usual. She acted foolish and giddy, like all young people do. She was always wild and full of fun. She didn't appear either tired or worried after we got in the boat."

The logical conclusion resulting from this train of circumstances is that, while it may be true that some time previous to the finding of this indictment Ella May Glessner may have been robbed of her priceless jewel, it was not on Sunday evening, July 24, 1898, on her way from the house of the prisoner to Spring Mills. If the subsequent conduct and actions of this girl were inconsistent with the charge contained in the indictment, what must we say of the testimony of a negro boy,—Peter Johns? In looking at this testimony, we must not only take into consideration what any sane man who had been guilty of such an offense would have said or done under like circumstances, but we must look at the character and reputation of the prisoner, as appears from the testimony of the Presbyterian minister and five others. They all testify as to his being an honest and upright man. Also the statement of said Johns on cross-examination that, although he lived

about a mile from prisoner's, they were only acquaintances. He had only been to prisoner's house once. That they did not run together. Taking this view of the circumstances and conditions of the parties, can we regard it as within the bounds of possibilities that the prisoner, if he had been guilty, would have stopped on the road, and made a voluntary statement to this young negro boy that he had gone a piece with a girl and committed an outrage upon her chastity against her consent, or even with it? The prisoner was within a short distance of his home, where his wife and children were. He stood well in the community as an honest, respectable man, and it is natural to suppose that he valued the reputation he had earned among his neighbors; and it is taxing our credulity too far to believe that, even if he had so far forgotten himself as to have been guilty of such conduct, that he would have made a confidant of this strange negro boy, and imparted to him a secret which might cost him his life or his liberty.

We come next to the consideration of the testimony of Dr. D. R. Ross, who testified that he "had occasion to examine Ella May Glessner on the 1st day of August, 1898." He says: "My examination was to determine whether an assault had been made upon her person. I found evidence of recent cohabitation, and that she had been injured by it. The parts were still swollen and congested, and very tender. I found no other marks of violence. She was about a half-developed girl. The hymen was destroyed. That is all I know." On cross-examination he said: "There were no marks upon her except about her private parts. The indications were that several days—three or four, at least—had elapsed since she received the injuries, as there was some sloughing. I could form no idea how long previously her virginity had been destroyed. It was evident that the injuries would not have happened to a person habitually accustomed to intercourse. The internal injuries would have been the same whether the intercourse was forced or by consent." On redirect examination, and over the objection of the prisoner, this witness testified as follows: "I do not believe that any girl would have voluntarily submitted to the suffering necessary to have brought about this result." Now, it is reasonable to suppose that the testimony of this physician, who had been called on to make the examination of this girl, would have great weight, and a controlling influence with the jury. The distinguishing feature of this heinous crime is that force should have been used in its commission. This medical witness had just stated that "the internal injuries would have been the same whether the intercourse was forced or by consent," and then, in response to a question propounded by the state, said, "I do not believe that any girl would have voluntarily submitted to the suffering necessary to have brought about this result."

Did the circuit court err in allowing this answer to go to the jury over the objection of the prisoner? It required no science, or skill, or peculiar habits of study to reach the conclusion expressed in this opinion, after the facts were before them. Any man on the jury was as capable of arriving at a correct conclusion as this physician. In the case of *Welch v. Insurance Co.*, 23 W. Va. 305, Green, J., in delivering the opinion of the court, says: "Of facts which require proof by indirect evidence, says Starkie: 'There are some of so peculiar a nature that juries cannot, without other aid, come to a direct conclusion on the subject. In such instances, where the inference requires the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the facts is admissible evidence to enable a jury to come to a correct conclusion. * * *' But Starkie lays it down further that when the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible; and he is unquestionably right in this position." We also find the law thus stated in Starkie, *Ev.* (9th Ed.) p. 755: "An expert cannot be asked to give his opinion upon doubtful facts in the case on trial which remain to be found by the jury, but a similar case may be hypothetically put to him, based upon the evidence in such case." This court held in the case of *State v. Musgrave*, 43 W. Va. 673, 28 S. E. 814 (Syl. point 5): "The object of all questions of experts should be to obtain their opinion as to matters of skill or science which are in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts." Yet this medical witness was allowed to tell the jury that he did not believe any girl would have voluntarily submitted to the suffering necessary to have brought about this result (that is, the indications which he found). Did he not, by that answer, tell the jury that, in his opinion, the result was not accomplished with her consent, or—which is the same thing—was done by force; in other words, that a rape had been committed on this girl? If this prosecution was lacking in this important element, required to constitute rape, this witness was allowed to tell the jury that, in his opinion, the act was committed against her consent, and, consequently, by force. Counsel for the prisoner cite the case of *Noonan v. State*, 55 Wis. 258, 12 N. W. 379, which, in point of facts, closely resembles the case under consideration, which is quoted from in the brief as follows: "A medical witness, called on behalf of the state, who made an examination of the prosecutrix several days after the rape was alleged to have been committed, testified that on such examination he found an aggravated inflammation of the uterus, vagina, and other sexual organs of the prosecutrix. He was then al-

lowed, under objection by the plaintiff in error, to testify that, in his opinion, such inflammation was produced by her having connection (a violent, not a free, connection); that is, in substance and effect, that the inflammation was the result of rape, which had been committed upon her. The testimony here quoted was given in answer to the questions put by the judge: "To what do you attribute the inflamed condition that you say you found?" And the question was duly objected to, and exception thereto taken. The question and the answer which it elicited were clearly incompetent. The witness was competent to state what effects might result from a rape, but it was going far beyond the range of authorized expert testimony to allow him to give an opinion that the inflammation he discovered was produced by rape. On the cross-examination this witness was constrained to admit—what any person of ordinary intelligence knows without the aid of expert testimony—that there are other adequate causes which might have produced such inflammation. It was for the jury to determine whether the inflammation which the witness testified to was the result of rape or some other cause, and the extent to which expert testimony affecting that question could properly be resorted to would be to show what effects upon the sexual organs of the female might result had she been ravished; but the testimony admitted was a usurpation of the province of the jury, and, beyond all question, its admission was error,"—citing *Luning v. State*, 2 Pin. 285; *Knoll v. State*, 55 Wis. 249, 12 N. W. 369; *Cook v. State*, 24 N. J. Law, 843. In 7 Am. & Eng. Enc. Law. p. 500, it is said, "A physician may testify what effect rape would have upon the sexual organs, and that on examination he found them inflamed," and in note 1, "but not that, in his opinion, such inflammation was produced by having violent connection," citing *Noonan v. State*, supra. In 8 Enc. Pl. & Prac. p. 751, we find the law thus stated: "While the admission in evidence of the opinions of experts necessarily gives rise to very nice distinctions between facts and findings, it nevertheless does not annul the rule of law, axiomatic with reference to them as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus usurp the peculiar province of the jury," citing *Gunter v. State*, 83 Ala. 96, 3 South. 600. In the same work (page 771), speaking of expert witnesses, it is said: "The rule that an expert cannot be asked his opinion as to the merits of the case on trial is equally as applicable to his re-examination as to his examination in chief." The medical witness in this case not only expressed his opinion upon the merits when he stated that he did not believe that the prosecutrix would have voluntarily submitted to the suffering necessary to have brought about the result, but he invaded the province of the jury.

Now, without attempting to recapitulate the testimony, my conclusion is that its character is not such as to establish the corpus delicti. Bearing in mind the language of Lord Hale, who, in speaking of rape, says, "It must be remembered that it is an accusation easily made, but difficult to be disproved by the party accused, be he ever so innocent" (1 Hale, P. C. p. 635), and also the maxim that the prisoner must be presumed innocent until his guilt is proved by competent evidence, I cannot refrain from referring for a moment to the earnestness and zeal displayed by the attorney for the state in attempting to overthrow the effect of the character shown by the prisoner for honesty and morality by asserting that the newspapers are constantly heralding to the world the fall of men high in church work, who have embezzled the funds of institutions, or robbed their Sunday school scholars of their virtue, and seeking to establish the rule by referring to such monumental exceptions as the case of Pearl Bryan, of Cincinnati, and Durrant, of San Francisco, in both of which cases murder was committed to conceal the first crime. This attorney must have fully realized how important it was to his success in this prosecution to remove from his way the character which the prisoner had established by his minister and those that knew him best, and to bolster up the character of this ignorant boy, who relates a story that bears on its face unreasonableness and improbability. The prosecutrix has sworn to enough in this case to establish the prisoner's guilt if she had spoken the truth; but she has been contradicted in so many particulars that, to say the least of it, extreme doubt has been cast upon her testimony; and, considering the whole evidence,—as we are required to do by statute,—my conclusion is that the court erred in overruling the motion to set aside the verdict.

I am also of opinion that the court erred in allowing said medical witness, after stating that the result would have been the same whether the intercourse was forced or by consent, to testify that he did not believe that any girl would have voluntarily submitted to the suffering necessary to have brought about this result. Was the prisoner prejudiced by this ruling? In *State v. Musgrave*, supra (Syl. point 9), this court held that: "Where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party; and if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment, but, if it clearly appear that it could not have changed the result if it had been excluded it will not be cause of reversing the judgment." But it does not appear, and we cannot say, that this evidence, if excluded, would not have changed the result. The opinions of this physician in a case of this character would necessarily have great weight with a jury, and we cannot say that this opinion, illegally and improperly expressed in the pres-

ence of the jury, did not prejudice the prisoner, or that it did not control the verdict. For these reasons the judgment complained of is reversed, the verdict set aside, and a new trial awarded.

BRANNON, J. I agree to the syllabus. I agree that a new trial be granted for the admission of improper evidence. But I do not agree to all that part of Judge ENGLISH'S opinion holding the evidence of the state's witnesses unworthy of credit, and holding that the corpus delicti is not proven. I do not think we ought to pass on the evidence, and thus disparage and destroy the state's case in advance of a new trial. What is the use of a new trial with the state's evidence condemned in advance? My position is that that part of Judge ENGLISH'S opinion sets a bad precedent for this court. I hold that where this court reverses for the admission or rejection of evidence, or for giving or refusal of instructions, or on any ground other than the weight or credit of evidence, we should not pass on the weight or credit of evidence, but remand the case for a new trial without influence from an opinion of this court branding and condemning the evidence as not worthy of credit. The evidence may not be the same on another trial; other evidence may be brought in; and, if we brand the evidence, it necessarily discounts the effect of the old evidence. Need I cite cases to show that the jury is almost uncontrollably the judge of the credit of the witnesses? Yet Judge ENGLISH makes a jury out of this court, and makes us brand witnesses as false whom 12 sworn jurors and a judge believed, when they saw the witnesses, and enjoyed great advantage in passing on their evidence, which we do not possess, which Judge ENGLISH said gave them better capacity to judge than we. *Sigler v. Beebe*, 44 W. Va. 502, 30 S. E. 76. I do not say that where a party's case turns only on weight of evidence we are not bound to consider it. We are so bound. But when the party gets a new trial on other grounds, we ought not to pass on the evidence. Chapter 181, § 9, Code 1891, as construed in *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686, does not require us to do so where not necessary to give the party a new trial. And I am sure that act was not intended to utterly reverse the rule that made the jury peculiarly, and almost uncontrollably, the judge of the veracity of witnesses. If we do pass on the evidence, we must say it establishes the case. And why? Because the jury gave it credit (*Gilmer v. Sidenstricker*, 42 W. Va. 57, 24 S. E. 566; *Dudleys v. Dudleys*, 3 Leigh, 436), and because in *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669, it was held that, if the sole ground for new trial depends on credit of witnesses, this court will not disturb the judgment. Are we to usurp the jury power? Is this great jury right from Magna Charta, imbedded in our bill of rights, to be frittered away? If this doctrine is carried out, how far will it de-

prelate, or at last undermine, this right which we have all considered sacred? The old rule of demurrer to evidence and motion for new trial preserved to the party the benefit of all his evidence conflicting with that of his opponent, and conceded credit to his witnesses; but, if we change this by denying credit to his witnesses, do we not deny him jury trial in effect? I do not think that act goes so far. If we so construe it, do we not make it unconstitutional? We must give it a construction not making it run counter to the constitution, if possible.

NOTE BY DENT, P. I concur in the result reached in this case and the syllabus, but dissent from that portion of Judge ENGLISH'S opinion that passes on the credibility of the witnesses, as this is an invasion of the province of the jury. See *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669.

49 W. Va. 701.

GRAHAM v. CITIZENS' NAT. BANK OF PARKERSBURG.

(Supreme Court of Appeals of West Virginia.
Dec. 17, 1898.)

JUDGMENT—INJUNCTION—DAMAGES—COSTS—NEW TRIAL—VERDICT—IMPEACHMENT—DELIBERATIONS OF JURY—VENUE—HARMLESS ERROR.

1. Chancery will not enjoin a judgment at law and grant a new trial merely for error in the law court, but only because of fraud, accident, surprise, or some adventitious circumstance unknown to the party before judgment, and beyond his control.

2. If a party know, or by ordinary diligence could have known, before a final judgment in a law court, a fact, he must make it the ground of a motion for new trial, and, if refused, go to an appellate court, as equity will not grant him a new trial for it.

3. Equity will not grant a new trial because of prejudice in the community. That must be made available by application for a change of venue and writ of error.

4. A new trial in equity cannot be had on merely asking. Particular grounds pointed out by equity law must exist, and they must be clearly proven.

5. Jurors will not be heard to impeach their verdict, except in few instances. They are heard more readily to sustain their verdict.

6. Depositions read in a trial at law by a jury cannot be carried out by the jury, to be considered when deliberating on the case, except by leave of court. Code, c. 131, § 12.

7. In case the judge of a circuit is interested, a circuit court of a county of an adjoining circuit has jurisdiction to enjoin a judgment rendered in a court of his circuit.

8. Chancery cannot reverse or set aside a judgment of a law court for error or other cause, and order the law court to grant a new trial; but it can act on the person of the owner of the judgment by injunction against the enforcement of the judgment, and direct a trial by jury, and, upon verdict, either perpetuate or dissolve, in whole or in part, the injunction.

9. Where there is an injunction to a judgment against two or more persons, and only one signs the injunction bond or applies for the injunction, upon dissolution there should not be award of execution for damages at 10 per cent. on principal, interest, and costs from the date till dissolution of the injunction against all the judgment debtors, but only against those signing the bond or asking the injunction; nor should costs in the injunction case be given against those not going in bond or injunction.

10. Where there is no other error, this court will not reverse for error as to costs.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; Reese Blizard, Judge.

Bill by R. B. Graham against the Citizens' National Bank of Parkersburg. From a decree dismissing the bill, plaintiff appeals. Affirmed.

William A. Parsons and V. S. Armstrong, for appellant. V. B. Archer and William Beard, for appellee.

BRANNON, P. The Citizens' National Bank of Parkersburg brought two actions at law in the circuit court of Wirt county,—one against R. B. Graham and D. H. Bumgarner, and the other against R. B. Graham and M. M. Dent,—which were tried by jury, and in which the verdicts were for the bank, and judgments given for it. Graham then brought a chancery suit in Jackson county to obtain a new trial, and, it resulting in the dismissal of his bill, Graham appealed to this court.

The printed record is 385 pages, and the briefs copious; yet I think the matter to be considered very limited, and dependent on well-settled principles. The bill of 20 printed pages sets up very many matters as grounds for new trial, and impeaches the court and jury which tried the cases, and the community where the cases were tried, for prejudice against Graham, all of which substantially fail for want of proof; most of them immaterial, even if true. After a trial at law, application to equity for a new trial stands on very restricted ground. Courts of equity have no disposition to prolong litigation after fair trial at law. They will do so only where the reason for it is based on fraud, accident, surprise, or some adventitious circumstance beyond the control of the party. *Braden v. Reitzenberger*, 18 W. Va. 286; *Sayre's Adm'r v. Harpold*, 33 W. Va. 557, 11 S. E. 16.

From the many grounds presented by the bill for new trial, all are eliminated, and very properly so, by the last brief of appellant's counsel, but three, viz.: (1) That the depositions of Shattuck, Jackson, and Flaherty in some way got before the jury in its retirement to consider of its verdict, and were read by the jury; (2) that public prejudice existed in the town of Elizabeth and in Wirt county against Graham at the time of the trial; (3) personal ill-will and prejudice on the part of some jurors.

As to the depositions: This charge is sustained by the evidence of two jurors. A long list of Virginia and West Virginia cases, as well as late cases from almost everywhere, hold that the evidence of jurors will not be heard to impeach their verdict. *State v. Cobbs*, 40 W. Va. 724, 22 S. E. 310; *Probst v. Braenulich*, 24 W. Va. 357; *Steptoe v. Flood's Adm'r*, 31 Grat. 323; *Reynolds v. Tompkins*, 23 W. Va. 229; 4 Minor, Inst. pt. 1, p. 761; 2 Thomp. Trials, § 2618. But the

effort is to make this case an exception to the confessed general rule, upon the argument that while the evidence of jurors is inadmissible as to their motives in reaching a verdict, or the consideration they gave the evidence of persons or papers, or whether they considered irrelevant or improper evidence, yet they are competent to show collateral or independent circumstances, or facts which, by mistake, accident, or fraud, were before the jury. I do not think this exception can be sustained. Look at the reason of the rule. It is based on a general policy. In *Bank v. Waddill's Adm'r*, 31 Grat. 483, Judge Moncure says that the rule rests on three grounds: (1) Because the evidence would tend to defeat the solemn acts of the jurors; (2) their admission would open the door to tamper with jurymen after they have given their verdict; (3) because such evidence would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it. These reasons apply to this case. While the evidence of jurors cannot impeach their verdict, it is sometimes received to support it, though cautiously. *State v. Cartwright*, 20 W. Va. 32 (Syl. point 5). One juror says the depositions were not before the jury. He was foreman, and would likely know. Another, who, as Graham said, told him they were before the jury, when put under oath, says that he does not recollect that they were. If they were, it is strange he had forgotten it. The only evidence we have to show that the depositions were before the jury is that of Graham, whose evidence throughout shows a deep feeling, a strong prejudice, and very ready and liberal unrestrained statement in his own behalf, on this and other points. How does he know the depositions were before the jury? My construction of his evidence is that he saw a bundle of numerous papers, which were before the jury by consent and leave of court, returned into court when the jury returned their verdict, which were all wrapped up in a newspaper, and that at a subsequent time, after the court had adjourned, when he looked among those papers to secure some of his, he for the first time observed these depositions among them, and thence concluded they had been before the jury. On this he flatly states that they "were read by the jury," as if he had been in the jury room. Now, these depositions might have been put among the papers in the meantime. We do not know. We want certainly to nullify a tedious trial. This interested witness is not alone adequate to establish this important fact. Why did he not prove this by the clerk who would likely know? Is it his effort to defeat verdicts rendered in due course for just debts? If he did see these depositions for the first time after adjournment, it does not show that they were before the jury. If he saw them just when the jury returned, that utterly defeats his bill as to this ground of new trial, because the law compelled him to make a

motion then and there for a new trial, and state this fact as its ground. He did not. The law is that an application to equity for a new trial cannot be had on merely asking. He must prove good ground. *Black v. Smith*, 13 W. Va. 780. And the ground must be one which was unknown to the party before adjournment of court. *Alford v. Moore's Adm'r*, 15 W. Va. 597; *Meem v. Rucker*, 10 Grat. 508; *Faulkner's Adm'r v. Harwood*, 6 Rand. 126. I do not assert that, if these depositions were read by the jury, it would not be ground for new trial. I shall not discuss this, because their presence before the jury is not established; but in this connection it may not be without force, in denying the bill, to say that, if they were, it ought not to affect the case, but is a mere technical objection, to frustrate a fair trial, because they were taken before a commissioner, to whom the case was referred to take an account, and all parties agreed that they might be read in evidence, though they were not read on the trial; and to say, further, that the witnesses who gave them were examined on the trial, and it ought to appear that the depositions were different from their evidence. Did they hurt Graham more than the evidence of the witnesses? Did they contradict them? It does not appear. And how do we know the court did not, as it could, give leave to let them be carried out by the jury? This deposition matter is the core of the plaintiff's case, and there is nothing in that.

As to the second point,—prejudice in the community: If the case were a criminal case, we might more readily credit the existence of this prejudice; but it is hardly credible that a prejudice existed about actions of debt on two small promissory notes, sufficient to pervert justice in judge and jury. This is not a fact discovered after trial, and not one which ordinary diligence could not have revealed. Graham had lived at Elizabeth 13 years, was mayor, and well acquainted with the people. If this "torrent of prejudice," so called by a witness, existed, he surely knew it. The cases had been pending five years. Strange that the roar of the torrent was not heard till the trial, and not then till after verdict! Graham ought to have asked a change of venue to get away from this prejudice; but he took his chances, and lost, and on this ground wants to defeat a fair trial. Surely, too, as the trial lasted four days, the prejudice would crop out before the verdict. Why did not Graham make it a ground of new trial? "To sustain application to equity for a new trial, it should appear, not only that complainant could not lay his case before a jury, but why he did not move to set aside the verdict; and, though the province of a court of equity to inquire into alleged mistrial still exists, it has been circumscribed, and will not be exercised, unless it appears, not only that the verdict was erroneous, but that the plaintiff could not have had the mistake rectified by

the use of proper diligence." *Bart. Ch. Prac.* 42; *Braden Case*, 18 W. Va. 286 (Syl. points 1, 8). But the truth is no such prejudice is shown as would at all affect the verdict. When asked whether he could not have made inquiry to find out prejudice and other things of which he complained, Graham answered, "No, sir; was too busy preparing my case and attending to my family." If this prejudice existed, was he willingly blind to it?

Third. As to prejudice of some jurors: This is one of the numerous charges of the bill selected by counsel as one of three relied upon, and there is no evidence to sustain it. The defense had right to peremptory challenge of jurors, and right to test them as to prejudice and partiality. There is no specification under this head,—no proof, no argument, because there is no proof.

Though not under the three heads of relief specified by counsel in their brief, complaint is made that the case was not continued for the absence of witness Bumgarner. It is only necessary to say that this was a subject for exception and writ of error.

The brief specifies also that certain pass books, bank books, notes, and checks produced by Graham, and used by the attorneys at the bar, were locked up by order of the judge from Friday till Wednesday, during an adjournment, and the clerk refused access to them to Graham during that adjournment. Now, this is a general charge. Graham knew these papers well. But, surely, the judge would have given him time to examine them on reassembling, if asked. It is not shown that he asked indulgence. If any harm was done in this, it was proper for a motion for a new trial and exception and writ of error.

I have written too much for the case; for really, on the merits, to speak mildly, it is barren of strength for relief. The whole face of the case shows it to be merely an effort, on no solid basis, to get rid of a fair trial and verdict.

It is cross assigned as error by appellee that the circuit court of Jackson had no jurisdiction. As appellee gained the case, it does not prejudice it; but the question is raised. The judge of the circuit in which Wirt county is included was interested in the case, and under Code, c. 123, § 1, cl. 7, the suit was brought in Jackson county. It is argued that while chapter 123 points out, in general, in what particular county a suit is to be brought, yet chapter 133, § 4, is a special enactment, and it limits an injunction suit to the county in which the judgment, act, or proceeding shall be, and, as this is an injunction, the suit must be in Wirt. If so, a case might be long tied up, awaiting decision, because of the incompetency of the judge to act in the case. True, our present provisions for special judges relieve such cases; but we must discard that considera-

tion, as these enactments existed before those provisions. If that argument is tenable, then nothing but the coming of a judge of another circuit by exchange would relieve the case. Clause 7 says that "if a judge be interested in a case which, but for his interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county of an adjoining circuit." In its well-chosen words and its known purpose, this clause imports that it controls, by its generality, the particularity of all other clauses of chapter 123, and also section 4, c. 133, as to injunctions. It says: "You may sue in an adjoining circuit in any case which, but for such interest, would be proper for the jurisdiction of his court." It is an exception to other general provisions. True, a judge of any circuit may award an injunction, but cannot hear it; for, after the award, the injunction must be heard in the county assigned to it by law. I think that said injunction provision relates to pure bills of injunction, not to cases where other causes of action and relief would give jurisdiction in another county, the injunction being then merely ancillary. It is not certain how we should classify this suit. It seeks a new trial, and, until that can be had, an injunction to the enforcement of the judgments. It may be said that, as the object is a new trial, it is not a pure bill of injunction, and therefore the injunction section does not control the jurisdiction; but as the object of a bill in equity for a new trial, so called, is not purely for a new trial,—that is, as it does not give a retrial in the law court, but only directs an issue in the chancery suit as a step to inform the chancellor whether he should perpetuate or dissolve the injunction,—I regard the injunction the main relief, and I hold the case to be one of pure injunction. Equity does not grant a new trial in the law forum. It only gets control of the person by injunction, tries the merits by a jury, and then dissolves or perpetuates the injunction, that being the process by which it executes its function. *Railroad Co. v. Davisson*, 45 W. Va. —, 29 S. E. 1028.

It is assigned as error that, on dissolution of the injunction, the court, under section 12, c. 133, Code 1891, combined principal, interest, and costs of the judgments up to the date when the injunction took effect, and gave damages on the total at 10 per cent. per annum from that date to the date of dissolution of the injunction against Graham and Dent, whereas Dent did not sign the injunction bond. I think it is wrong to give that total award of execution against Dent. It should have been against Graham alone. Thus Graham would be liable upon the injunction bond, and both on the original judgment. But the effect of this is to give 4 per cent. for only about 19 months against Dent,—much less than \$100,—and therefore we cannot reverse the case for that. *Lamb v. Cecil*, 25 W. Va. 288.

The court erroneously awarded half the costs of the bank in defending this suit against both Graham and Dent. Dent was a party, it is true, but he did not sue out the injunction, or sign its bond, or seek to sustain the injunction by any pleading; and the award of costs against him I regard as wrong. One debtor cannot thus impose costs on another. But we have settled it that we will not reverse a decree where there is no other error than in the matter of costs (*Long v. Perine*, 41 W. Va. 314, 23 S. E. 611); but we will correct the decree so as to protect Dent against this erroneous imposition of costs. We must affirm the decree.

SHANK v. GROFF et al.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1898.)

TENDER—SUFFICIENCY—MORTGAGES—INTEREST.

1. While in a tender an actual visible production of money is dispensed with where the party denies all right to pay any sum, yet it must appear that there was an actual offer to pay, and that the tenderer had the money, and was about to produce it, and would have done so if he had not been prevented by such denial of right to pay.

2. Tender, to stop interest, must be of an exact amount, and must be kept good and ready at all times to be paid to the creditor on demand, which must be shown by the tenderer.

3. A bill to redeem a mortgage must allege and rely upon a tender, if one is claimed; and the money must be paid into court.

4. One making a tender, and then using the money, and afterwards failing to pay the money into court, with a pleading relying upon such tender, loses its benefit, and will not be released from interest by it.

(Syllabus by the Court.)

Appeal from circuit court, Grant county; Robert W. Dalley, Jr., Judge.

Bill by Samuel B. Shank against Samuel Groff and others. A decree was rendered, from which defendant Given appeals. Reversed.

George Baylor and Benj. Dalley, for appellant. F. M. Reynolds, L. J. Forman, and J. N. McMullan, for appellee.

BRANNON, P. This case was once before in this court. 43 W. Va. 337, 27 S. E. 340. The bill claimed that a deed, absolute on its face, was in fact but a mortgage, and it sought to compel the parties claiming under that deed to so treat it, and allow a redemption of such mortgage. This court decided that it was a mortgage, and directed that a redemption be allowed. When the case went back, it was referred to a commissioner to report the proper sum "to be paid in such redemption," and his report fixed a sum which excluded interest for some years, because of a tender which Shank claimed he had made, and the court sustained the commissioner, and allowed a redemption at the sum fixed by him. To this abatement of the debt by the allowance of said tender, Given, the party claiming the debt, objects, and appeals.

I do not think that the evidence shows any tender. It seems to show rather a mere talk between the parties, Shank claiming the right to redeem, and the other parties denying it; a mere expression by Shank that he desired and was willing to pay the proper sum to redeem, not even an actual offer, with money in his pocket to redeem. A mere proposition to redeem will not do. The strict law of tender requires the actual production of a precise and proper sum of money in the outstretched hand, so that the creditor may take it. I know that circumstances will mitigate this strictness, but still there must be what shall be called an actual offer of the actual money; it must amount to that. "Mere readiness and willingness to pay the debt amount to nothing without an offer or tender of payment, and a refusal by the creditors." 25 Am. & Eng. Enc. Law, 916; Moore v. Harnsberger's Ex'rs, 28 Grat. 667; Moynahan v. Moore, 77 Am. Dec. 474. Though it is claimed in this case that the parties entitled to the money at the time of this alleged tender refused to allow a redemption, and that such refusal dispenses with the production of actual money, yet it must be clear that the offer to pay was an actual offer, with money present on the person of the tenderer, though not presented to sight. If the party had not the money, and his proposals to pay were a mere pretense, surely it would be no good tender. Therefore the circumstances must be such as to show that the party was ready to make actual payment, and that he would have done so but for such refusal. "Actual tender of money is dispensed with if the debtor is willing and ready to pay, and about to produce it, but is prevented by the creditor declaring he will not receive it." McCalley v. Otey (Ala.) 42 Am. St. Rep. 87 (s. c. 12 South. 406). Shank says that he went to Keneagy and Groff and said to each one that he was there to pay the money, but he does not say that he had the money, that he showed it, that he actually offered it; nor does he express any sum that he offered. Indeed, it appears that likely he did not know the sum to be paid, but that it was to be ascertained by calculation. Anyhow, he does not say what sum he offered to pay, nor even that he had the money there to pay, nor does he give date of offer. We must be able to say that he had the money on his person, and we cannot. Moynahan v. Moore, 77 Am. Dec. 474. "A plea of tender ought to state particularly the day when it was made. Instead of pleading that he offered the principal and all the interest due, the defendant ought to compute the interest, add it to the principal, and say that he offered a sum certain." Downman v. Downman's Ex'rs, 1 Wash. (Va.) 26. But a conclusive consideration against the allowance of this tender is that it was made in the fall of 1891, and in 1893 Shank brought this suit, not to enforce a tender, nor to declare a deed a mortgage, and allow the sum that had been tendered to be paid in full redemption, show-

ing the truth of the tender, and that he still insisted upon it; but the bill and two amended bills waived such tender, if it ever existed, by admitting repeatedly that there was due and owing from Shank the sum of \$16,000, with interest thereon from the 1st day of April, 1889, and averring a willingness to pay that sum and that interest, and offering to pay it, and asking the court not to declare that he owed a specific amount as one tendered, but to ascertain the amount by reference to a commissioner. He insisted in his bill that he had the right to force Keneagy and Groff to convey and release the land "upon the payment of the sum of \$16,000, with interest thereon from the 1st day of April, 1889." Again and again, in these bills, did Shank admit that that sum and that interest were due from him. After he had made a tender in 1891, why did he not insist upon it in these bills filed in 1893? Why offer to pay more than was due from him? And he swore to the bills. The bills are utterly inconsistent with any idea that a tender stopping the interest in 1891 had been made. After he had made that tender, he should have pleaded and relied upon it in his bill; and, not only that, but he must bring the money into court with his bill, else the tender is unavailing, even if he had made it, and made a legal one. He neither pleaded that tender nor brought the money into court. He must bring it into court with his bill, so that the creditor can accept it if he wishes. Gilkeson v. Smith, 15 W. Va. 44; Shumaker v. Nichols, 6 Grat. 592; 25 Am. & Eng. Enc. Law, 932; Spann v. Baltzell, 46 Am. Dec. 346. The nearest approach to mention of any tender in the bill is the very general language that he "offered to pay them whatever was due on the Henning interest, but they, and each of them, refused to accept said amount, or any part thereof," and that he was ready to pay into court whatever sum the court might determine to be due; but he mentioned no amount as having been tendered, and relied on no tender, but repeatedly admitted that he owed \$16,000, with interest from April 1, 1889. This tender was not in the pleadings, but was first presented before the commissioner by a claim made for abatement of interest. This is no plea of tender. It is simply a bill to redeem on the payment of such sum as the court should fix. "If the bill be brought on the ground of a tender made and refused, the tender should be followed up by payment into court at the time of the filing of the bill, which should contain a proper averment of a compliance with this requirement." Jones, Mortg. § 1095. I should think, if no actual money is produced, there ought to be a statement of the sum offered or ready to be offered. "Tender made and refused, to stop interest, must be the exact amount due, and must be kept good and ready at all times to be paid to the creditor at his demand, and on plea must be followed by the payment of money into court." McCalley v. Otey (Ala.) 42 Am. St. Rep. 87 (s. c. 12 South.

406). No sum was tendered or named, but it seems that, if he was ready to pay, the creditor must count the debt, and fix the sum. This is no tender.

But there is another strong argument against abating from the creditor's debt interest by reason of the alleged tender. The money was not paid into court, nor deposited where the creditor could get it, nor, in a legal sense, kept ready for him. Shank seeks to cut the creditor out of interest, when he used the money himself, and derived interest therefrom. Money of one man, used by another, as justly calls for compensation by way of lawful interest as does the use of a horse or any other property, and the case must be plain to deprive its owner of this legal reward. All books say that the tender must be kept good, and many strong cases say that, if the tenderer use the money, it destroys the tender. Judge Dent strongly presents this view in *Thompson v. Lyon*, 40 W. Va. 97, 20 S. E. 812. I quote from a strong opinion in *McCalley v. Otey* (Ala.) 42 Am. St. Rep. 90 (s. c. 12 South. 407), as follows: "Unless the tender is kept good all the time,—that is, unless the debtor is willing and prepared to make payment at any time after the tender, if the creditor should conclude to receive it, and until the money is paid into court upon a plea,—the debtor is chargeable with interest. He cannot make a tender to-day, and then use the money for his profit, and escape payment of interest. He is released from the payment of interest upon the supposition that he has been deprived of the use of the money by holding himself in readiness all the time to pay his creditor upon demand. The burden to make this proof, when the tender is denied, rests upon the debtor who seeks to avail himself of the benefit of a tender." I held the view in the *Thompson Case* that generally the use of the money by the debtor did not deprive him of his tender; but where, as in this case, there is a claim of tender, and later a bill filed, and the party does not yet even pay the sum into court, but still uses it, his tender cannot stop interest. What right or justice has he to receive interest and pay none? I am not sure now but that Judge Dent's position was right in all cases, though the authorities are divided on it. We think the sum proper to be decreed in this case is \$16,000, with interest from the 1st day of April, 1889, and that the alleged tender is unavailing. We reverse the decree, and remand the case that a decree may be entered as herein directed.

DENT v. BOARD OF COM'RS OF TAYLOR COUNTY.

(Supreme Court of Appeals of West Virginia.
Dec. 31, 1898.)

MANDAMUS TO ELECTION CANVASSER — CERTIFICATES OF RESULT—BALLOTS AS EVIDENCE.

1. A mandamus will not issue to compel an election canvasser to assent to and certify the

result of a recount of ballots as found by another canvasser, though both were present at it, if they disagree as to such result, and the unwilling one says it is not an adequate, correct, true recount. (By two judges.)

2. Certificates of the result of an election made by the commissioner at the precincts are prima facie evidence of such result. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons, as to afford a reasonable probability of their having been changed or tampered with. If there has been an opportunity for tampering with ballots, they lose their character as primary evidence. *McCrory, Elect.* § 443. (By two judges.)

3. If there is evidence tending to show that ballots are not sealed up after being counted by the precinct election officers, the ballots, on recount, are not the best evidence, but the result will be governed by the precinct certificates, where the certificates and the recount differ in result. (By two judges.)

4. A mandamus cannot be brought against an officer in his official capacity after his term of office has ended. 13 Enc. Pl. & Frac. 661. (By two judges.)

English, J., dissenting.

(Syllabus by the Court.)

Application by W. R. D. Dent for a writ of mandamus to the board of commissioners of Taylor county. Dismissed.

A. N. Campbell and John H. Holt, for petitioner. John W. Mason, George W. McClintic, Joseph Gaines, and Atty. Gen. Edgar P. Rucker, for respondent.

BRANNON, P. William R. D. Dent and Humphrey F. Brohard were competing candidates at the election in November, 1898, to represent Taylor county in the house of delegates. The board of canvassers found upon the returns of the officers of election at the various precincts that Brohard received 1,607 votes and Dent 1,526 votes, electing Brohard by 81 majority. Dent demanding a recount, a recount claimed by Dent as complete showed that Dent received 1,558 votes, and Brohard 1,521, giving Dent a majority of 37. There being a vacancy in the membership of the county court, the canvassing board was composed of two commissioners, W. J. Curry and J. K. Means. Curry signed a statement and declaration upon the book called "Election Record" that Dent was elected, and he signed and delivered to Dent also a certificate of his election. Means did not sign said entry on the election record, but refused to do so, and refused to sign Dent's certificate of election, and, on the contrary, caused to be entered of record in the office of the county court—if that be material—a declaration that Dent received 1,526 votes and Brohard 1,607, as shown by certificates of the precinct officers; and that he declined to unite with Curry in declaring such result as Curry found by such recount, as he was not satisfied that such result was correct; and Means issued and delivered a certificate

of Brohard's election. Dent asks of this court a mandamus to compel said Curry and Means, as composing said board of canvassers, to declare the result as ascertained by said recount, and to sign certificates thereof, and transmit one to William M. O. Dawson, secretary of state, and one to each of said candidates. An alternative mandamus having been awarded, Means filed a return, and Brohard has intervened, and filed a return to said alternative writ, and the plaintiff, Dent, has demurred thereto.

I remark that Dent's petition does not seek a mandamus to review the action of the canvassers for error in counting ballots, and to have this court recount ballots and declare the result, and thus the case does not seem to me to raise the very grave question which would then arise, as to the jurisdiction of the judiciary to count ballots, and declare the result of an election for the house of delegates, in view of the provision of the constitution that each branch of the legislature shall be the judge of the election and returns of its members. The plaintiff's case is based solely on the theory that there has been a complete recount of ballots electing him, and that he is entitled to a declaration and certificate thereof by said canvassers to give him a prima facie title to the office. I think there are three reasons against awarding a peremptory mandamus. One reason is that there is no finished, legal recount, by which both commissioners found a final result, so as, in law, to call for the signature of both commissioners to the declaration and certificate. The statute says that when the canvassers canvass the returns, whether with or without a recount, they shall enter the result in the election record, and deliver certificates thereof. This record entry and certificate must, in the words of the act, be signed "by the board, or a majority of them." This record entry has not been signed. It is urged that Means' return admits that there was a recount, showing Dent elected, and that upon it a mandamus should go. The return cannot receive such construction, taken as a whole. That return does say that the canvassers opened the packages of ballots after they had been sealed up upon the first count, and that they were read by Curry, and the tally kept by the clerk, and that according to the report of the clerk Dent received 1,558 votes and Brohard 1,521, but that Means did not agree with Curry as to the correctness of said recount, and that Means refused, and still refuses, to make a record of the same, and that thereupon Curry, of his own motion, in the absence and without the knowledge, consent, or concurrence of Means, made the record in the election record purporting to be the record of said recount; that Curry claimed that a true and complete recount had been made, and desired to record it, but that he (Means) was of opinion that a full and complete recount had not been made, and he refused, for that

reason, to record the same. Said return says: That the recount began at 9 o'clock a. m. of November 15th, and continued until 3 o'clock next morning, with the exception of one hour for dinner and one hour for supper; and that the board handled and considered over 3,129 ballots, all being considered as to three offices, and a portion as to four. Two hours were consumed by counsel in argument and other matters incident to the work. That the inspection and count were hurriedly made, and under such circumstances that he (Means) was not and is not certain of the accuracy of the recount. That he was not well, and during the greater part of the recount was physically exhausted. That said Means found that said recount showed in one precinct a change greater than one vote in four from the result as determined by the commissioners of election at that precinct, and very great changes at other precincts. That he believed and says that a more careful inspection of the ballots will determine their genuineness and the correctness of the canvassers in reading them, and of the clerk in reporting the count, and was necessary to determine accurately, and do justice to the parties. That for these reasons he did not believe that an adequate, full, and just recount had been made; and that such recount had not been made; and that said recount should not be recorded, and certificate issued, until an opportunity is given the canvassers to require the attendance of the commissioners, poll clerks, and others present at said election to testify respecting the same, and especially to ascertain the genuineness of the ballots; and that no such opportunity had been given, and no such witnesses had been examined touching such questions. That the ballots at precinct No. 5, Grafton district, were not sealed by the commissioners, as required by law, nor the names of the commissioners written upon the envelope containing them, as required by law, but that they were only partially inclosed in a torn envelope, not sealed, but only tied about with common twine, and neither sealed nor signed by the commissioners. That no sufficient and proper inspection or recount of the ballots at that precinct, and others cast in said election, was had. The return further says that: "Immediately after said Curry had the record of said partial recount, made as aforesaid, entered upon the record book, he, the said Curry, absented himself from Taylor county, left the state, and remained absent for more than a month, and until the day respondent's successor entered into office in the place of respondent; that during this time respondent was unable to make a full and complete canvass as to said recount, for the reason that he and said Curry composed the said board, and, in the absence of said Curry, no quorum could be secured; that during all this time, up to his retirement from office on December 19, 1898, when his successor went into office, respondent

ent was exceedingly anxious to complete said canvass, and ascertain and declare the true result of said election." Said return further states that at the time of making said "partial recount he became convinced that a more careful examination of said ballots should be had for the purpose of determining their genuineness." Brohard alleges that he and his counsel were refused an inspection of the ballots on said recount.

I have stated enough of the contents of Means' return to show that it cannot be construed as admitting, but must be construed as denying, that a recount, finished and completed, existed, so as to warrant a mandamus to compel Means to approve it, and sign a certificate thereof. If the application were to compel the commissioners to reconvene and recount, that would present another question; but here it is claimed that there was a perfect recount, and that it only remains to execute it. In no sense can we regard this recount as so completed. One canvasser says that it is correct, and satisfies his judgment and conscience; the other says it is not correct, and does not satisfy his judgment and conscience. Shall he be compelled to give an assent under such circumstances? It may be asked, shall a canvasser be allowed to withhold a certificate of election by merely saying that he is not satisfied with the result of a recount? If it clearly appeared to the court that he was wrong in so refusing, the court would compel him to accede; but we have no ballots before us, if we lawfully could have for this office, and we cannot say that Means is willfully acting against his duty under oath when he tells us under oath that his judgment and conscience were not satisfied, and he was present in the county, ready to make further canvass and inspection of the ballots. I know that the duty of canvassers is, as to the general function of making a canvass, ministerial; but within the pale of that action their action is in some respects quasi judicial, calling upon them to exercise judgment and discretion. Thus they act judicially in determining that the ballots, poll books, and certificates of the election returns are genuine or altered. *Brazie v. Commissioners*, 25 W. Va. 213. I have no hesitation in saying that if a canvasser, before he signs a result, becomes dissatisfied, and desires a review and re-examination and recount of the ballots, he has a right to have it. He has a discretion in making up his mind. Though a candidate has no right to a second recount, surely a member of the board has, in order to finally make up his mind. When his return states that upon a recount it does not find the true result, and that he did not assent to it, it seems to me that ends it; and he will no more be compelled to sign than would a judge be compelled to sign a bill of exception by mandamus when he says that it does not truly state the facts. I repeat that if we had the ballots before us, and could see that Means was corrupt, or par-

tisan, or arbitrary in refusing his assent, we might, perhaps, compel him to give his assent; but, without such ballots, how can we say whether his hesitation is proper or improper? How can we say that his discretion has not been properly exercised? How can we deny him the exercise of judgment and discretion of a public officer under oath? If we follow Judge English in *Marcum v. Commissioners*, 42 W. Va. 273, 26 S. E. 281, we must refuse the mandamus in this case. He stated that the writ does not lie to compel the exercise of discretion by an inferior tribunal in a particular way; that, while it will be compelled to act in some way in the matter (that is, compelled to action), yet it will not be compelled to act in a particular way, where that manner involves the right to exercise discretion,—compelled to act, but not directed how to act. He said that, as the ballot commissioners of Putnam county had acted by putting one candidate on the ballots, yet they could not be compelled to put a different candidate on, though he was the legal nominee of the party. Apply Judge English's doctrine in this case. Both canvassers, Curry and Means, did act, one in one way, the other in another; one received the ballots as telling the result, the other received the precinct returns as evidence of the result; one declared Dent elected, the other declared Brohard elected. It is now proposed to make Means declare Dent elected; that is, to exercise his discretion and judgment in a particular way, contrary to the principles stated by Judge English. Those principles are sustained by law, as a general proposition. In that case the majority of the court held that under chapter 25, Acts 1893, mandamus could be used with the same effect as certiorari in reviewing action of officers under the election laws, and that the writ had wider scope therein than under the common law as expounded by Judge English. And so I say now, in matters of election, when mandamus is used to review the action of election officers, and to reverse them for error, it is efficacious even in matters where those officers are vested with discretion; but that is because of that statute, and is not at common law. But note that this mandamus does not seek to review the work of these canvassers, does not bring before us the ballots, that we may see whether the action of one or the other canvasser is right. On the contrary, it assumes the recount as made, and asks us to compel Means to approve it when he disapproves it, and his action and judgment were contrary to it; thus asking us to compel his discretion in a certain direction. The case thus falls, not under that statute, but under the common law as laid down by Judge English. In declaring the result on the mere certificate from the precinct, canvassers act purely ministerially, and, but for the statute allowing a recount, they could not go behind those certificates. *McCrary. Elect.* § 227. And upon a recount I have

heard it suggested that the character of the function changes, and that the board becomes a court with judicial powers, having additional discretion, and bound to exercise judgment in some matters; for instance, to construe ballots, and say for whom they were cast, or whether the ballot is void or not. If this doctrine be true, the case is clearer against a mandamus. Whether still canvassers or not, a mere ministerial body or not, their action involves discretion beyond what it does when acting only on precinct certificates. I conclude, therefore, that, in the absence of a complete recount, joined in by both commissioners as final, a mandamus cannot issue.

I now give another reason against awarding a mandamus. It is undisputed that at two precincts, casting hundreds of votes, the ballots were not sealed up in closed envelopes, with the names of the commissioners written across the seal. When the commissioners went to put the ballots in the envelopes, the envelopes were torn half way down or more, so that they could not be sealed, and so that the officers could not write their names upon them, and were merely closed with twine strings tied about them, and thus transmitted by the hands of individuals to the clerk's office, where they remained in the ballot boxes for some days, until the canvassers met. Now, I disclaim utterly any imputation upon anybody of tampering with or altering these ballots. But this I state as a legal proposition: that, as evidence before that board of canvassers, the certificates made at the precincts were *prima facie* evidence of the result, and good until shown to be wrong. These certificates are made in the presence of numerous election officers of different parties eyeing the count, and that with scarcely any motive for wrong, and they are likely to tell the truth. The burden is on him who denies their truth to show that they are wrong. 6 Am. & Eng. Enc. Law, 335; McCrary, Elect. § 445; Cooley, Const. Lim. 788. The ballots themselves are the highest evidence of the result, when their identity as cast is established. McCrary, Elect. § 443; Hartman v. Young (Or.) 20 Pac. 17. But, if those ballots have not been preserved with the scrupulous care and in the manner directed by law, they lose their force as evidence of the result, and do not overthrow the precinct returns. "Where the ballots are preserved properly, so that they may be recounted by the order of court, they will govern, when there is a difference between them and the returns. But this should never be allowed unless the recount is made under such circumstances that it will be presumed to be more accurate than the official count, or where the ballots have been so kept that there is no danger that they have been tampered with." 6 Am. & Eng. Enc. Law, 335. "If there is evidence tending to show that the ballots are not sealed up after being counted by the board of canvassers, * * * the ballots, on a recount by the board

of supervisors, are not the best evidence, but the court may adopt the result arrived at by the board of canvassers." *People v. Burden*, 45 Cal. 241. "If they have not been kept or protected with that zealous care which the statute contemplates, or so as to preclude opportunity for intermeddling with them, they are the weakest and most unreliable evidence." *Hartman v. Young*, supra. "If the ballots have not been kept as required by law, and surrounded by such security as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all." *Cooley*, Const. Lim. 625. This doctrine is abundantly supported. *Hartman v. Young*, supra; *Quinn v. Lattimore*, 120 N. C. 426, 28 S. E. 638; *Andrews v. Probate Judge*, 74 Mich. 278, 41 N. W. 923; *McCrary*, Elect. § 443, citing *Hudson v. Solomon*, 19 Kan. 177; *Martin v. Miles*, 40 Neb. 135, 58 N. W. 732. *Paine*, Elect. § 776, says that, "before courts or legislative bodies should receive the result of recounts, there must be absolute proof that the ballots have been safely kept, and that they are the identical ones used at the election," and that not until this is proved beyond all reasonable doubt can force be given to the recount. Judge English, in an opinion concurred in by Judge Dent, in a case where there was no whisper that the ballots were not the true ones cast, held that when they were not sealed up they could not be counted. *Snodgrass v. Wetzel Co. Ct.* 20 S. E. 1036, 44 W. Va. 56. He said that the law did not intend that even the clerk should have access to ballots required by law to be returned in a sealed package, properly indorsed, until such package was opened by the canvassers. But there was the precinct certificate, showing the same result as the ballots, while here they differ. The certificates prevail. I do not mean to say that there was any wrong touching these ballots, though the returns charge it. It was only a question before the board as to the force of two instruments of evidence, one being the ballots, the other the precinct returns; and I am bound to hold, under the principles just stated, that the precinct returns prevail in law over the ballots, and, instead of entitling Dent to the certificate, would give it to Brohard. Then how can we compel Means to declare Dent elected upon the strength of the recount that was made, thus giving superior weight to the ballots over the certificates?

There is another reason against the award of a mandamus. When the petition for it was presented, Means had ceased to be a commissioner of the county court by expiration of his term. "A writ of mandamus cannot be brought against an officer in his official capacity after his term of office has ended." 13 Enc. Pl. & Prac. 661; *High*, Extr. Rem. § 441; *Stock Co. v. Smith*, 165 U. S. 28, 17 Sup. Ct. 225. If there was a completed recount, as spread upon the record

and signed by Curry, the mandamus should have been against the commissioners in office at its date, as the county commissioners are a continuous body, and nothing remained but to sign the result of the recount, if it had been in fact complete, as it in fact was not, under the circumstances developed in this case. *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 863. Judge McWHORTER concurs herein. The alternative mandamus is dismissed.

DENT, J., absent.

ENGLISH, J. (dissenting). At the late election, W. R. D. Dent and Humphrey F. Brohard were opposing candidates for the house of delegates from the county of Taylor. At the time the returns of said election came in, W. J. Curry and J. K. Means were the only commissioners of the county court of said county, and as such were ex officio the board of canvassers, whose duty it was to canvass the returns of said election. In pursuance of the duty imposed upon them by statute, they proceeded to count the vote, and enter the same upon their record, and ascertained that at said election said Dent received 1,526 votes and said Brohard received 1,607 votes for said office, the majority in favor of said Brohard being 81 votes; and thereupon said W. R. D. Dent demanded a recount of the ballots returned, which was proceeded with in the presence of counsel for the respective parties and various witnesses, and resulted in ascertaining that said Dent received 1,558 votes and said Brohard 1,521 votes, finding the majority in favor of Dent to be 37. When the recount was completed, J. K. Means left the room where the recount was carried on, and W. J. Curry proceeded to record the result on the election record, as required by statute, and sign the same, and also signed a separate certificate of the result of the election in said county for each of the offices to be filled, including the house of delegates. Said J. K. Means did not return to the place where said recount was made, and subsequently declined to sign the record of the result which had been signed by said Curry. Subsequently said Means claimed that he was not satisfied with the result of said recount, refused to sign the certificate of the result entered on the election record by said Curry, and caused to be entered on said election record a declaration that said Dent received 1,526 votes and Brohard 1,607, as shown by the certificate of the returns from the various precincts, and signed a certificate of said Brohard's election to said office; thus utterly ignoring and disregarding the result ascertained by the recount demanded by Dent. Thereupon said Dent applied to a judge of this court for a mandamus nisi to compel said Commissioners Curry and Means to declare the result as ascertained by said recount, and to sign certificates thereof, and dispose of them as required by statute. A

mandamus nisi having been awarded, said Means and Brohard filed returns to said writ, and said Dent demurred thereto. On the 31st day of December, 1898, the case was heard, and the above opinion handed down. In which I cannot concur, for the following reasons:

First. When the legislature, in section 68 of chapter 3 of the Code, provided that "after canvassing the returns of the election, the board should upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same," and that "when they had made their certificates and declared the result as thereafter provided, stating what shall be done with the sealed packages, poll books," etc., and further provided that, "if the result of the election was not changed by such recount the costs and expenses should be paid by the party at whose instance the same was made," it never intended that a member of the canvassing board should, after a recount was demanded and made, utterly ignore the result of such recount, and enter on the election record the result ascertained from the returns of the precinct officers before the recount was demanded. Who would demand a recount, and incur the risk of paying the costs of the same, if a member of the board could disregard the result, and excuse himself by saying he was not satisfied therewith? While it is true that one of the envelopes or paper sacks in which the ballots were returned from the voting precinct to the clerk's office was ripped in putting the ballots in it, and it was not properly sealed and indorsed, yet the sack was tied up with twine, and placed in the ballot box, and in this way brought to the clerk's office, and the ballots so returned were counted by the board of canvassers, and the number of votes cast for W. R. D. Dent and the number cast for H. F. Brohard were ascertained; and, after the recount had been demanded by Dent, and the votes recounted in the presence of J. K. Means, the defendant, so far as appears without objection on his part, on the 17th day of December, 1898, said J. K. Means went into the clerk's office of Taylor county court, and made an entry upon the election record that he, as a member of the board of canvassers of Taylor county, charged with the duty of canvassing, ascertaining, and declaring the result of the election held in said county on the 8th day of November, 1898, said that he declined to join with his associate, W. J. Curry, in certifying the result of said election as recorded by said Curry alone on the 14th, 15th, and 16th of November, 1898, purporting to be the result of said election, for the reason that he (said Means) was not satisfied that the result as above declared was correct. He, however, proceeds to state that he concurs with the recount, except as to the record for the offices of the house of delegates and county commissioner for the four-year term, and

then proceeds to declare the true result to be as ascertained on counting the ballots returned by the precinct commissioners, and proceeded to issue a certificate in accordance with the result ascertained before the recount was demanded, certifying that he had carefully and impartially examined the returns of said election. It thus appears that the ballots were not in such bad condition as to prevent this officer from making a careful and impartial examination when they were first returned to the clerk's office, and nothing appears to have prevented the same careful and impartial examination on the recount, and yet Commissioner Means was not satisfied, nor does it appear that he asked to make any further examination of the ballots. We come now to the inquiry whether the duties of this commissioner with reference to counting and recounting the vote were such as he could not be compelled to perform by mandamus. We find the law thus stated in 13 Enc. Pl. & Prac. p. 520: "While the writ of mandamus lies in many cases to courts and judicial officers to compel them to perform certain acts, or to take action in various classes of cases, in no case will the writ issue to control the exercise of discretion vested in such court or officers;" and on page 528 of the same volume it is said: "When the writ of mandamus issues to ministerial officers, though they constitute part of the machinery of the courts, or to judicial officers to command acts which are ministerial, and involve no exercise of discretion, the writ may control such officers, and not only command them to perform the acts in question, but direct the manner of such performance and the decision which they are to render,"—citing numerous authorities. McCrary on Elections (page 198, § 261), on this question, says: "It is well settled that the duties of canvassing officers are purely ministerial, and extend only to the casting up of the votes, and awarding the certificate to the person having the highest number. They have no judicial power,"—citing many authorities. The same author (page 290, § 385) says: "The courts will not undertake to decide upon the right of a party to hold a seat in the legislature, where, by the constitution, each house is made the judge of the election and qualification of its own members; but a court may, by mandamus, compel the proper certifying officers to discharge their duties, and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal." In the case of *Brazie v. Commissioners*, 25 W. Va. 220, Snyder, J., delivering the opinion of this court, says: "The authorities uniformly agree that the precinct commissioners act judicially in passing upon the right of persons to vote. The county commissioners, then, as a mere ministerial body, have no power to review this judicial action, because to do so they must of necessity act judicially," etc. Again, on page 222, he says: "All the acts which the commission-

ers can do under the statute must be based upon the returns. Their final act and determination must be such as appears from and is shown by the returns from the several voting places of the county to be correct. * * * They are authorized to enter no judgment, and their power is limited by the express words of the statute which gives them being to the signing of a certificate containing the whole number of votes received by each person for each office, and therein declaring the result, after having carefully and impartially examined the returns of the election. This certificate, thus signed, is not a judicial judgment, * * * but it is a declaration of a conclusion limited and restricted by the letter of the statute." In the case of *Lewis v. Commissioners*, 16 Kan. 107, Brewer, J., delivering the opinion of the court, said: "The view taken by the Iowa court seems to us the correct one. It is the duty of the canvassers to canvass all the returns, and they as truly fail to discharge this duty by canvassing only a part of the returns, and refusing to canvass the others, as by refusing to canvass any; and it is settled by abundant authority that where the board refuses to canvass any of the votes it may be compelled to do so by mandamus, and this though the board has adjourned sine die,"—citing *Hagerty v. Arnold*, 13 Kan. 367, as a case in point. "The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of a term of the district court would prevent this court from compelling by mandamus the signing of a bill of exceptions by the judge of that court, which had been tendered to him before the adjournment. * * * As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which, in the first place, the duty ought to have been done." Now, applying this ruling to the case under consideration, it appears that W. R. D. Dent demanded a recount of the votes, which was proceeded with, both commissioners being present; Curry, one of the commissioners reading the ballots, and the clerk recording them, until all the ballots were thus canvassed, and the vote recorded. It does not appear that Means objected at the time to the mode of ascertaining the result, or to the conduct of either of the parties engaged in making the recount, nor does it appear that he asked that the ballots from any of the precincts should be recanvassed. Curry remained until the record was made up by the clerk, and signed the same, and made out the certificates. Means, in his return, says that he refused to make a record of said recount, but does not state when he so refused, and to whom he gave notice of such refusal. Said Means, in his return, also says "that imme-

diately after said Curry had the record of said partial recount, made as aforesaid, entered upon the record book in the clerk's office of the said county, he absented himself from Taylor county." But the record shows that Curry signed the proceedings of the 15th of November, including said record, and that on the 16th both Means and Curry were present, and Brohard and Armstrong tendered bills of exceptions; but the record nowhere shows that Means objected to the recount, or assigned any reason for not signing the declaration of the result, although Curry was present the day after he had signed it, and did not immediately absent himself, as the return states, as he signed the adjourning order on the 16th. Again, it is claimed that Means went out of office, and for that reason he could not be compelled to sign the declaration of the result of the recount. He does not appear to have been out of office on the 17th of December, 1898, when he proceeded to declare the result without reference to the recount, simply stating that he was not satisfied therewith, and issued a certificate of the result, found, as he says, by carefully and impartially examining the returns of the election. Now, as it appears to me that all that remained to be done by J. K. Means was to sign his name, this would have completed the recount, and certified the result. He says, in his return, that he suspected frauds, but he does not point them out; neither did he at the proper time ask an opportunity to do so. He simply absented himself, and declined to add his signature to the record, which was a personal duty imposed upon him by the statute. If a commissioner can, by saying he is not satisfied with the result, and resigning, prevent the result of an election from being declared, few candidates would receive certificates where the commissioners are of different politics. That this was a personal duty is apparent from the fact that his successor would know nothing about the proceedings in counting the vote, and, of course, could not certify. In the case of *State v. Shearer*, 29 Neb. 477, 45 N. W. 784, it was held that: "It is the duty of the county clerk to report all the fees of his office, and pay the excess over the amount to which he is entitled into the county treasury. This duty is personal to himself, and in case of his failure to perform his duty in that regard a mandamus may be issued, even after the expiration of his term of office, to compel the performance of such duty." Now, the duties required by statute of this board of canvassers in making the returns of the fact as to the result of elections is not entirely dissimilar to the duties required of a sheriff. Under the statute, he is required to return the time and manner of serving process, and to subscribe his name to such return. The canvassers are required to ascertain the result of the election by counting the ballots, and, when ascertained, they are to certify the result; but the performance of such duty on the part of the sher-

iff is not limited to his term of office, as will be seen by reference to the case of *Shenandoah Val. R. Co. v. Ashby's Trustees*, 86 Va. 232, 9 S. E. 1003, in which case a sheriff was allowed to amend his return, 13 years after judgment by default, to show that service was on a director of the defendant corporation in the county wherein he resided. Lewis, P., in delivering the opinion of the court, said: "And it makes no difference that the officer by whom the return was made has gone out of office, there being no specific limitation of the time within which the power may be exercised,"—which case is cited with approval by Brannon, J., in the case of *Hopkins v. Railroad Co.*, 42 W. Va. 537, 26 S. E. 187. This recount was demanded by Dent at the proper time, and, as it seems to me, was improperly refused on the part of the defendant Means, and in my opinion the return filed by him in this case furnishes no sufficient excuse for his failure to perform the duties required of him by statute. I would, for these reasons, be in favor of awarding the mandamus.

ABNEY et al. v. OHIO LUMBER & MINING CO.

(Supreme Court of Appeals of West Virginia.
Dec. 3, 1898.)

PROCESS—ISSUANCE BY CLERK—ATTACHMENTS—ACKNOWLEDGMENT BY CORPORATION—VALIDITY—VENDOR AND PURCHASER—UNRECORDED DEED—NOTICE.

1. Process to commence a suit or action is issued by the clerk on the order of the plaintiff or his attorney or agent, and not by order of the court.

2. Whether the court is in session or vacation, the clerk's office is open for the purpose of commencing suits or actions by issuing process therefor, including also process of attachment under chapter 106 of the Code.

3. A certificate of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer or agent executing it was sworn, and deposed to the facts contained in the certificate, as required by section 5, c. 73, Code, is fatally defective, and does not entitle such deed to be recorded.

4. An unrecorded deed is void as to creditors, whether they have notice or not, but it will be good against purchasers with notice, or who have not purchased for valuable consideration. (Syllabus by the Court.)

Error to circuit court, Wayne county; E. S. Doolittle, Judge.

Action by Abney, Barnes & Co. against the Ohio Lumber & Mining Company. Attachment awarded, and W. H. Millinger and William Nold, assignees of defendant, filed claim. Findings for the claimant, and from an order refusing to set same aside plaintiffs bring error. Reversed.

Payne & Payne, for plaintiffs in error. Harvey, Wyatt & Hutchinson and Campbell, Holt & Campbell, for defendant in error.

McWHORTER, J. The Ohio Lumber & Mining Company, a foreign and insolvent cor-

poration, on the 23d of January, 1897, executed and delivered to W. H. Millinger and William Nold, assignees, a deed of assignment of all its real estate and personal property, for the benefit of all its creditors, to be paid pro rata, with the following certificate of acknowledgment: "The State of Ohio, Columbiana County—ss.: I, James W. Clark, a notary public in and for said county and state, do hereby certify that S. J. Rohrbaugh, president of the Ohio Lumber and Mining Company, and J. L. Yoder, secretary of said company, whose names, respectively, are signed to the foregoing instrument, bearing date on the 23d day of January, 1897, have this day acknowledged before me in my said county the signing and execution of said instrument, for themselves, respectively, and for and on behalf of said the Ohio Lumber and Mining Company, and acknowledged that they affixed the corporate seal of said company to said instrument by direction of a resolution of the directors of said company, and have acknowledged that the same in all respects is their free act and deed, as such officers, respectively, and the full act and deed of said corporation for the purposes and uses herein set forth. I further certify that S. J. Rohrbaugh and J. L. Yoder are known to me to be the individuals and officers described in and who executed said instrument. I further certify that William H. Millinger and William Nold, whose names are signed to the foregoing instrument, have this day acknowledged the same before me in my said county. Witness my hand and official seal, this 23d day of January, A. D. 1897. James W. Clark, Notary Public. [Notarial Seal. J. W. Clark, Columbiana County, Ohio.]" On the 25th day of the same month the said assignment, with the certificate of acknowledgment indorsed thereon, was admitted to record in the clerk's office of the county court of Wayne county. Two days after, on the 27th day of said January, Abney, Barnes & Co., creditors of said company, instituted their action of assumpsit in the circuit court of Wayne county, suing out their writ from the clerk's office of said court returnable at the February rules, 1897, and on the same day filed an affidavit claiming the right to recover \$939.71, and gave bond for attachment, upon which the clerk of said court issued an order of attachment against the estate of said corporation, which was duly levied on both the personal effects and real estate of defendant, the levy on the personal property being made on the 27th of January, and on the real estate on the 29th of January, 1897. On the 2d day of February, 1897, the said deed of assignment was reacknowledged, and on the 4th of February was again recorded, together with the new certificate of acknowledgment. The assignees, W. H. Millinger and William Nold, appeared in court on the 2d day of February, 1897, and tendered their petition in the said action of assumpsit, setting up their claim to the property of the defendant

corporation by virtue of said deed of assignment, and praying that the claim to the property and its possession be adjudicated and determined according to the statute in such case made and provided, and that said order of attachment be quashed and abated, and that said levy be released, and for general relief; to the filing of which petition plaintiffs objected, and by consent the matters arising on said objection were passed to a future day of the term, and on the 10th day of February the court overruled the objection, and filed the petition, and the parties agreed as to the facts and submitted the matters of law and fact to the court in lieu of a jury. On consideration the court held that the deed of assignment was a valid deed, and that the same was duly and properly recorded on the 25th of January, and that the claim of said assignees to the property attached was paramount and superior to the said attachment, and ordered that the levy of said attachment on all of said property, except the money, if any, in the Huntington National Bank, be released and discharged, and that the officer levying the same deliver all of said property to the said assignees, and rendered judgment for petitioners' costs; to which ruling of the court in directing the release of the real estate levied on by plaintiffs, and in holding that said deed of assignment was duly recorded on the 25th of January, 1897, and that the title of said assignees to said real estate was paramount to the lien of plaintiffs' attachment, plaintiffs objected and excepted, and on motion of plaintiffs the operation of so much of the order and judgment as affected the real estate was suspended for 60 days to give plaintiffs time to obtain a writ of error, and the plaintiffs moved the court to set aside its finding and judgment, and grant them a new trial, of which the court took time until the next term to consider. At the June term, 1897, of said court, the order of publication awarded having been duly published and posted, judgment was rendered for plaintiffs in the action of assumpsit by the court in lieu of a jury for \$939.71, but the court declined to order a sale of the property attached, and reserved all matters pertaining to a sale for further consideration and action. And on the 4th day of December, 1897, the court, having maturely considered the motion of plaintiffs to set aside the finding and judgment rendered upon the petition of the assignees holding that said petitioners were entitled to the possession of the property levied upon by the order of attachment, and grant them a new trial, overruled said motion, and refused to set aside the judgment and grant a new trial, to which rulings plaintiffs excepted. Plaintiffs obtained a writ of error and supersedeas.

It is insisted by appellants that under section 5, c. 74, Code, the deed of assignment was void as to their creditors by reason of the fact that the certificate of acknowledgment to said deed was so defective under the stat-

ute providing for acknowledgments of deeds and other writings by corporations that it could not be admitted to record, and, if not properly recorded, under said section 5, c. 74, it remained void as to creditors and subsequent purchasers for valuable consideration without notice, notwithstanding it was written in the record book in the clerk's office. Sections 2, 3, c. 73, Code, provide what instruments of writing shall be recorded, and what is necessary to appear on such writing, or how it shall be proved to entitle it to recordation; and, if it is wanting in certificate of proper acknowledgment or proof required by the statute, it is not recordable. Section 5, c. 73, prescribes what shall be evidence of proper acknowledgment of a corporation to entitle the writing acknowledged to be recorded. The officer or agent of the corporation must be first sworn or affirmed by the magistrate taking the acknowledgment, and he must depose and say (1) that he is such officer or agent of the corporation described in the writing bearing date on the — day of —, 18—; (2) that he is authorized by said corporation to execute and acknowledge deeds and other writings of said corporation; (3) that the seal affixed to said writing is the corporate seal of said corporation; and (4) that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And after this deposition is given the officer or agent acknowledges the said writing to be the act and deed of said corporation, all of which must appear in the certificate of the certifying officer. And this is required by the statute to appear before the paper can be legally admitted to record. It will be seen from the certificate that the officers who executed the deed were not sworn or affirmed, but simply appeared before the notary public, and acknowledged, as set forth in the certificate. The form of acknowledgment on behalf of a corporation is a recent enactment (Acts 1891, p. 38, § 5), prior to which there was no particular form prescribed, but, if the corporate seal was affixed, and the signature of the proper officer was proved, the courts would presume that the officer did not exceed his authority, and the seal itself was *prima facie* evidence that it was affixed by proper authority, and the contrary must be shown by the objecting party. *Lamb v. Cecil*, 25 W. Va. 288. The legislature enacting the statute requiring this most solemn form of acknowledgment evidently appreciated the importance of it, and intended it as a safeguard to the vast interests committed to the care of the officers of the corporations, and to prevent them from abusing their powers. But it is contended by appellees that "the taking and certifying the acknowledgment of a deed is in the nature of a judicial act, whether done by a court, justice, or a notary," and "that such certificate of acknowledgment is conclusive of every fact appearing on the face of the certificate," and cite many authorities to sustain

their position, which is, I think, a correct one. This being true, does it cure the defect alleged in the certificate in this case? The facts shown in the certificate are, that the notary who took the acknowledgment was duly authorized thereto, that S. J. Rohrbaugh, president of the Ohio Lumber & Mining Company, and J. L. Yoder, secretary of said company, whose names were respectively signed to the deed, acknowledged on the day mentioned, before the notary, in his county, the signing and execution of said instrument for themselves, respectively, and for and on behalf of said company, and they also acknowledged that they affixed the corporate seal of said company to said deed by direction or resolution of the directors of said company, and that in all respects the same was their free act and deed as such officers, respectively, and the full act and deed of said corporation for the purposes and uses therein set forth; and the notary further certifies that S. J. Rohrbaugh and J. L. Yoder were known to him to be the individuals and officers described in and who executed said instrument, which last fact appellees insist makes the certificate sufficient to entitle the deed to recordation. The facts as set out and acknowledged by the persons who executed the deed were substantially as required by said section 5, c. 73, Code, but it fails to show that the acknowledging parties were by the notary duly sworn, and deposed to the truth of the facts acknowledged by them; and the only fact stated, to the truth of which the notary certifies, except merely the fact of acknowledgment, is that the said parties were known to him to be the individuals and officers described in and who executed said instrument. The most important fact under the statute, viz. the fact that the parties were sworn, and deposed to the truth of the facts acknowledged, falls to appear in the certificate. "To render the acknowledgment effectual, it must affirmatively appear from the certificate that the requirements of the statute have been substantially observed." 1 *Devl. Deeds*, § 508, and cases cited. "Acknowledgment is a prerequisite for registration in a majority of the states, and a necessary incident to every conveyance designed to furnish constructive notice under the recording acts; and when, by reason of defects or omissions, the statutory requirements are not substantially complied with, the instrument is not legally recordable, and, although actually transcribed, the record thereof will not afford constructive notice." 1 *Warv. Vend.* 519. "To entitle a deed to registration, it must be executed according to the statute requisites by which the registry of deeds is established." *Isham v. Iron Co.*, 19 *Vt.* 230. The question is not, as seems to be claimed by appellees, whether the deed is good and sufficient, as between the corporation and the assignees or trustees, to convey the property described in the deed, but is the acknowledgment sufficient to entitle it to recordation? In *Cox v. Wayt*, 26

W. Va. 807 (Syl. points 1, 2), it is held: "If a deed of trust, the execution of which has not been proved or acknowledged in the manner prescribed by law, be admitted to record by the clerk of the county court of the proper county, such deed is not 'duly admitted to record.'" (2) "If such a deed so admitted to record be copied by such clerk into the deed book, it is not, by being so copied into such book, 'duly admitted to record.'" The acknowledgment is clearly fatally defective, as shown by the certificate, and it was not properly recorded. It is stated in the agreed facts that a member of the plaintiffs' firm and their attorney read the deed as spread upon the record before suing out their process and attachment. Section 5, c. 75, Code, provides that a "deed of trust or mortgage conveying real estate or goods and chattels shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract or deed may be." In *Guerrant v. Anderson*, 4 Rand. (Va.) 208 (Syl. point 2), it is held that "an unrecorded deed is void as to creditors, whether they have notice or not; but it will be good against purchasers with notice, or who have not purchased for valuable consideration"; and (point 3): "A purchaser under a sale on behalf of a creditor holds the right and occupies the place of the creditor, and therefore he will not be affected by notice of an unrecorded deed." Appellees contend that the motion to quash the attachment should have been sustained, because there was no suit legally pending; that the writ was void, and a nullity, for the reason that the court whose clerk issued it was in session at the time, and no permission asked of, or leave granted by, the court to bring the suit; that the supposed writ was made returnable to February rules to be held in the clerk's office of said court the following Monday, when it was known the court would be, and in fact was, in session, as shown by the record. Section 5, c. 124, Code, provides that "the process to commence the suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. It shall be issued on the order of the plaintiff or his attorney or agent, and shall not, after it is issued, be altered, nor any blank therein filled up, except by the clerk." This is the only provision in the statute for process of the court to commence a suit or action, and it is always issued by the clerk, and issued on the order of the plaintiff or his attorney or agent, and not on the order of the court. So that, whether the court is in session or vacation, the clerk's office is open for the purpose of commencing suits or actions by issuing process therefor, including also process of attachment, under chapter 106, Code. Sections 1, 2, c. 125, Code, provide for taking rules by the clerk, arranging same as far as possible that the same may

not come on a court day of a regular term; the rules are to be entered by the clerk; and section 4 provides that "when there is no clerk to take a rule in a case, it shall stand continued until the next rule day after there is a clerk"; and section 5: "The rules may be to declare, plead, reply, rejoin, or for other proceedings; they shall be given from month to month." It is especially the clerk's duty to enter the rules, and there is no prohibition to his entering them when the court is in session, except as provided in section 1 aforesaid. The last clause of section 2, c. 124, Code, which reads, "and process awarded in court may be returnable as the court shall direct," has no reference to the original process to commence a suit or action, but process found necessary by the court to a proper disposition of a case, which has been so far matured as to place it upon the court's docket, and includes *scire facias* to revive, rules to show cause, etc., as well as process for new parties found to be necessary to a proper hearing of the cause. No exceptions having been taken as to the judgment of the court releasing the lien of attachment on the personal property, I have not deemed it necessary or proper to discuss the sufficiency of the recordation of the deed of assignment as a mortgage or trust on personal property, such trust or mortgage being accompanied with a transfer of the possession of the personal property in good faith for a lawful purpose. For the reasons herein stated, so much of the judgment of the court as is complained of—that is to say, so much of the finding and judgment as finds that the deed of assignment was properly admitted to record on the 25th day of January, 1897, and that the title of the assignees, Millinger and Nold, to the real estate, was paramount to the lien of plaintiff's attachment—is set aside and annulled, and the case remanded to the circuit court of Wayne county for further proceedings to be had therein.

CUSHWA et al. v. IMPROVEMENT, LOAN & BUILDING ASS'N et al.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1898.)

MECHANICS' LIENS—PRIORITY—WAIVER—BILLS AND NOTES—PAYMENT—TRUST DEEDS.

1. Where a material man, workman, laborer, mechanic, or other person, performs any labor or furnishes any material or machinery for constructing any house, mill, manufactory, or other building or structure, by virtue of a contract with the owner or his authorized agent, he shall have a lien, to secure the payment of the same, upon such house or other structure, and upon the interest of the owner of the lot of land on which the same may stand; and such lien will not be affected by the party claiming the same accepting negotiable notes for the amount of his account, which notes are not made payable after the time fixed for bringing a suit to enforce the mechanic's lien.

2. A receipt, so far as it is a mere admission, is not conclusive evidence of the payment therein acknowledged, but the party signing it

may invalidate it by oral evidence of fraud or mistake; for the document amounts only to prima facie proof, and is capable of being explained.

3. A note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, unless it be so expressly agreed, whether the note received was that of one previously bound or a stranger.

4. The acceptance of the notes of the debtor, payable after the time granted by the statute for filing a mechanic's lien, and maturing before the expiration of the time limited for bringing suit, will not bar a suit and recovery upon the lien, if the notes are produced to be surrendered at the trial.

5. Where work has been commenced and material furnished under a contract, for constructing buildings, with the owner of the land on which buildings are to be erected, the mechanic's lien attaches from the time the performance of the work and furnishing materials begin, and such mechanic's lien is entitled to priority over a deed of trust subsequently executed on the same property.

Dent, J., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Berkeley county; R. W. Dalley, Jr., Judge.

Bill by the Improvement, Loan & Building Association and H. T. Cushwa & Bro. against the Auburn Wagon Company for the administration of defendant's assets as an insolvent. From a decree postponing the claim of Cushwa & Bro. under a mechanic's lien to a trust deed, they appeal. Reversed.

Faulkner & Walker, for appellants. W. H. Travers, M. T. Ingles, A. C. Nadenbousch, and U. S. G. Pitzer, for appellees.

ENGLISH, J. On the 16th day of February, 1897, the Improvement, Loan & Building Association of Martinsburg, a corporation under the laws of the state of West Virginia, A. C. Nadenbousch, trustee, and Harvey T. Cushwa and Harry S. Cushwa, partners trading under the firm name of H. T. Cushwa & Bro., appeared in open court in the circuit court of Berkeley county, and filed their bill in chancery against the Auburn Wagon Company, a corporation, U. S. G. Pitzer, trustee, and others, in which, among other things, they alleged that on February 18, 1896, the defendant the Auburn Wagon Company, a corporation under the laws of Pennsylvania, and a citizen of said state, was the owner in fee of a lot of ground in the town of Martinsburg, Berkeley county, W. Va., containing 2 acres, 3 rods, and 10 poles, and on that date executed a deed of trust to said Nadenbousch, trustee, on said lot, together with all improvements then on same, or thereafter to be put thereon, etc., a copy of which trust deed was exhibited with said bill, from which it appears that said deed was made for the purpose of securing the payment of an indebtedness of \$40,000, with interest, to said Improvement, Loan & Building Association, owed by said Auburn Wagon Company, which was payable in installments as therein set forth, and upon terms and conditions therein set forth. On February 13, 1897, said building and loan association gave notice to said

Nadenbousch, trustee, to proceed to execute said deed of trust by selling the property thereby conveyed in the terms required by said deed. It was further alleged that on October 13, 1896, said firm of H. T. Cushwa & Bro. filed their mechanic's lien in the office of the clerk of the county court of Berkeley, wherein the real estate owned by said Auburn Wagon Company, above described, is situated; that is to say, they filed a just and true account of the amount due them, after allowing all credits, together with a description of the property owned by the said wagon company, and intended to be covered by the lien claimed by said H. T. Cushwa & Bro., sufficiently accurate for identification, duly sworn to by said Harry S. Cushwa, an office copy of which was exhibited with plaintiffs' bill, as Exhibit B. The bill also alleged that there was due to said H. T. Cushwa & Bro. on account of said lien the sum of \$3,888.40, with interest; that the same was for work and labor performed and materials furnished in constructing the buildings of the plant of the said Auburn Wagon Company on lot aforesaid; that said work was performed and materials furnished partly under a contract in writing made by said Cushwa & Bro. with said wagon company; that said work and labor were performed and said materials furnished between the 24th of February, 1896, and 1st of September, same year; and that no part of the amount due them as shown by said Exhibit B has been paid, but the same is wholly due, with interest thereon. It was further alleged that on December 3, 1896, the Auburn Wagon Company executed a deed to U. S. G. Pitzer, trustee for the Morrison & Westfall Company of said real estate, with other property therein described, to secure to said Morrison & Westfall Company the payment of certain drafts, notes, and indebtedness, a copy of which trust deed was also exhibited as part of the bill. The plaintiffs in their bill also described several judgments which had been obtained by other parties, who were made defendants, against said Auburn Wagon Company, before a justice of the peace of Berkeley county. Plaintiffs also alleged that said wagon company was wholly insolvent; that its liabilities exceeded \$100,000; that the assets consisted almost exclusively of the real estate above mentioned, with the improvements thereon, and machines and tools used in the business of manufacturing wagons, the total value of which was not more than enough, if properly administered, to pay the indebtedness due plaintiff, said Improvement, Loan & Building Association; that said wagon company has in process of manufacture, and almost ready for shipment, a large number of wagons, to wit, 800, but which cannot be completed and placed on the market for want of additional material to complete the same, which, owing to its crippled financial condition, it was unable to secure; and the plaintiffs prayed the appointment of a

receiver to take charge of the property and business of said company, and operate the same, until such time as a sale can be properly made thereof, or until the court should otherwise order, that the creditors of the company might be convened by a reference of the cause to a commissioner, and that the respective amounts and priorities of their liens and debts might be ascertained, and the assets of the company properly distributed among them. The defendant wagon company answered the plaintiffs' bill, admitting the execution of the deed of trust to A. C. Nadenbousch, trustee, mentioned in the bill, and alleged that previous to the making of said conveyance the said building and loan association had entered into a contract with it, bearing date December 10, 1895, which was not sealed and delivered until the 28th of January, 1896, but possession of the property to said wagon company had been delivered some time prior to January 13, 1896, whereby said building and loan association agreed to loan said company \$40,000, to be paid at the time and in the manner therein set forth, and the said wagon company, among other things, thereby agreed that it would make and acknowledge for record a proper deed of trust upon said lot of ground, and upon all its buildings, plant, and machinery, to secure the party of the first part the loan aforesaid, and the performance of, all and singular, the covenants and agreements therein contained, and keep said property insured in some solvent company, which agreement was signed by H. T. Cushwa, president of the Improvement, Loan & Building Association, and by F. C. Ward, president of the Auburn Wagon Company, acknowledged by H. T. Cushwa, president, on January 17, 1896, and by F. C. Ward, president, on January 28, 1896, and was admitted to record on March 13, 1896. The wagon company, further answering, said that it had a contract with H. T. Cushwa & Bro. by which certain buildings were erected and materials therefor furnished by said Cushwa & Bro., and that on August 15, 1896, it had a settlement, through its president, F. C. Ward, with said Cushwa & Bro., and then gave to them three negotiable promissory notes of the said wagon company, each for the sum of \$1,160.31, making, in the aggregate, \$3,480.93, which notes were given by respondent as payment and satisfaction, and received by H. T. Cushwa & Bro. in payment in full, of the balance owing to said firm under that contract, and the extra work done for it by them, except a small part thereof, to wit, the execution of what was called the "Mailing Office," which was to cost \$407.47, taking said Cushwa & Bro.'s receipt therefor, which was filed as an exhibit in the cause. The respondent also denied that said Cushwa & Bro. on October 13, 1896, filed their mechanic's lien in the office of the clerk of the county court of said county (that is to say, a just and true account of the amount due them after allow-

ing all credits), but, on the contrary, it is alleged that the account filed by them was a false one, in which payment of said \$3,480.93 as aforesaid was entirely omitted; and respondent denied that said Cushwa & Bro. had any mechanic's lien whatever on respondent's property, and claimed that said false and fraudulent account filed by them failed to preserve a lien for any sum whatever. On February 16, 1897, a receiver was appointed of all the property of said wagon company, to take immediate possession of said property, and hold the same, as an officer of the court, under its orders and directions. On March 6, 1897, the cause was referred to a commissioner in chancery, with instructions to ascertain and report the debts owed by said wagon company, their respective amounts and priorities, and if, in so doing, he should find that the deed of trust by said wagon company to U. S. G. Pitzer, trustee, dated December 3, 1896, was made at such time as said wagon company was insolvent, then, in ascertaining such priorities, he should treat such deed as void as to the preferences therein given, and as a general assignment for the benefit of all the creditors of said wagon company who should assert their claims in the manner prescribed by statute in existence at the time, ratably; also, to report the real estate and personal property owned by said wagon company, and what has been acquired, if anything, by said company, since the making of the deed of December 3, 1896, to Pitzer, trustee. On September 13, 1897, the commissioner filed his report, ascertaining the debt due H. T. Cushwa & Bro., evidenced by a mechanic's lien, amounting to \$4,102.91, principal and interest, as of September 14, 1897, to be the first lien upon the real estate owned by the Auburn Wagon Company; a debt due the loan and building association, evidenced by a deed of trust executed to A. C. Nadenbousch, trustee, amounting to \$37,497, principal and interest, as of September 14, 1897, to be the second lien upon said real estate; a debt due the employees of said wagon company for labor performed, amounting, principal and interest, as of September 14, 1897, to \$1,361.16, to be the first lien upon the personal assets of said wagon company; and all debts proven, as due the general creditors of said wagon company, amounting, principal and interest, as of September 14, 1897, to \$113,924.97, to be a second lien on said personal assets; and that the personal property of said wagon company, when it went into liquidation, was sold by the receiver for \$6,250, which was then in the hands of the receiver, subject to the order of the court.

The Auburn Wagon Company excepted to the commissioner's report so far as it audited as a first lien on its property the claim of said Cushwa & Bro. for the sum of \$4,102.91: (1) Because the testimony shows that said wagon company on the 15th of August, 1896, made a settlement with said Cushwa & Bro.,

in which it gave to them its three negotiable notes, each for the sum of \$1,160.31 (in all, \$3,480.93), which were accepted by said firm in full payment of said claim, and full discharge of the contract under which the said claim arose, except as to the mailing office mentioned in said agreement, to be supplied by the said claimant for the sum of \$407.47. (2) Because the pleadings and testimony show that, prior to the time the said claimant furnished any work or materials for the improvements upon which the said mechanic's lien set up is founded, the said claimants had notice of a contract in writing of the wagon company with the loan and building association whereby the said association agreed to advance the sums of money mentioned in the bill, in the manner therein stated, and which are audited as a second lien on said wagon company's property, and also the agreement evidenced by the said contract to secure the payment of the said sums of money in the manner set out in said bill, and audited as aforesaid, by deed of trust on said property, which should be a first lien thereon. Depositions were taken and filed, and a decree was rendered on the 9th of November, 1897, sustaining the exception of said wagon company to said commissioner's report, so far as it held the mechanic's lien claimed by H. T. Cushwa & Bro., amounting to \$4,102.91, to be a first lien against said real estate, and holding that it should have been audited as a general debt of the Auburn Wagon Company, but overruling said second exception, from which decree H. T. Cushwa & Bro. obtained this appeal.

Counsel for the appellees claim that the appellants acquired no mechanic's lien, for the reason that during the progress of the work payments were made on account of said wagon company to H. T. Cushwa & Bro. by the loan and building association, through H. T. Cushwa, its president, by his checks as such, and on the completion of the contract a settlement was made between said wagon company and appellants, and an ascertained balance of \$3,480.93 was settled "in full for contract and extras, except mailing office," by the acceptance of three negotiable notes, each for \$1,160.31, executed on the 15th of August, 1896, by the Auburn Wagon Company, payable to H. T. Cushwa & Bro. four, five, and six months, respectively, from their date. Now, while it is true said notes were executed as above stated, and a receipt given on the same day in the following words: "Received of Auburn Wagon Company, Martinsburg, W. Va., three thousand four hundred eighty ⁹³/₁₀₀ dollars (\$3,480.93), for bill Aug. 13, in full for contract and extras, except mailing office. [Signed] H. T. Cushwa & Bro."—yet this receipt was merely prima facie evidence of the fact therein stated. Upon this question we find the law thus laid down in 1 Greenl. Ev. (15th Ed.) § 805: "In regard to receipts, it is to be noted that they may be either mere acknowledgments of payment or

delivery, or they may also contain a contract to do something to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony." So, also, 2 Tayl. Ev. § 1134, says: "Therefore, except in some few special cases, a receipt, so far as it is a mere admission, is not conclusive evidence of the payment therein acknowledged, but the party signing it may invalidate it by oral evidence of fraud, or of mistake or surprise on his part; for the document amounts only to prima facie proof, and is capable of being explained." To the same effect, see 19 Am. & Eng. Enc. Law, p. 1120, and authorities there cited. Bish. Cont. § 176, says: "In general, receipts of payment, whether embodied in written instruments or not, are deemed to be of the imperfect sort, which, though prima facie evidence of what they declare, may be explained or contradicted orally. They are so even when expressed to be in full of all demands;" citing several authorities in note. When we look to the evidence in explanation of this receipt, it appears that the Auburn Wagon Company, instead of having paid said Cushwa & Bro. \$3,480.93 in full for contract and extras, except mailing office, executed to them its three notes, bearing date August 15, 1896 (the same date as said receipt), for \$1,160.31 each, payable, respectively, in four, five, and six months after date, to the order of H. T. Cushwa & Bro., at the Citizens' National Bank of Martinsburg, W. Va., which notes were still held by said Cushwa & Bro. at the time the account was taken in this cause, and were filed before said commissioner by H. T. Cushwa, with his deposition. Now, what was the effect of executing these three negotiable notes, which do not appear to have been discounted or used in any manner by the payees, but remain in their possession? Can they be regarded as a payment and extinguishment of the debt they represent? In the case of Bank v. Good, 21 W. Va. 465, Snyder, J., delivering the opinion of the court, said: "It is well settled in both Virginia and this state that a note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, unless it be so expressly agreed, whether the note received was that of one previously bound, or of a stranger;" citing Poole v. Rice, 9 W. Va. 73; Lazier v. Nevila, 3 W. Va. 622; Miller v. Miller, 8 W. Va. 550. See, also, Dunlap's Ex'rs v. Shanklin, 10 W. Va. 662, where it is held that: "Giving a receipt or taking a note with security from the purchaser, or taking the note of a third party, specifying in either case that it is for the purchase money, will not, while the title remains in the vendor, be an extinguishment of the vendor's lien, unless the purchase money has been actually paid. * * * Taking a note from a debtor, or a note of a third party, is no discharge of the

debt, unless it is expressly agreed between the creditor and the debtor that it is an absolute payment thereof. * * * A receipt may be explained or contradicted by parol evidence." Now, it clearly appears by the evidence that although the receipt dated August 15, 1896, signed by H. T. Cushwa & Bro., acknowledged that they had received of the Auburn Wagon Company \$8,480.93 for bill of August 13th, in full for contract and extras, except mailing office, said amount was not in fact paid, but that the three notes above mentioned were executed for the same. The account of H. T. Cushwa & Bro. appears to have been filed with the clerk of the county court of Berkeley, and sworn to, on the 14th of October, 1896, and the last of said notes executed by the wagon company to Cushwa & Bro. became due on February 15, 1897, and suit to enforce said mechanic's lien might be brought, under the statute, until the 13th of April, 1897; and it has been held that, though a note is payable after the expiration of the time limited by law in which a lien must be filed, it is not waived, if it be payable before the time in which the action must be brought for its enforcement, for a mechanic is allowed to file the lien before his note is due. In the case of *Ashdown v. Woods*, 31 Mo. 465, it is held that "the acceptance of the notes of the debtor, payable after the time granted by the statute for filing a mechanic's lien, and maturing before the expiration of the time limited for bringing suit, will not bar a suit and recovery upon the lien, if the notes are produced to be surrendered at the trial." See, also, *McMurray v. Taylor*, 30 Mo. 263; also, *Schmidt v. Gilson*, 14 Wis. 514, in which it is held that "a mechanic does not lose his lien under the statute for work done upon a building by taking the note of the owner of the building, payable within the time allowed by law for commencing an action to enforce the lien"; and in *Goble v. Gale*, 7 Blackf. 218, it was held that "a mechanic's lien for work done is not waived by taking his employer's note for the money due for the work, and giving a receipt in full for such money, the note not being paid."

It is contended that the debt due or to become due to the Improvement, Loan & Building Association, secured by trust deed, for \$37,497, was entitled to priority over said mechanic's lien. Is this position correct? In considering this question, we notice first the fact that on February 18, 1896, a written contract was entered into between the Auburn Wagon Company and H. T. Cushwa & Bro., with elaborate specifications thereto annexed, for the erection of certain buildings on its lots in the town of Martinsburg, in accordance with said specifications, with certain minor exceptions, for the sum of \$21,950, which exceptions were to be paid for as extras, which was, and must be considered, an entire contract. It is shown by the testimony that H. T. Cushwa & Bro. began work under

this contract on February 10, 1896, and completed it September 4, 1896. The work was pushed right along, and said Cushwa, when asked what amount of work and material in money was done and furnished prior to March 9, 1896, answered that they were excavating and building the foundation during that time, which was a part of the contract. The deed of trust in favor of the building association above mentioned was admitted to record in Berkeley county on the 9th of March, 1896. Did the fact that this trust deed was executed and recorded after the appellants had commenced work under said contract entitle said trust deed to priority over said mechanic's lien? If such be the case, the mechanic's lien law affords very little protection to the contractor in this state, since the party who employs him to erect buildings upon his lands can defeat his lien, when the work is almost completed, by executing a deed of trust on the property. The right to execute and record such trust deed one day or one month, as in this case, after the work has commenced under the contract, implies the right to create such trust deed, and take priority over the mechanic's lien, at any time while the work is in process of completion. Our statute (Code, p. 652, § 2) provides that every mechanic, etc., who shall perform any work or furnish any material, etc., shall have a lien to secure the payment of his contract, upon such house or other structure, and the lien authorized by this section shall have priority over any other lien created by deed or otherwise on such house or structure subsequent to the time when such labor shall have been performed or material furnished. Cushwa & Bro. were proceeding with their contract. The wagon company had notice that they were performing it, and that every day's work in pursuance of the contract entitled them to a lien for their services. Would it be a fair construction of the statute to hold that said wagon company, by executing said trust subsequent to the time one month's labor had been performed under the contract, would give the cestui que trust priority over said mechanic's lien? I think not; and it is certain that few contractors would rely for protection on the mechanic's lien, in this state, if such was the proper construction. It surely never was the intention of the legislature that a contractor should have no right to a mechanic's lien for work and material furnished until after he completed his contract. In a recent case,—*Building Co. v. Saucer* (not yet officially reported) 31 S. E. 965,—Brannon, P., delivering the opinion of the court, said (speaking of the builder): "He may go on to work, and he has his lien from its commencement, or when he began furnishing material; and the statute gives him a lien over any creditor whose liens arise after his lien commences, without any recordation, because the law gives notice to the world that the mechanic's lien attached to the building, which

lien he may enforce by filing it 60 days after completion." See note below.¹ Now, as between the Auburn Wagon Company and Cushwa & Bro., the mechanic's lien of the latter surely attached from the time they commenced performing said contract, and after that said wagon company could only convey the property to a trustee subject to the mechanic's lien, as they could only convey the property as they held it. In 15 Am. & Eng. Enc. Law, p. 191, it is said: "Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and this rule requires them to prove when the work was commenced, the character of the work, and when it was completed;" citing *Bank v. Winslow*, 3 Minn. 87 (Gil. 43), and *Davis v. Alvord*, 94 U. S. 545, in which last-named case Justice Field, speaking of the mechanic's lien law, says: "The statute was designed to give security to those who, by their labor, skill, and materials, add value to property by a pledge of the interest of their employer for their payment; and for that purpose it subordinates all other interests acquired subsequent to the commencement of their work, although no notice that a lien may even be claimed is required, except within sixty days after the work is completed." See *Bank v. Dashiell*, 25 Grat. 616.

It is clearly shown in this case that the work was commenced under this contract more than a week before the deed of trust was recorded. By commencing the work, Cushwa & Bro. acquired a vested right, which could not be overthrown or superseded by said deed of trust. To hold otherwise would be to hold that a deed of trust executed and recorded one day before the work was completed would take priority over the contractor's entire claim. I therefore hold that our statute must be construed to intend that the lien attaches when the performance of the work commences. In view of the authorities above cited, and looking to the facts proved in the record, I am of opinion that the court erred in holding that the mechanic's lien

claimed by H. T. Cushwa & Bro., \$4,102.91, was not properly audited as a mechanic's lien, and that it should have been audited as a general debt of said wagon company, and in sustaining the first exception taken by the Improvement, Loan & Building Association and others to the commissioner's report, for the causes assigned in said exception. Said claim of Cushwa & Bro. should have been held as a mechanic's lien, to take its place as such, in point of priority, in the account reported by said commissioner. For these reasons the decree complained of must be reversed, and the cause remanded.

DENT, J. (dissenting). I respectfully dissent from the majority of the court in this case, for the reason that they hold, in effect, by point 5 of the syllabus, that the clause in section 2, c. 75, of the Code, to wit, "The liens authorized by this and the next preceding section shall have priority over any lien created by deed or otherwise on such house or other structure and the lots on which the same are erected subsequently to the time when such labor shall have been performed or material or machinery furnished," is equivalent to the words, "The lien created by this act shall be preferred to every other lien or incumbrance which shall have attached upon said property subsequent to the time at which the work was commenced or the material furnished, and no incumbrance upon the land created after the making of the contract for the erection of a building upon such land shall operate upon the building erected until the lien in favor of persons doing the work or furnishing the materials shall have been satisfied," contained in the statutes of Virginia, Minnesota, and Montana, and I might add Missouri, New Jersey, Maryland, and Connecticut, and other states and territories having similar provisions to the Virginia statute. Some states begin the lien from the making of the contract. *Bell v. Cooper*, 26 Miss. 650. Statutes have changed from time to time in the different states, so that the decisions thereunder vary accordingly. But this is the first case that I have been able to find that holds that the words "shall have performed" mean "commenced." Nor can any such definition be found in the dictionaries or law books. The court seems to place the misuse of the word "performed" on the legislature. The presumption is against the assumption of such legislative ignorance, and the law says that words used in a statute must be given their common and ordinary meaning, unless the contrary plainly appears from the context. To do otherwise is to legislate, and not to construe. In this case the court has manifestly exceeded its judicial powers, and amended the statute so as to make it read, "when such labor shall have been commenced," instead of, "when such labor shall have been performed." The authority under which the court justifies itself

¹ In the case of *Manufacturing Co. v. Brockmyer*, 18 W. Va. 591, Green, J., delivering the opinion of the court, says: "The statute itself provides expressly that 'such lien shall have priority over every lien created by deed or otherwise on such house,' etc., 'subsequent to the time when such labor shall be performed, and material furnished.' This would, it seems to me, by its clear language, give a lien from the time when the labor commenced on the buildings, or the material commenced being furnished, though, by the third section, thirty days after the labor has ceased, or the material has ceased to be furnished, are given in which to record the lien. Thus for a time it is a secret lien. The mechanic's lien, under our statute, begins from the day when the work is begun, according to what I think is its proper meaning." See, also, *Dunklee v. Crane*, 103 Mass. 470.

in doing this is from those tribunals where the governing statutes use the word "commenced," and not the word "performed," to wit, Virginia (Bank v. Dashiell, 25 Grat. 616), and Montana (Davis v. Alvord, 94 U. S. 545), and the mere dictum of Judge Brannon in the case of Building Co. v. Saucer (not yet officially reported) 81 S. E. 965, not supported by any authority, except a general reference to section 215, Phil. Mech. Liens, and not necessarily involved in a decision of that case. It is hard to conceive why reference was not made to authorities from Massachusetts, Missouri, New Jersey, Connecticut, Maryland, District of Columbia, and various other states where the statutes use the word "commenced," instead of the word "performed," unless the court grew tired of the subject, or considered the last authority quoted as of such binding and unimpeachable conclusiveness—a *ne plus ultra*—that it would be a matter of wasted labor to look any further. In Phil. Mech. Liens, § 215, it is said: "The time when the lien is to be considered as acquitted depends essentially upon the provisions of the law authorizing this remedy. * * * The period fixed has not been uniform in the several states. The larger number have established [this is by statute, and not by decision of court] the commencement of the work upon the premises as the moment when the rights of the mechanic are to be protected; others have made the filing of a notice, in some public office of the jurisdiction where the building is situate, of intention to hold a lien, the time when it will attach; while a few have adopted the date of the contract or the completion of the work." Looking for the true definition of the word "performed," we find it means "completed, furnished, or finished," but never "commenced." So our state really belongs to the last class above mentioned, as to the priority of mechanics' liens and those created by deed or otherwise. In 15 Am. & Eng. Enc. Law, p. 80, it is said, "The time when a mechanic's lien is acquired depends upon the provisions of the law authorizing the remedy;" and on page 88, "The rights of a mortgagee are paramount to those of the mechanic, where the mortgage attaches before the house was erected, altered, or repaired;" and page 91, "Where the lien attaches when the structure is completed, a mortgage executed after the commencement and before the completion of the work is paramount to the lien." In the case of Williams v. Chapman, 17 Ill. 423, in construing a somewhat similar statute, it was held: "The mechanic's lien will attach from the delivery of the materials upon the premises, and the use of them by connecting them to the freehold, not from the date of the contract." Scates, C. J., in his opinion, on page 425, says: "In McLagan v. Brown, 11 Ill. 526, it was held that the lien under this statute will attach and commence upon the performance of the work or delivery of the materials. The same principle is, in effect,

asserted, and the reason for it alluded to, in the case of Gaty v. Casey, 15 Ill. 192, where, in answer to an objection to a contract made in St. Louis having an extraterritorial effect to create a real estate lien in Illinois, the court said: 'It is not the contract which creates the lien under the statute, but it is the use of the materials furnished upon the premises, the putting them into the building and attaching them to the freehold, which entitles the party furnishing the materials to a lien upon the premises to the extent of their value.' * * * This is the most equitable construction, if the rights of others are to be regarded. While we will give the act a liberal interpretation, to preserve the rights of mechanics and material men, we are not called upon to destroy all other rights in order to foster and give efficiency to every claim and assertion of this secret incumbrance. By the delivery of material, or the bestowal of labor upon the land, means are offered others to know something of such claims for the eighteen months that may follow within which the right must be asserted. Were the promise or contract for the material or labor the ground of lien, or even the bare commencement to deliver the one or bestow the other, no one could possibly have any means of knowledge, and the time of completion and payment might prolong this uncertainty for years. We think the lien put upon the right and reasonable ground,—the existence of a debt; for the one or the other by performance of the benefit contracted for the land, and it is immaterial whether that debt be due or not." The lien, under our statute, is not given by reason of the contract, but because and for labor performed and material furnished, and hence cannot attach to the property until the labor is performed and the material furnished, and goes into, and becomes a fixed part of, the realty. As long as it is not a part of the realty, no lien attaches by reason thereof. Such was the holding of the supreme court of Arkansas, under a precisely similar statute, except that the reservation now under discussion was not contained in the Arkansas statute; and yet the court reached a conclusion in perfect accord with this reservation, while the court with much more plausibility could have arrived at the same conclusion our court now arrives at, for the very reason that this reservation which is in our statute was not in the one under construction. McCullough v. Caldwell, 5 Ark. 237. In that case it was held by the court: "The lien of a mechanic for work and labor or materials furnished commences with the completion of the work and the delivery of the materials under the contract with the proprietor."

Section 2, c. 75, Code, provides, in its first clause, that "every mechanic, builder, artisan, workman, laborer, or other person who shall perform any work or labor upon or furnish any material or machinery for constructing, altering, repairing or removing a

house, mill, manufactory or other buildings, appurtenances, fixtures, bridge or other structure, by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same, upon such house or other structure and upon the interest of the owner in the lot of land on which the same may stand or to which it may be removed." This clause, standing alone, could not be construed otherwise than that the lien was to attach to the property only after the labor was performed or the materials furnished; for it attaches by reason of the performance of the labor and the furnishing of the material, and is in its nature a purchase-money or vendor's lien, and follows the labor and material into the property. The affixing the one fixes the other. "The lien attaches, and the right to enforce it accrues, at the completion of the contract, and when the labor has been fully performed." *Cumming v. Wright*, 72 Ga. 767. To render this emphatic, and place it beyond question, our statute then provides for the priority of the mechanic's lien over any lien created by deed or otherwise, "subsequently to the time when such labor shall have been performed or material or machinery furnished." Here the time is fixed, and the past perfect tense is used, denoting completion; yet this court says these words mean subsequent to the time when such labor shall have commenced. Verily, the power of construction is great, when a statute can be made to mean just the opposite from what it says. There is neither end nor beginning. Both are ends, and it is possible to be at both ends at the same time. If such construction be correct, how useless it was for the statutes of Virginia, Minnesota, Montana, and other states to provide "that the lien created by this act shall be preferred to every other lien or incumbrance which shall have attached upon said property subsequent to the time at which the work was commenced." The legislature meant just what it said,—that the lien should attach from the time the work shall have been performed, or, in short, completed. The law does not give notice to the world that the mechanic's lien attaches until the labor be performed or the material or machinery be furnished. What labor the mechanic may have done, or the material or machinery he may have furnished, the law gives notice of, but not what he is to do or furnish. The idea that the mere working on a foundation, getting out stone, being notice that an immense factory was to be built by those doing this work, is entirely too broad. "The fact that some of the appellants were at work on the property and material being furnished by others at the time the mortgage was executed was not actual notice of the existence of the lien. It was notice that the property was being repaired, but gave no evidence to the purchaser of the nature of the contract between the employer

or the employes, or that the money for the labor and materials furnished was unpaid. It is the lien the purchaser must have notice of, and not the fact that the property is being improved." *Foushee v. Grigsby*, 12 Bush, 75. In the present case the Improvement, Loan & Building Company had a prior equitable lien on the property involved, of which Cushman & Bro. had actual notice, the object of such lien being for the purpose of securing money to pay for buildings on the property. With full knowledge of such lien, Cushman & Bro. contracted to put up such buildings, and this lien is referred to, and certain provisions made in relation thereto in their contract. They did a small amount of work in getting out stone for the foundation, when, on the 9th of March, 1896, the prior equitable lien became effective by recordation. They went on and completed their contract by the 1st of September. It amounted, including extra work, to \$22,918.95, on which they received, presumably out of the money furnished by the improvement company, \$19,030.53, leaving a balance unpaid, which was really not due until the 1st of August, of \$3,888.40, and which, with interest added, will probably eat up the whole sum for which the lot and buildings sold, and leave nothing to be applied on the large debt of nearly \$40,000 due and coming to the improvement company; and this court, in giving a strained and unwarranted construction to the statute, permits this to be done, although plainly unjust and inequitable. The only excuse given for this is that the rights of the mechanic must be protected, although subsequent, both in equity and law, to the person who furnishes the money, without which no building could have been built, or no building contract entered into. There is no injustice done to the mechanic in limiting this law to its true meaning as indicated by the language used. The mechanic gets his lien when the labor is performed and the material furnished, and as it is performed and furnished, and the bona fide mortgagee gets his lien from the time the mechanic has notice thereof; so that the mechanic need not perform further labor, or furnish further material, unless he wishes to, in subjection to the trust lien. But it is said this may defeat his contract. That may be true. The object of the statute was not to preserve his contract, or give him a lien therefor, or clothe him by reason thereof with a vested interest in the property; but it was simply to provide a lien for him on the property for the actual work performed or material furnished, subject, however, to any lien on the property of which he has notice at the time he performs the work or furnishes the material. It is said judgment and other liens would intervene and interfere with, if not destroy, his contract, and he would be prevented from carrying the same out. It is just as well that he should lose his contract, when he

saves his labor and material, as that other lienors, who might be just as needy as he, should lose their debts. It is said that liens might attach of which he had none but constructive notice, and, if he went on and completed his contract, he would lose his labor and material, by reason of no fault of his, as he could not watch the records to see what might thereon be recorded. A court of equity would treat his lien as a purchase-money lien, to the extent of the labor and material furnished, and prior to any lien acquired during the performance of his contract, of which he had not actual notice. Such secret liens would be subject to the same rule which takes land from the true owner thereof, who stands by and suffers a mechanic to go ahead and do work thereon under the belief that it belongs to some one else. 15 Am. & Eng. Enc. Law, p. 65; *Colman v. Goodnow*, 36 Minn. 9, 29 N. W. 338; *Donaldson v. Holmes*, 23 Ill. 85; *Higgins v. Ferguson*, 14 Ill. 269; *Hulsman v. Whitman*, 109 Mass. 411. A judgment lien is always limited to the interest of the judgment lien debtor in the property, while a trust lienor could not stand by and allow another, ignorant of his holding, to bestow labor and material on the trust subject, unless such trust was either prior to any rights the mechanic may have in the property, or he have actual notice thereof at the time the labor is performed or material furnished, for the giving of such secret trust would be a fraud against the mechanic. And a court of equity will apportion the property between the mechanic and the mortgagee. *Preston v. Sonora Lodge*, 39 Cal. 116; also, *Butler v. Thompson* (W. Va.) 31 S. E. 960, and *Lawyer v. Barker*, Id. 964, decided at this term. It is said that the mechanic's lien would be broken into by intervening liens, and the matter would be hard of adjustment. Nothing is too hard for a court of equity to adjust so as to clothe each party seeking its aid with his true equitable rights. It falls only when its administrators prove unequal to the task it imposes upon them, and the trust and confidence it reposes in them. Equity, law, and right are on the side of the improvement company in this controversy, and yet it falls of justice for the reason that a majority of the court construes the words "shall have performed" to mean "commenced," instead of "completed."

In the amendment² of the court's opinion in this case since the rehearing was applied for, attention is, with some degree of exultation, directed to the dictum of Judge Green in the case of *Manufacturing Co. v. Brockmyer*, 18 W. Va. 591, in which he says, in commenting on a similar statute: "This would, it seems to me, by its clear language, give a lien from the time when the labor commenced on the buildings, or the material commenced being furnished, though, by the third section, thirty days after the labor

ceased or the material has ceased to be furnished are given within which to record the lien. Thus for a time it is a secret lien. The mechanic's lien begins from the day when the work is begun, according to what I think is its plain meaning. Similar statutes have been generally so construed. See *Wells v. Canton Co.*, 3 Md. 234." It is undoubtedly true that the lien begins when the work commences, but it only extends so as to cover the work and labor actually performed and material furnished, and as performed and furnished, and does not extend to cover the whole contract in advance of its performance. If this is the meaning of Judge Green,—and his language plainly allows such construction,—then he was right, and the construction of his language by the court is wrong. If, however, the court is right in its construction, then undoubtedly Judge Green dropped into the same error as his learned successor in the *Saucer Case*. The only authority relied on by him (being *Wells v. Canton Co.*, cited) clearly shows this, as this was a decision under a Maryland statute (Laws 1838, c. 205), dissimilar to ours, in that it by its terms gave a lien to the mechanic from the commencement of his work for his whole work and material furnished. Judge Eccleston, in his opinion, says: "The ninth section of which [meaning the statute], and the first section of the second act [Laws 1845, c. 176], give preference to liens on buildings for work and materials over all liens or incumbrances attaching subsequently to the commencement of the buildings,"—being directly contrary to the provision in our statute. This plainly illustrates the many errors that creep into judicial decisions by the hasty, inconsiderate, and ill-advised dictums of judges on points not necessary for them to determine; but which afterwards become traps for the unwary, and form the foundation of future erroneous decisions, to the destruction of the logical harmony of our system of common-law jurisprudence, and the denial of justice and the perpetration of wrong. And such dictum, when once launched, continues on its chaotic course until some succeeding court, by a recurrence to fundamental principles, stays its further progress by disapproving all decisions founded thereon. Year by year the number of overruled and disapproved cases is augmented, many of which might have been avoided, had their learned authors given the law as it is written, and not their opinions as to what it ought to be. It is the law that litigants want, and not the dictum of one judge founded on the dictum of some other judge. The I's and my's could be erased from all opinions without detriment thereto, except to record a dissent from palpable error, or they could be so plainly expressed as to show a mere opinion as to what the law should be, in opposition to what it really is. This would prevent them from being misleading from the mere fact of the learned source of their utterance. The court, in its amended

² See note 1, on page 264.

opinion, also refers to the case of *Dunklee v. Crane*, 103 Mass. 470, as a case in point, wherein it is held that "a mechanic's lien, under Gen. St. c. 150, has priority over a mortgage executed after the making of a contract under which the lien is claimed under a statute which expressly provides that the mechanic shall have a lien from the date of his contract prior to any subsequent mortgage." It is useless to comment on such inapplicable authority. The court had better confess that its decision has nothing to support it except its obiter dictum as to what the law should be, and not as it is written, than to base its conclusion on authorities that have no possible application. "Open confession is good for the soul." And no one who has access to the Reports is going to be misled by irrelevant references thereto.

There is another matter which detracts greatly from the equity of the conclusion reached in this case. H. T. Cushwa, one of the members of the firm of Cushwa & Bro., was president of the Improvement, Loan & Building Association on the 10th day of December, 1895, and as such president he entered into and signed a contract with T. C. Wood, president of the Auburn Wagon Company, which contract was acknowledged by said Cushwa on the 17th day of January, 1896, and by which the said building association agreed to loan said wagon company the sum of \$40,000, to secure which the deed of trust in controversy was afterwards given and recorded. This contract was also recorded on the 13th day of March, 1896, before any considerable proportion of work had been done by Cushwa & Bro. on their contract, and the part for which they now claim a lien was not completed until months afterwards. This contract contains the following provision, to wit: "The said party of the first part hereby covenants and agrees to and with the said party of the second part that it will loan to the said party of the second part the sum of forty thousand dollars in installments as follows: \$5,000.00 on the 15th day of February, 1896, less the dues on said 400 shares of stock from the 16th day of December, 1895, and the sum of \$1,000.00 advanced by the said party of the first part to pay the purchase money to W. T. Stewart, guardian, etc., for the parcel of land in said city of Martinsburg, lying on the northwestern side of Race street, adjoining the right of way of the Cumberland Valley and Martinsburg Railroad Company, upon which the said party of the second part is to locate its said plant; \$5,000.00 on the 16th day of March, 1896; provided, however, that if, at the time the said two installments become payable, the work on the buildings to be erected for said plant shall not have progressed sufficiently to warrant the payment of such installments, then the time of the payment of the same shall be deferred until such time as the progress on said buildings shall so warrant, and all subsequent payments here-

inafter set forth shall be made at regular intervals every thirty days thereafter; \$5,000.00 April 16th, 1896; \$5,000.00 May 16th, 1896; \$5,000.00 June 16th, 1896; \$5,000.00 July 16th, 1896; \$5,000.00 August 15th 1896; and \$5,000.00 September 16th, 1896; the last six installments, however, being made subject to the conditions affecting the time of payment of the said first and second installments as above provided,"—thus showing a clear intention that the money loaned was to be used to pay for the buildings, and was not to be paid over until it was secured by the completion of the buildings as they progressed. By the building contract of H. T. Cushwa & Bro., the buildings were to be completed on the 1st day of May, 1896, at which time \$25,000 of the loan would have remained in the control of the association; and if H. T. Cushwa, as president of such association, had adhered to the provisions of the loan contract, no part of the \$25,000 would have been paid over until the buildings were completed, but, because his firm was behind in its contract, he authorized the association funds to be paid over, in violation of the condition on which it was loaned, to be used for other purposes than payment for the buildings. The last installment was not to be paid until the 16th of September, 1896, which was four months after the buildings were stipulated to be completed, one month after H. T. Cushwa & Bro. settled with the wagon company, and accepted its negotiable notes, payable four, five, and six months after date, to wit, August 15, 1896, and 15 days after they finally completed the work for which they claim a mechanic's lien; and yet the said H. T. Cushwa concealed from the association, of which he was still the president, the fact that his firm was going to file and claim a mechanic's lien, and actually allowed and joined in paying, as such president, to said Auburn Wagon Company, said installment of \$5,000, which should have been applied to the payment of the amount of such mechanic's lien. By accepting the deferred notes of the company, he placed it out of the firm's power to sue until they were due, concealed the fact of the claim from the association, and led the other officers thereof to believe that it had been satisfied, and then, as president of the association, authorized the payment of the last installment to the company. This is certainly a breach of trust, for which, if the mechanic's lien were coming to him individually, it would justify the court in postponing it, if prior in right, to the trust deed of the association. Not only this, but as president of the association he neglected to have the trust deed or contract on record until after his firm had commenced work under their building contract, with full notice of such deed of trust and loan contract. He virtually had the money in his own hands which was intended to and should have gone to the extinguishment of the mechanic's lien; but, having extended credit to the company,

he placed it out of the power of his firm to demand payment thereof, and allowed the money to be applied in fraud of the association, without giving it any notice, while he was its trusted executive officer. Its rights he gave away without its knowledge, but was careful to preserve his own. His acts and knowledge in the premises were the acts and knowledge of the firm. And when he authorized the money which was intended by the association to be used in payment of the firm's indebtedness to be paid to the wagon company, and allowed the same to be applied otherwise than to the extinguishment of the mechanic's lien, and accepted deferred negotiable notes in lieu of such money, he thereby bound his firm to the release of its prior right, if any it had, over the association trust lien. 17 Am. & Eng. Enc. Law, pp. 1038, 1069. The association trusted him with its business. The firm did likewise. The association never authorized him to permit the application of its loan to the wagon company to be used for any purpose other than the extinguishment of the debt on its security until such debt was fully satisfied, as appears from the contract signed by him as its president; yet, as a member of the firm, he had a right to release the firm's debt, postpone its payment, or to direct the funds applicable thereto to be applied otherwise in such manner as to completely bind the firm, but not to the injury or loss of the association. With both he must act honorably, and within the scope of his authority in his double capacity. His duty as president of the association was to see that its funds were applied to relieve its security from prior liens, and this duty he could not legally disregard, as he had no other alternative. His duty to his firm was to see that this money was applied on its indebtedness as soon as the work was completed. This duty he could legally disregard, postpone the indebtedness, and allow the money to be otherwise used, and thus bind the firm. This he did do, and the firm should be held bound by his action, and its lien should be postponed to the trust lien. This is both just and equitable. The innocent stockholders were made to suffer by the decree of the court, while he who had it in his power and should have protected their rights is rewarded for breach of the trust and confidence placed in him. He saved himself; others he should, but would not, save. His gains, therefore, should have been used to cure their losses. The commencement of a duty is not the performance thereof, the court to the contrary notwithstanding, but, to be rightly performed, it must be fully completed; and in this case this means that the loss should be rightly placed on the shoulders of that one of two parties whose conduct, innocent or fraudulent, occasioned it. This is an elementary principle of equity. The firm, through its agent, H. T. Cushwa, knowingly permitted the money intended to satisfy its lien to be otherwise disposed of and

used, to the injury of the association; and therefore, the firm should bear the loss, and not the association.

PARKER et al. v. BRAST et al.

(Supreme Court of Appeals of West Virginia.
Nov. 30, 1898.)

TENANCY IN COMMON—TAX TITLE—TRUSTS—PURCHASERS OF COMMON PROPERTY—OUSTER—ADVERSE POSSESSION—DISSEISIN—LAPSE OF TIME—CONVEYANCE.

1. Where a co-tenant permits the common property to be sold for taxes, and directly or indirectly secures the title in his own name, his deed will be avoided at the instance of his co-tenants, or he will be held to be a trustee holding the legal title for their mutual benefit.

2. A purchaser of the common property from such co-tenant, with notice of the character of his title, will be limited in his holding to the actual interest of his grantor in such property.

3. A grantor claiming the common title of the co-tenancy under a deed from one of the co-tenants is under the burden of showing some notorious act of ouster or adversary possession, which has ripened into perfect title by its unbroken continuation during the statutory period of 10 years, with the full knowledge and acquiescence of the disseised co-tenants.

4. As the possession of one co-tenant is the possession of all, laches, acquiescence, or lapse of time cannot bar the right of entry of a co-tenant until the actual disseisin has been effected by some notorious act of ouster brought home to his knowledge.

5. The making of a deed for the whole property by a co-tenant to a stranger is not such act of ouster, unless actual adverse possession is taken thereunder.

(Syllabus by the Court.)

Appeal from circuit court, Wetzel county; Romeo H. Freer, Judge.

Bill by William W. Parker and others against M. A. Brast and others to recover possession of land claimed in co-tenancy. From a decree in favor of complainants, defendants M. A. and Amos E. Brast appeal. Affirmed.

Thomas P. Jacobs and George H. Umstead, for appellants. Robert McEldowney, S. B. Hall, and J. C. Parker, for appellees.

DENT, J. William W. Parker and others against M. A. Brast and others, from the circuit court of Wetzel county. In the year 1858, William W. Parker, John W. Horner, and R. W. Lanck were the joint owners in fee simple of several large tracts of land lying in Wetzel county, held by them under patent from the state of Virginia. R. W. Lanck was a resident of the county, and was intrusted by the other co-tenants with the supervision of these lands. He permitted the same to be returned delinquent for the year 1859, and in the year 1860 they were sold, and purchased by J. D. Ewing, who, on the same day he received his deed, conveyed them to R. W. Lanck, in consideration of \$100. Some time afterwards, Lanck disposed of a large portion of these lands to other parties. In the year 1869, William W. Parker and John W. Horner filed their bill against R. W. Lanck

and his purchasers, claiming to be co-tenants in said lands, but asking that the sales made by said Lanck be ratified and confirmed, and that he be required to account for the proceeds, and pay to the complainants each one-third thereof. This suit was never finally heard and determined. In the year 1864 said Lanck conveyed the balance of said lands, the title of which still remained in him, to his son Edgar W. Lanck, in consideration of one dollar and natural love and affection. Without taking possession of the lands or knowing anything regarding the quantity or boundaries thereof, on the 11th day of April, 1893, Edgar W. Lanck conveyed the same to Amos E. Brast and Michael A. Brast, in consideration of \$250,—\$150 cash, and the residue for surveying done and taxes paid. In October, 1896, the plaintiffs filed their bill to have themselves declared co-tenants in this tract of land, supposed to contain not less than 1,000 acres. In the meantime, the said Brasts had executed leases on said land to the South Penn Oil Company and the Eureka Pipe-Line Company, which plaintiffs desire, so far as they are concerned, to be satisfied and confirmed. The Brasts answered, claiming to be bona fide purchasers for value without notice, that plaintiffs had lost their right by laches, by acquiescence and waiver in the former suit instituted, and by the statute of limitations, and adverse possession by respondents and those under whom they claim for more than 10 years. Edgar W. Lanck answered, claiming adversely to plaintiffs' pretensions, and claiming that his deed was for valuable consideration, namely, the support of his father and mother. He alleges that the land was in a state of nature, and therefore in the actual possession of no one until after his deed to the Brasts, which he claims was obtained from him through fraud on their part. Some depositions were taken, and some redemption tax receipts, against the objection of defendants, were admitted in evidence. The circuit court held that the co-tenancy between Parker and Horner's heirs and Lanck and those claiming under him still existed, and that the plaintiffs were entitled to the two-thirds of said land. From this decree the Brasts alone appeal.

The appellants seemingly rely on the case of *Bryant v. Groves*, 42 W. Va. 16, 24 S. E. 605, as decisive of this case. This would undoubtedly be true if it were not for the settled principles of co-tenancy here existent, which were not present in the former decision. On the contrary, this case is governed by the principles announced in the case of *Cecil and Hall v. Clark*, 44 W. Va. 659, 30 S. E. 216. The tax purchase and after-acquirement of title to this land by Lanck, by reason of the sale to Ewing, in 1860, under the decisions of this court, was nothing more than a mere redemption, and the legal title stood in his name in trust for his co-tenants. *Battin v. Woods*, 27 W. Va. 58; *Curtis v. Borland*, 35 W. Va. 124, 12 S. E. 1118. See point 4 in case

of *Cecil and Hall v. Clark*, where it is held: "A tax purchase by one tenant in common of the land owned in common is but a redemption, and inures to the benefit of the co-tenancy. So, with a purchase under a sale of land under the common title forfeited for taxes, and sold by commissioner of school lands." The co-tenant in charge could not oust his co-tenants by permitting the land to be returned delinquent and sold, and then buying the same at a nominal price from the tax purchaser, as such conduct on his part simply establishes a collusive attempt to acquire the title of his co-tenants without their knowledge. There is nothing to show that the absent co-tenants were aware of the deed to their co-tenant until they brought their suit, in 1899, to have the proceeds of the sales made partitioned between them; and in such suit they treated him as holding the legal title in trust for them, just as the law would treat him. Had he taken actual adverse possession of the land, and thus completely ousted his co-tenants, and so held the same for the period of 10 years with their knowledge, the ouster would have been complete, and the co-tenancy would have ceased. But actual possession of the land in controversy was not taken until after the deed from Edgar W. Lanck to the Brasts, in 1892, less than four years from the bringing of this suit. These parties all had constructive notice of the condition of the title from the records, and they cannot claim to be innocent purchasers for value without notice. *Pillow v. Improvement Co. (Va.)* 23 S. E. 32, approved in *Cecil and Hall v. Clark*, above cited. Edgar W. Lanck, by his deed, under this last decision, took only the title of his father, and therefore he became a co-tenant with the plaintiffs, as no perfect disseisin has been shown as to them; and his grantees took in the same manner, as the disseisin could not become perfect until the statutory period of 10 years of actual, notorious, and adverse possession intervened, with notice brought up to the ousted co-tenants. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557.

These defendants insist that this suit is barred for the reason that William W. Parker and John W. Horner filed their bill heretofore referred to, in 1869, without attacking the tax deed or the purchase of Lanck from Ewing, but apparently ratified the same, and asked that Lanck, in the sales made by him, be treated and held to account as their trustee, and claim that this position is entirely inconsistent with that of the present plaintiffs. While it is true that the plaintiffs did not at that time ask to have said deeds canceled as a cloud on their title, they did ask that Lanck be regarded as a trustee, holding the legal title for their benefit, which is the same thing in substance, except as to innocent purchasers for value without notice. If by permitting the deeds to remain uncanceled, and the title to remain in Lanck unchallenged, some innocent person had been led to purchase the

property and pay full value therefor, without notice of their claim of co-tenancy, they might have been barred as to the lands, but not as to Lanck. Such is not this case. The purchasers here affected were neither for value nor without notice, as the paper evidence and the admission of the parties in their pleadings fully establish. The appellants purchased this property for less than \$250, which was certainly but a nominal price compared with its real value; and they say they had the title examined, and were fully aware of the same at the time of the purchase. They therefore knew that Lanck's title depended upon a tax sale made during the time of great confusion on account of the war, and that he had been a co-tenant with the plaintiffs and those under whom they claim; and it must be presumed they were fully advised as to the law of co-tenancy, and knew that the purchase of Lanck inured to the benefit of his co-tenants until actual disseisin by him had become perfect by time, under the statute of limitations. This put them on their guard and inquiry as to the true state of the co-tenancy.

The present suit is in perfect harmony with the former one, except the subject-matter is different, as both seek to treat Lanck and his grantees as trustees, holding the legal title for the benefit of the co-tenancy. In the former suit they were willing that the sales be confirmed, and the proceeds be partitioned, because they were made for value. In the latter suit they ask that the sales to Edgar W. Lanck and the Brasts be limited to the original Lanck one-third interest, because the sales were not for value without notice. So, the doctrine of estoppel does not apply to this case either by way of laches or inconsistent position on the part of plaintiffs. If the first suit had been heard on its merits, and determined adversely to the plaintiffs' claim, it would have been a bar to the present proceedings. The questions of title are the same in both suits. But, as clearly appears from the record, such suit was never finally heard, determined, or dismissed, and hence it cannot bar the present suit. *Watson v. Watson* (decided at this term) 81 S. E. 939. The relation of trust and confidence is such between co-tenants that it would be inequitable to permit one of them to do anything to the prejudice of the others in reference to the common property. For one co-tenant in any way but the most open and avowed, with the full knowledge of those in common interest with him, to try and obtain the common title, has been held to be a breach of trust, amounting to a fraud against the rights of the co-tenancy. The only way to destroy a co-tenancy is either for part to buy out the others, or to exclude them from participation therein by such open and notorious acts of ouster as amount to a disseisin, and which has ripened by actual adverse possession into perfect title under the statute of limitations. The present is not such a case. This conclusion renders it

unnecessary to consider appellants' objections to the depositions and tax receipts, as they in no wise affect the determination reached. The decree is affirmed.

FIRST NAT. BANK OF CUMBERLAND et al. v. PARSONS et al. (four cases).

(Supreme Court of Appeals of West Virginia. Dec. 17, 1898.)

CIRCUIT COURTS—DURATION OF TERMS—RELEASE OF SURETY—ABANDONMENT OF COLLATERAL—INDULGENCE OF CREDITOR—EXTENSION OF TIME—INJUNCTION BOND—FRAUDULENT CONVEYANCES.

1. A term of a circuit court of one county can, if necessary, prolong its session beyond 4 o'clock p. m. of the third day of the time fixed for a term in another county.

2. Circuit courts of different counties in the same circuit may sit at the same time.

3. If a creditor surrender a lien or hold upon property of a principal debtor, which constitutes a substantial security for the debt, in part or whole, without consent of a surety, the surety is, in equity, discharged from the debt, in part or whole, according to the value of the property; but if the principal had really no title to the property, and it cannot be said to have a real value applicable to the debt, and the surety is not injured by the surrender, the surety is not discharged.

4. Mere indulgence of a principal debtor by a creditor, without a binding contract for such indulgence, based on valuable consideration, will not discharge a surety.

5. Mere continuance at a term of court of a suit against a principal debtor by consent of the creditor, not under any valid contract to continue, will not discharge a surety.

6. The principle on which an agreement for an extension of time discharges a surety is that the creditor thus deprives the surety of means of relieving himself by paying the debt and proceeding immediately against the principal, or, without paying, by filing his bill quia timet to make the surety pay, or by notice to the creditor under the statute. The surety is not discharged by an act which in no manner affected his right or impaired the remedies of the creditor. *Adams v. Logan*, 27 Grat. 201.

7. An injunction bond payable upon the contingency specified in its condition, given before a deed of land which is a preference of one creditor over others, and which stands for the benefit of all creditors, on which bond judgment is recovered after the date of such deed, is entitled, under section 2, c. 74, Code 1891, to share in said land, the owner of such judgment being a creditor. The contingent character of the bond makes no difference.

(Syllabus by the Court.)

Appeals from circuit court, Tucker county; *J. H. Holt, Judge.*

Suits by The First National Bank of Cumberland and others against Ward Parsons and others. From a judgment dismissing the bills, plaintiffs appeal. Reversed.

W. B. Maxwell and A. Jay Valentine, for appellants. J. P. Scott, A. B. Parsons, Fred O'Blue, and Dayton & Dayton, for appellees.

BRANNON, P. The First National Bank of Cumberland and other creditors of Ward Parsons brought four separate equity suits against him and others, to set aside a conveyance of all his real estate to his son Lem-

uel W. Parsons, as fraudulent; and, upon a joint hearing of the causes, a decree was entered December 14, 1897, dismissing the bills of these creditors, selling the land for other creditors, but ignoring and disallowing the debts of those creditors, and they appeal.

One error assigned against the decree is that the circuit court of Tucker county was not lawfully sitting on the date of this decree, its term having expired, for the reason that the term of the circuit court of Preston county was fixed by the law to begin December 11th, and the Tucker county court could not go on till December 14th. This presents a much-mooted and interesting and very important question, which ought to be definitely decided. It has been the understanding of the legal profession, so far as I am able to say, for many years, that a circuit court term legally ends at a point of time from which there only remains time enough, by the usual course of travel, to enable the judge to reach the next court in his circuit, and open it not later than 4 o'clock of the afternoon of the third day. This is an impression founded on *Mendum's Case*, 6 Rand. (Va.) 704, *Hill's Case*, 2 Grat. 595, and *Boice's Case*, 1 W. Va. 329. But in all of these cases the sentences alleged to be void because of the alleged expiration of the terms when they were rendered were sustained, because it appeared that a sufficient time remained after sentence for the judge to reach his next court by 4 o'clock after noon of its third day. In no one of them was the question decided: Is a judgment of a circuit court continuing to sit after it is too late for the judge to so reach and open his next court by 4 o'clock p. m. of its third day, rendered after that point of time, void, as being *coram non iudice*, or voidable for that reason? In *Mendum's Case* the question is mooted, but not decided, but passed by because that sentence was in time for the judge to reach his next term. *Hill's Case* is the nearest approach to the decision of this question. The syllabus of the decision is that "the law has affixed no limit to the terms of the circuit superior courts, except that the judge holding the court shall adjourn in time to hold the next court in his circuit at the time appointed by law; and the judge may continue the session of his court until the latest period which will allow him time to get to the next court by 4 o'clock p. m. of the third day of the term." Judge Duncan does not, in his opinion, say just this, but perhaps it is a fair construction of what he does say. Judge Baker said nothing of that kind. He only said it was the duty of the judge to go on with the prisoner's case after the expiration of his term, as he did. But, at any rate, it is not the point of decision, legally speaking, but *obiter dictum*; for Hunter Hill was sentenced at 9 o'clock a. m., in Nansemond county, and the court found, as it was certified, that the judge could travel the 17 miles to the Isle of Wight court in three hours, thus having four hours to spare. The

same may be said of *Boice's Case*; the exact point now up was not decided, the judgment being held to be in time. This understanding has sprung from the generality of Judge Duncan's language in *Hill's Case*, whereas it is not certain that he or the court intended to decide that a judgment rendered after the third day of the next term was void.

But assume that *Mendum's* and *Hill's Cases* decide that a term can last no longer than a point of time from which the judge can reach his next court by 4 o'clock p. m. of its third day, and that a judgment rendered later than that point would be void; I would then hold that these cases do not govern, because the statute existing then is different from that now in force. The statute governing those cases reads: "Each of the aforesaid courts shall sit until the business thereof shall be dispatched, unless the judge holding the same be compelled to leave the court, in order to arrive in time at the next succeeding court of his circuit, or at the general court." 1 Rev. Code, p. 229. Here, it might be said, was a limitation to the term by the letter of the statute. In *Mendum's Case*, Judge Bouldin states that two of the judges—Brockenbrough and Summers—were "strongly inclined to think that the qualifying words 'unless the judge be compelled to leave in order to arrive,' etc., are to be considered as directory or permissive only, and that of the necessity to go to the next court, or to finish what is before him, and what has already been begun, he is to judge, and, on his own responsibility, decide whether a compliance with the express orders of the legislature to dispatch the business before him, or go to the next court, as the law permits, will best subserve the public interest. They argue that it is right it should be so, else there would often be a failure of justice. In some of our courts it sometimes happens that cases of the most important character could not be finished, and consequently would never be tried, unless the judge has power to run into the term of the next court to which his duty calls him; and, as the legislature has fixed no precise limit, the construction which best fulfils their general purpose is the right one." But this point was waived, not decided.

Our present statute (section 2, c. 114, of the Code) reads: "The supreme court of appeals and circuit court may at any time adjourn from day to day until the business is dispatched, or until the end of its term,"—meaning to authorize adjournment from day to day, and to continue these adjournments until the business is done, or until it actually adjourns; the end of the term here meant being not that which happens from the coming on of the time fixed for another court, but the actual end of the term by actual adjournment. This section leaves out that language in it when *Hill's Case* was decided, "unless the judge holding the same shall be compelled to leave the court in order to arrive in time at the next succeeding court

of his circuit." The statute having changed, *Hill's Case*, if it decided the point, cannot apply. We must construe and apply our present act. Our statute law fixes dates for the commencement of terms, but fixes no express length of those terms. The only limitation is one to be implied. It may be said, by the coming of the time fixed for another court; and, as each county has its time, the law intends to close one court when another begins. But it is only an implied termination. The judge is directed, it is true, to hold a court in the other county; but, if he continues in one county, the court of the other county is simply without a term,—the term is simply lost in the second county. The Preston term is simply lost or lapsed; but the Tucker term, already in session, if actually continuing, is still the circuit court of Tucker. It has not ceased to exist. It has its own separate, independent existence as the circuit court of Tucker. The regular judge of the circuit—the person representing the judicial office and function in the circuit—is on its bench, and nowhere else; and it cannot be that its acts are void. The plain object of the act is to continue the court until the business is done; but, as that might prolong its session indefinitely if it had to sit until all its business was dispatched, the act plainly contemplates the power to adjourn, though all the business may not be done, by the use of the words, "until the end of the term." Look at the inconvenience and evil resulting from a different construction. An important criminal cause, occupying days or weeks in one county, is on trial. All the evidence and arguments have been heard. The jury is out deliberating, but has not reached a verdict. The clock strikes the hour when the judge ought to leave to get to his next court. He calls in the jury, and disbands it; remands the prisoner to jail. All the expense and work go for naught, and, worse yet, the prisoner is deprived of his right to a speedy trial. I cannot yield to this construction, entailing so much evil, without a statute more plainly calling for it than our present statute. Therefore I think the acts of the circuit court of Tucker not void, though done by that court sitting any number of days into the term fixed for the circuit court of Preston. It seems to me that common sense, convenience, dispatch of the public business, range themselves on the side of one construction; mere idle technicality and inconvenience on the other. Two courts in the same circuit can proceed at the same time in different counties. The law provides that a judge of one circuit may hold in that of another. The circuit court of each county is a separate, distinct entity,—an existence in itself. Why a lawful judge may not sit in one county, another lawful judge in another county of the same circuit at the same time, I have yet seen no good reason. It does not appear whether the circuit court of Preston was going on at the time or not.

If so, it would not, in my judgment, alter the case.

Under authority of the constitution (article 8, § 15), the legislature, by Code 1891, c. 112, § 11, has provided for holding circuit courts "when from any cause the judge shall fail to attend and hold the same, either at the commencement of the term, whether regular, adjourned or special; or if he be in attendance, and cannot properly preside," by the election of special judges. The special judge is a judge, under the constitution and statute, vested with circuit court powers, and just as much authorized to hold a circuit court as the regular judge,—considerations which, it seems to me, carry the conclusion that two courts in the same circuit can go on, under lawful judges, at the same time. The language of constitution and statute is broad,—“When from any cause the judge shall fail to attend;” the evident purpose being to save the term when the regular judge does not come. Each court has a separate existence. It is created for the county. So it have a judge, it is a lawful court; and that it may have, the law has provided. What has the circuit court of Tucker to do with the circuit court of Preston, or the reverse? Why can they not both act at the same time? Public need and policy both say they can. I have no doubt of it.

I come now to the merits of the case. The case was once before in this court, and the nature of it will be found in 42 W. Va. 137, 24 S. E. 554. Certain creditors of C. H. Barritt, Jr., had instituted chancery suits against him to recover debts, and levied attachments upon his personality and land as his property; and there was a decree in the suits heard together, subjecting the personality to sale, and decreeing the debts personally against Barritt, but no decree against the land, and referring the cases to a commissioner, to report the lands owned by Barritt, levied under the attachments, the condition and state of the title thereto, their owners and priorities. A few days later, bonds were given by Barritt, in which Ward Parsons was a surety, to release the personality levied under the attachments of certain of the creditors. A few days later came a decree rectifying that these bonds had been given, and the attachments released by the sheriff. In this decree occurs this clause, after declaring that the sheriff had released the attachments: "Thereupon, on motion of the said defendants, the decree entered in these causes at this term, directing a sale of the property which has been attached, is set aside, and, by consent of parties, no decree is to be entered in these causes in favor of the plaintiffs at this term." Of course, the sheriff could not release attachments on realty, or the lien thereof. He possessed no power to do so. He could release the personality only. It is said that the former opinion in this case decided that, by the clause

above quoted from the decree, the plaintiffs, by their consent, released the personal decree against Barritt, and thereby released the lien of that personal decree on his land, and thus absolved and discharged Ward Parsons, the surety in said replevin bonds, from all liability arising from them. I do not see how it can be said that said clause in said decree shows that the plaintiffs in those causes consented to the setting aside of the decree, when its terms show that it was the action of the court. The former decision was one of reversal, not affirmance, and question might be made of the effect of such opinion now, if it were material; but it is not. And question might be made, looking at other passages in the opinion, whether it was intended to finally pass upon the question, and hold that the clause showed that the plaintiffs consented to the setting aside of the decree. But it is useless to discuss that further. That opinion clearly left open for future ascertainment and decision whether that personal decree operated on any land, whether the land was of any value, whether it would have discharged the debts pro tanto or in toto.

Suppose, however, we say that the action of the plaintiffs in that decree is such as constitutes a surrender of a lien, if there was one, or to give further indulgence to the principal debtor, W. A. Barritt, Jr.; that will not discharge the surety, Ward Parsons, for we must then see whether it entailed injury on Parsons. If Barritt had no land to which the personal decree could attach, or if, though vested with a title, it was colorable only,—a mere shadow, constituting no substantial estate from which payment could be reasonably expected,—the surrender of this decree would not discharge Parsons. The question is: Did the surety really thus suffer a loss? 24 Am. & Eng. Enc. Law, 851, says: "A surety is released when the creditor parts with a lien for the payments of the principal's debt. The release or surrender of the lien or security will not, however, discharge the surety absolutely from all liability, but only to the extent of the loss which his action will cause the creditor." It will release pro tanto or in toto, according as the value of the property released was equal to or less than the property released. *Bank v. Parsons*, 42 W. Va. 138, 24 S. E. 554 (Syl. point 8); *McKenzie v. Wiley*, 27 W. Va. 661; *Mingus v. Daugherty* (Iowa) 54 N. W. 66.

Without detailing evidence, I can say that, when this decree was set aside, the two tracts of land to which Barritt had a paper title, and no possession, were not owned by him. His title was an empty shell. They were omitted from the tax books for many years, and were thus forfeited, and the legal title vested in the state, or in junior or other claimants. There was a right of redemption, it is true; but it is not possible to say the creditors had to institute proceedings, and pay out money to redeem. How much money? Likely more than

their debts. And it would then avail nothing; for all this land was claimed under adverse titles, and their claimants in actual adverse possession for many years, and redemption would not take from them the forfeited title vested in them; and, if it could, they would hold all or great part by adversary possession, and perhaps by superiority of title. These creditors, the books say, need not use ordinary diligence, unless urged thereto by the surety. They could not sue the state to allow redemption of the land, because the law provides for no such suit. Were they to wait, before proceeding on the replevin bond, till the state asked a sale of the forfeited land, and then redeem by petition? That would be a high degree of diligence, attended by large outlay and delay, which the law did not require of them. Further, these two tracts, before the so-called "release," were levied upon by attachment in a suit of the Bank of the Ohio Valley against Barritt, before attachments in which the bonds were given, in which Parsons was Barritt's surety, and were sold under decree in that suit, the tract of 3.951 acres realizing \$1,000, and that of 3.477 acres \$100, leaving three-fourths or more of the bank's debt unpaid; and the tract that brought \$1,000 was bought in by it, else it would likely not have brought what it did. This shows alone that the personal decree against Barritt was not worth any sum which we could reasonably name. A redemption by those creditors would have been only for another creditor. The commissioner reported without details that the title to the tracts was "considerably clouded, the same overlapping several other tracts." He failed to answer the requirement of the decree that he report on the condition of title any further. He reported their value upward of \$24,000, but that was on the basis of clear title. The evidence taken by him showed clouded, dangerous title; one witness, County Surveyor J. W. Bowman, saying, "I am under the impression there isn't an acre of this land but what is owned by other parties" than Barritt. And consider, too, that attachments levied in these creditors' cases on this land were not released. They were liens older than the personal decree. Parsons could be substituted to their lien on paying the debts, but they were worthless from the simple fact that Barritt's title was what is called, in West Virginia vernacular, "wild-cat title,"—a mere illusory will-o'-the-wisp. *Blydenburgh v. Bingham*, 38 N. Y. 371, held that where a creditor releases from his judgment land in which it was thought such debtor might have some contingent interest for the purpose of relieving the premises from a possible cloud, it does not discharge the surety, where it is shown that in fact the debtor had no title whatever in the land released, and that, in consequence, the judgment never was a lien upon it. "Surety not released by any act or conduct of payee which does not place surety in a worse position." *Driskell v. Mateer* (Mo.) 80 Am. Dec. 105.

The burden is on the surety who has voluntarily assumed obligation, and asks that an honest debt shall be lost to its owner, to show that the creditor surrendered something that would have availed to save him from loss. *Knight v. Charter*, 22 W. Va. 422 (Syl. point 6). But, if the burden were on the other side, enough is shown to show that no lien was released.

Having discussed the case as respects the setting aside of the personal decree, I next advert to the question, does the consent of the creditors not to ask a decree in the cases at that term of the court release the surety, *Parsons*? This was, clearly, not decided in our former decision. This comes under the head of indulgence to the principal. It is hardly indulgence. It fixed no new day of payment, and this is necessary to release surety. *Alcock v. Hill*, 4 Leigh, 622; *Brandt, Sur. § 344*. It is not the case of a new contract or novation of the debt, so as to discharge the surety absolutely; but, if it discharges, it must be because it is mere indefinite indulgence. No consideration for this indulgence appears, and therefore, unless the fact that it is a consent of record changes it, the want of consideration prevents it from operating to tie the hands of the creditor, and therefore does not release the surety. Mere leniency, mere indulgence, extended often and often by creditor to debtor, does not discharge a surety. *Knight v. Charter*, 22 W. Va. 429; *Norris v. Crummey*, 2 Rand. 334; *Alcock v. Hill*, 4 Leigh, 622; 3 Minor, Inst. 187. The most we can say is that such consent of record estopped the creditors from asking a decree that term of court. I do not know that it did that, as the parties might withdraw their consent with the court's leave; and the court seeing that it was based on no consideration, if the other party were present, or on rule, would set it aside, on motion of creditor or surety, if justice required. It was a mere consent not to prosecute that term, and not releasing the attachments or changing the status of the cases for future efficacy. It was only a continuance. Judge Woods says, in *Knight v. Charter*, supra: "The creditor may sue or not sue. If he sues, he may, if he pleases, dismiss or discontinue it. If he prosecute to judgment, he may or may not sue out execution." The cases support this statement. The syllabus says: "Sureties are not entitled to be absolved by want of diligence on the part of the creditor in prosecuting his demand against the principal." The surety "is not discharged by creditor's discontinuing proceedings against principal, where there was no abandonment of any absolute lien or security." *Springer v. Toothaker*, 69 Am. Dec. 66.

Here, too, comes another consideration. If that consent continuance did bind the creditors to a continuance, it did not tie the hands of the surety from any legal steps he might take for his security; and the cases all say that, if what the creditor does does not stop the surety from steps to save himself, he is not

released. In *Norris v. Crummey*, 2 Rand. 329, Judge Green said that if the creditor's agreement still left the surety free to proceed against the principal, or pay and be substituted to liens, and there were left the attachments, or the surety might proceed himself by bill quia timet against creditor and principal, "no injury is done to the surety by the creditor, and there is no possible reason for absolving him." The same is stated by Judge Moncure in *Shannon v. McMullin*, 25 Grat. 212, and in *Adams v. Logan*, 27 Grat. 201. It cannot be said that the steps of the surety—anything he might do to protect himself—were hindered by this continuance.

Under this head is another consideration: What good would a decree at that term of court have done the surety? I have shown that a personal decree as to the land would have been unavailing. So would a decree for its sale under the attachments, though they were left standing for future action. And *Barritt* was insolvent, except as to the personality attached; and that was sold under attachments heard with those cases, in which no replevy bonds were given, and it was levied on, and *Parsons*, by going into the bonds, released it. How did the continuance prejudice him? Many authorities hold, even where there is a binding agreement to extend time, that thereby the surety must be actually prejudiced, to be relieved. "It must put him in worse position." *Driskell v. Ma-teer* (Mo.) 80 Am. Dec. 106; *Brown v. Wright*, 18 Am. Dec. 190; *Steele v. Boyd*, 29 Am. Dec. 226; *Fulton v. Matthews*, 15 Johns. 433, 8 Am. Dec. 261, where the court says: "A delay to sue, or even a discontinuance of a suit brought, cannot absolve the surety, if he is passive and takes no measures indicating to the holder of the note that he insists on his proceeding against the principal. It ought to be put beyond a doubt that the surety is injured by the delay; that is, that the principal was solvent, and able to pay the debt, if he had been prosecuted for it." "Nothing from nothing, and nothing remains." It is apropos to this last eminent authority to say that no decree, personal or against the land, would yield any return, and the continuance did not make worse *Parsons'* condition; and to remark, further, that he was passive, and was somewhat a party to the cases, by signing the bond to redeem the personality from the attachment, which laid him under obligation to see that there was a decree, if he wished one for his safety. His own act practically gave indulgence, and now he complains of creditors.

After the best consideration I am able to give this case, I conclude that it is against equity to take from these creditors their just debts, and release a party who stayed their hands in securing their money, and freely assumed the burden. Before doing so, we ought to see some substantial wrong, actually prejudicing *Parsons*, done by these creditors.

The grounds on which he asks release are too unsubstantial.

L. W. James joins in this appeal because the decree disallowed his debt reported by the commissioner as a debt against Parsons. Our former decision held that the land conveyed by Ward Parsons to his son Lemuel W. Parsons should answer all debts at the date of the conveyance against Ward Parsons. This James debt was excluded, on the erroneous opinion that it was nonexistent as a debt of March 4, 1892, the date of the deed from Ward to Lemuel W. Parsons. This James debt was based on an injunction bond dated March 31, 1891, thus antedating the deed. Judgment on it was rendered against Ward Parsons March 15, 1894, after the deed. The date of the judgment is immaterial, as the obligation of the bond began with its date. The fact that it was not, like a straight note, for the unconditional payment of a fixed sum, makes no difference, as it was an obligation to pay money in a certain contingency,—the dissolution of an injunction,—and James, claiming under it, is a creditor, under Code 1891, c. 74, §§ 1, 2 (both sections). Whether the conveyance be fraudulent in fact, or merely voluntary, or one under section 2, held neither fraudulent nor voluntary, but a preference, and therefore standing for all then-existing debts or liabilities such an obligation comes in, though the liability be contingent. *Wolf v. McGugin*, 37 W. Va. 564, 16 S. E. 797; 5 Am. & Eng. Enc. Law (1st Ed.) 179; *Bump. Fraud. Conv.* §§ 502, 503; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; *Scraggs v. Hill*, 43 W. Va. 172, 27 S. E. 310. James' debt was improperly rejected. So as to the debts of First National Bank of Cumberland, Daniel Miller & Co., Greer & Laing, and L. D. Rohrer. Those debts must be allowed their proper participation, after preferred debts, in the property to be sold under a future decree. Reversed and remanded.

O'CONNOR v. O'CONNOR et al.

(Supreme Court of Appeals of West Virginia.
April 7, 1897.)

FRAUDULENT CONVEYANCES — PURCHASER PENDENTE LITE—SUBJECT TO EQUITIES—POWER OF ATTORNEY—CONSTRUCTION—EXECUTORS AND ADMINISTRATORS—RIGHT OF APPEAL.

1. P. executed an absolute deed for his land to J. P., in consideration of \$1,900 cash, dated June 1, 1893; and J. P., not being ready at the time said deed was executed to pay the cash, obtained possession of the deed on pretense that he wished to take it to a neighboring town to show it to a man, and at the same time executed a writing, and delivered it to P., reciting the purchase of the land for \$1,900, and the execution of the deed, and agreeing that, if the sum of \$1,900 was not paid to P. in three days, then the deed should be null and void, but, if the said money was paid as aforesaid, the deed was to be of full effect. J. P. obtained possession of said writing, and, without authority of P., changed it so to read "June 15th," instead of "June 3d," and, on the same day on which said deed was executed, conveyed said land to O. C.

W., both of which deeds were placed on record but no part of the purchase money was paid. Said deed was fraudulent and void as to P.

2. On the 15th day of August, 1893, a suit in equity was instituted to set aside said deed as fraudulent and void by P., making J. P. and C. W. parties defendant. After process in said suit had been served, but before the bill had been filed, O. C. W. executed a deed for said land to the R. C. C. & C. Co. Said company thereby became a pendente lite purchaser, and took said land subject to the equities in litigation in said bill, and was bound to abide by the result.

3. On the 23d day of June, 1893, P. entered into an executory contract with L. H. K., which he agreed to sell him said tract of land upon the terms and for the consideration therein set forth, and on the same day executed to L. H. K. a power of attorney, wherein he cited the facts in regard to his sale to J. P., fraudulent conduct and failure to pay the purchase money, and also as to the sale to L. H. K. and authorized L. H. K. to institute and prosecute to final hearing a proper suit in equity in his name, or in the name of L. H. K., as might appear proper, for the purpose of setting aside and annulling said deed of conveyance from J. P. to O. C. W., and any other contracts that might have been made in reference to said tract of land; authorizing said L. H. K. to settle any and all matters of difference between him (P.) and J. P. (it appearing that there were several matters of account existing between P. and J. P.), and to attend to all business affairs of his generally. Subsequently J. P. paid to L. H. K. \$1,000 of the original purchase money for said land, which P. declined to receive, and shortly afterwards brought suit to set aside his deed to J. P. as fraudulent and void. Held, that in the circumstances of the case, and in view of the facts set forth on face of said power of attorney, it was not intention of P. to authorize L. H. K. to receive and collect said purchase money from J. P., and its reception by L. H. K. did not ratify and confirm the sale to J. P., or waive the effect of said fraud.

On Rehearing.

An administrator with the will annexed of a decedent who is indebted at the time of death, and who leaves nothing with which to satisfy the same except a tract of land which has been obtained from him by fraud, to set aside which fraudulent conveyance from him said suit had been instituted by such decedent, is determined adversely to him in the circuit court has the right to prosecute an appeal from said decree, holding that a purchaser from said fraudulent grantee, indirectly, during the pendency of such litigation, was an innocent purchaser, and entitled to hold the property.

Brannon, P., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Randolph county; Joseph T. Hoke, Judge.

Suit by Patrick O'Connor against J. P. O'Connor, the Roaring Creek Coal & Coke Company and others, to set aside conveyances of land as fraudulent. From a decree in favor of the coal and coke company, Joseph L. Hechmer, plaintiff's administrator et al. appeals. Reversed.

Samuel V. Woods and J. A. Bent, for appellant. E. D. Talbott, Brown, Jackson Knight, C. F. Teter, and Fred O. Blue, appellees.

ENGLISH, J. This was a suit in equity brought in the circuit court of Randolph

county by Patrick O'Connor against J. P. O'Connor and O. C. Womelsdorff, which litigation grew out of the following state of facts: On the 11th day of May, 1893, Patrick O'Connor, who was then about 90 years of age, entered into an executorial contract with his nephew J. P. O'Connor for the sale of 205 acres of land, which was the whole estate of said Patrick O'Connor, situated in Randolph county, in the Roaring Creek coal field, at the price of \$1,800, one-half of which was to be paid when the land was run out and the records examined, and the residue in two installments, payable in three months and six months from the date of the deed; stating that \$5 was paid, and the residue of said half was to be paid when said Patrick fulfilled his part of the contract. This paper does not appear to have been acted upon by either party. On the 1st of June, 1893, the plaintiff executed to J. P. O'Connor a deed for this land, absolute upon its face, in consideration of \$1,900 recited in the deed as in hand paid, but not in fact paid at all, which deed was acknowledged before the notary who wrote it on that day. On the same day, and at the same time, said J. P. O'Connor delivered to the plaintiff a written memorandum signed by him, reciting the execution of the deed, stating that it recited the payment of the purchase money, and agreeing that, unless said John P. O'Connor brought and delivered to the plaintiff the said \$1,900 by the 3d day of June following, then the deed was to be null and void. While this memorandum dated June 1, 1893, was in possession of the plaintiff, and after the time in which John P. O'Connor was to pay the \$1,900 in order to have title to said land, he obtained possession of said paper from the plaintiff, representing that he wished to examine the same, and wrote over the figure "3" the figure "15," thereby extending the time in which he might make the said payment. This change is admitted, but the defendant denies that it was made without authority. On the same day John P. O'Connor executed a deed for this land, conveying the same to O. C. Womelsdorff, at the stated price of \$25 an acre (the real price being \$15), of which \$3,587.50 was recited as paid in hand, and the receipt thereof acknowledged, \$708.75 was to be paid in three months, and the like sum on the 1st of December, 1893, and a vendor's lien was retained to secure the deferred payments. But O. C. Womelsdorff, the grantee therein, was not present, and never saw the deed, nor agreed to the terms thereof, unless the allegations of the deed be true, until more than ten days thereafter, when the deed was recorded. This deed was acknowledged by O'Connor and his wife on June 2, 1893. These deeds were both recorded in Randolph county on the 10th day of June, 1893, on motion of John P. O'Connor, who states that the consideration of this deed was fixed at \$25 an acre, instead of \$15, be-

cause said Womelsdorff requested it to be done. On June 23d Patrick O'Connor made to L. H. Keenan an executory contract under seal, and acknowledged it, agreeing to sell him this land at \$10 an acre; \$1,000 to be paid when the deed was delivered, and the residue in one year. This paper was recorded on the 24th day of June. On the same day Patrick O'Connor executed to said Keenan a power of attorney, reciting the execution of the deed to John P. O'Connor on the 1st day of June, 1893, conveying the 205 acres of land at the price of \$1,900 cash, the receipt of which was thereby acknowledged as paid; and reciting that he had taken from John P. O'Connor a writing, signed by him, showing that if the said purchase money was not paid by June 3, 1893, the deed was to be null and void, and that the said purchase money had never been paid, and that, contrary to agreement, the said deed had been placed on record in the clerk's office of Randolph county; and reciting that he was informed that John P. O'Connor had sold said land to O. C. Womelsdorff; and stating further that by memorandum in writing dated June 23, 1893, the plaintiff had sold said land to L. H. Keenan, and that he was entitled to have the same conveyed to him free from the claims of John P. O'Connor and said Womelsdorff; and authorizing said Keenan to institute any proper suit for the purpose of setting aside and annulling the deeds to John P. O'Connor and to said Womelsdorff, and any other contracts that might have been made in relation to said land, except the one to Keenan; and stating that Keenan was authorized to settle any and all matters of difference between the plaintiff and said John P. O'Connor and to attend to all his business affairs generally,—which paper was recorded on 26th day of June, 1893. About the 11th day of July, 1893, said John P. O'Connor paid Keenan \$1,000 of the said \$1,900, which he still has; the plaintiff refusing to receive it, or to ratify the action of Keenan in respect thereto. The bill in this case charges a combination and conspiracy between the defendants to cheat and defraud the plaintiff out of the title and ownership of his land, and prays that their deeds may be set aside as fraudulent and void, and for general relief. On the 1st day of September, 1893, after the writ had been served upon the said defendants, but before the bill was filed, O. C. Womelsdorff conveyed this land, by deed of that date, to the Roaring Creek Coal & Coke Company, a corporation, which assumed the unpaid purchase money, which deed was recorded September 9, 1893. At the January rules, 1894, they filed an amended bill against the same defendants, together with said coal and coke company, to set aside its said deed as void, and for general relief. On the 14th of May, 1895, the cause was heard, and a decree rendered holding the deed of John P. O'Connor fraudulent and

void as to the plaintiff, but holding that the Roaring Creek Coal & Coke Company was an innocent purchaser without notice, and that the plaintiff, as against that company, was not entitled to have his deed to John P. O'Connor, and John P. O'Connor's deed to Womelsdorff, and Womelsdorff's deed to said company, set aside, or the title restored to him, but that the said company was entitled to have the title confirmed to it; and further holding that by reason of the fraud of John P. O'Connor, of which the court found him guilty, he was entitled to reap no benefit or pecuniary profit by reason of his sale to Womelsdorff, but that the plaintiff was entitled to the full benefit thereof, and that of the \$1,537.50 actually paid to John P. O'Connor by Womelsdorff, \$1,000 of which went to Keenan, he should account to the plaintiff for \$599.31, the amount thereof, and the plaintiff should have the privilege of a settlement with said Keenan for the \$1,000 paid by John P. O'Connor to Keenan; and ordering Womelsdorff to pay the residue, \$1,537.50, with interest from June 1, 1893, to the plaintiff,—holding that the actual price Womelsdorff paid for the land was \$15 an acre. This decree further provided that, upon the payment of this money by Womelsdorff, his vendee should have the land discharged from the vendor's lien, but, if default was made, the land was directed to be sold in the manner therein prescribed; and from this decree the plaintiff applied for and obtained this appeal.

The first assignment of error relied upon by the appellant is claimed to be in the action of the circuit court holding that the deed executed by said Patrick O'Connor to John P. O'Connor on the 1st day of June, 1893, was fraudulent and void as to said Patrick O'Connor, but that the Roaring Creek Coal & Coke Company was an innocent purchaser of the said land, without notice of such fraud, because the said coke company was a pendente lite purchaser, and was not entitled to any notice of the pendency of this suit, under section 13 of chapter 139 of the Code, because this was not a suit or proceeding "to subject real estate to the payment of any debt or liability," within the meaning of that section, and because the contract and power of attorney between Patrick O'Connor and L. H. Keenan were recorded, in which Patrick O'Connor expressly repudiated this sale and the sale to O. C. Womelsdorff, and directed the institution of proper suits to vacate the same.

In considering this assignment of error, let us first look to the question raised by the fact that the Roaring Creek Coal & Coke Company purchased this land from Womelsdorff on the 1st of September, 1893, after the suit was brought, but before the bill was filed. If Womelsdorff, under all the circumstances of this case, could have conveyed this land, yet said coal company was a pendente lite purchaser, and was bound to take the

land with all the burdens sought to be imposed by the suit. Upon the question as to whether said coal company in this instance should be considered a pendente lite purchaser, attention is called to the case of *Harmon v. Byram's Adm'r*, 11 W. Va. 511, in which case the second point of the syllabus reads as follows: "H. sued out a summons in chancery against B. on the 3d day of January, 1872, which is served on the 6th of the same month. The bill is filed at February rules following. On the 20th of January, after summons served, and before bill filed, P. purchases the whole or a part of the land which is proceeded against in the suit. Held, that P. is a pendente-lite purchaser." In point 4 of the syllabus in the same case it is held that "every person purchasing pendente lite is treated as a purchaser with notice, and is subject to all the equities of the person under whom he claims in privity; and it makes no difference whether the purchaser pendente lite be the claimant of a legal or equitable interest, or whether he be the assignee of the plaintiff or defendant." It was also held by this court in the case of *Zane v. Fink*, 18 W. Va. 693 (Syl. point 1), that: "Ordinarily the decree of the court binds only the parties and privies in representation or estate, but he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party. This rule, however, is modified to a considerable extent in some cases by our statutes in relation to recording his pendens; and there are perhaps some other exceptions to the rule, in part, according to the principles governing courts of equity." The same principle is stated in the case of *Lynch v. Andrews*, 25 W. Va. 751.

Can there be any question in this case that the Roaring Creek Coal & Coke Company was a pendente lite purchaser of the tract of land in controversy? The purchase was made on September 1, 1893, the suit was instituted on the 15th day of August, 1893, and the process had been served before this purchase was made and before the bill was filed. The process having been served on the defendant Womelsdorff on the 18th day of August, and on John P. O'Connor on the 23d of August, and the bill filed at October rules, the lis pendens related to the service of the writ. From that time the suit was pending, and the said Roaring Creek Coal & Coke Company must be regarded as a pendente lite purchaser, unless the statute found in section 13 of chapter 139 of the Code requires that, under the circumstances of this case, notice of the pendency of said suit should have been recorded in order to affect said purchaser. That section provides that "the pendency of an action, suit, attachment, or proceedings to subject real estate to the payment of any debt or liability upon which a previous lien shall

not have been acquired in some one or more of the methods prescribed by law shall not bind or affect a purchaser of such real estate for a valuable consideration without notice, unless and until a memorandum setting forth the title of the cause, the court in which it is pending, the general object of the suit, attachment, or other proceeding, the location and quantity of the land as near as may be, and the name of the person whose estate therein is intended to be affected by the action, suit, attachment, or proceeding, shall be filed with the clerk of the county court in which the land is situated," which is required to be recorded without delay in the deed book, and indexed in the name of both parties. We find the doctrine in regard to purchasers pendente lite stated by Story in his *Equity Jurisprudence* (volume 1, p. 411, § 405), where the author says: "It is upon similar grounds that every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. And therefore a purchase made of property actually in litigation, pendente lite, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit;" citing the case of *Tilton v. Osfield*, 98 U. S. 163, in which it is held that "a purchaser of property pendente lite is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto." Story, in the same volume (page 412, § 400), says: "Ordinarily it is true that the decree of a court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy, for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end of litigation." In the case of *White v. Perry*, 14 W. Va. 66, Judge Green, in delivering the opinion of the court, on page 76, says: "The doctrine of lis pendens, however necessary, is harsh in its effect upon bona fide purchasers, and has always been confined in its operation to the extent of the policy on which it was founded,—that is, to give full effect to the judgment or decree which might be rendered in the suit depending at the time of the purchase (the lis pendens),—and it applied only to proceedings directly relating to the thing or property in question. * * * This suit pending at the time that the deed was made by Perry to the appellant in the case before us was an action of debt to recover a personal judgment

against Perry. The object of this suit was not to subject Perry's lands to sale. The suit for that purpose was not instituted till after the deed had been made by Perry to Tolly, and duly recorded. The rule of lis pendens has, therefore, no application in this case." In the case of *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730,—very similar in many points to the one under consideration,—Holt, J., in delivering the opinion of the court, on page 287, 41 W. Va., and page 731, 23 S. E., says: "The evidence shows that these grantees from the defendant Johnson learned through an agent who examined the records for them that Samuel O. Johnson had a general warranty deed for the land in controversy from the defendants to the petition, Mrs. Wilfong and husband, for consideration of \$50 in hand paid. He found no liens or judgments against the land, and considered Samson O. Johnson's title to the land as good as any man's title could be to land. But if he had looked further, and in the other clerk's office, he would have found a suit pending for setting aside the deed of which he speaks as obtained by misrepresentation and fraud; and whether he looked for it or not, or, having searched the records, failed to find it, this pending suit had the effect of notice to his principal. This doctrine is founded on the policy that real property which is specifically sued for shall abide the result of the suit; for otherwise, by successive alienations, the litigation might be indefinitely prolonged [citing *Arnold v. Casner*, 22 W. Va. 444; *Zane v. Fink*, 18 W. Va. 693; *Harmon v. Byram's Adm'r*, 11 W. Va. 511]. It does not come within the letter or meaning of section 18 of chapter 139 of the Code, requiring a memorandum of lis pendens, in certain cases, to be recorded." In determining whether it was necessary in the case at bar to record a lis pendens in order to affect the Roaring Creek Coal & Coke Company with notice of the suit, it is necessary we should refer to the record; and in so doing we find that the object of this suit, as it was in the case of *Wilfong v. Johnson*, was to set aside as fraudulent and void the deed made by the plaintiff to J. P. O'Connor, and by J. P. O'Connor to Womelsdorff, and that it was not a proceeding to subject real estate to the payment of a debt or liability, and therefore it was not necessary to record a lis pendens to give notice to the Roaring Creek Coal & Coke Company of the suit which was pending at the time of its purchase. Counsel for the appellees contend that, under the circumstances of this case, it was necessary to record a lis pendens to give said coal company notice, and prevent it from being an innocent purchaser, and rely upon the case of *De Camp v. Carnahan*, 26 W. Va. 839. A reference to that case, however, shows that it was an attachment suit in equity to subject land to the payment of a debt. The third point of the syllabus of that case reads as follows: "Where an attachment suit in equity was instituted to subject land to

the payment of a debt, and the land was sold under a decree in said cause, and a deed was made for the property to the purchaser at said sale, but after the levy of the attachment the debtor conveyed, for a valuable consideration, the land to another, and no lis pendens was recorded as is required by section 14 of chapter 139 of the Code, the purchaser from the debtor will hold the land as against the purchaser under the decree."

In the light of the rulings above quoted, my conclusion is that the circuit court erred in holding that the Roaring Creek Coal & Coke Company was an innocent purchaser of the 205 acres of land in controversy, and that for that reason the plaintiff was not entitled to have the deed from J. P. O'Connor to O. C. Womelsdorff and from O. C. Womelsdorff to said company set aside as to said company. The finding of said decree that the deed executed by Patrick O'Connor to J. P. O'Connor on the 1st day of June, 1893, was fraudulent and void as to Patrick O'Connor is not complained of as error by the appellant.

The remaining question for discussion in this case is as to the proper construction and effect of the power of attorney executed by the plaintiff, Patrick O'Connor, to L. H. Keenan. It seems that the plaintiff on the 23d of June, 1893, made an executory contract whereby he agreed to sell him this same 205 acres of land at \$10 per acre,—\$1,000 to be paid when the deed was delivered, and the residue in one year,—which paper was recorded on the 24th day of June, 1893, and on the same day said Patrick O'Connor executed to said Keenan a power of attorney which reads as follows: "Whereas, on the 1st day of June, 1893, I executed a deed of conveyance to John P. O'Connor for a certain tract of land, containing 205 acres, situated in Randolph Co., W. Va., on the waters of Roaring creek, at the price of \$1,900 cash, and acknowledged the receipt of the payment of said money to me in said deed, and took from the said O'Connor a paper writing, signed by him, showing that if the purchase money aforesaid should not be paid to me by the 3rd day of June, 1893, then the deed was to be null and void; and whereas, the said O'Connor has never paid me the said purchase money, and has, contrary to the said agreement in writing with me, placed the said deed of conveyance on record in the clerk's office of the county court of said county, and, as I am informed, has sold said land to one O. C. Womelsdorff; and whereas, by contract in writing bearing date of June 23rd, 1893, I have sold said tract of land to L. H. Keenan, who is entitled to have the same conveyed to him free from the claims of the said O'Connor and Womelsdorff, or either of them: Now, therefore, I hereby authorize the said Keenan to institute and prosecute to a final hearing a proper suit in equity in my name and his name, or in the name of either, as it may appear proper to do for the purpose of setting aside and annulling the said deed of conveyance to the said O'Connor and the deed

of conveyance to the said Womelsdorff, and any other contract or deeds of conveyance that may be made or have been made in relation to the said tract of land, other than the one made by me to the said Keenan, and that said Keenan is authorized to settle all matters of difference between me and the said O'Connor, and attend to all business affairs of mine generally. Witness my hand and seal June 24th, 1893. [Signed] Patrick O'Connor. [Seal.]" Which power of attorney was duly acknowledged and recorded. It appears from the testimony of L. H. Keenan that he entirely ignored the executory contract between himself and Patrick O'Connor, because he states that some time subsequent to the date thereof he tried to sell said land to O. C. Womelsdorff, simply as the agent of Patrick O'Connor. It appears from the testimony of L. H. Keenan: That on the 11th day of July, 1893, he met J. P. O'Connor, the defendant, and told him that the \$1,900 cash that was to be paid by him to Patrick O'Connor had not been paid, and he wanted to collect the same. After discussing the transaction, J. P. O'Connor said that he would pay \$1,000, which sum he did pay that day, and was to execute his note for the remaining \$900, to bear date July 11, 1893, with interest, with good security, to be approved by Patrick O'Connor. He was to have a few days, or a reasonable time, in which to make such note and give security. He was to give as security on the note Candolph Phillips and others. He received the \$1,000, and deposited it in the bank in the name of "L. H. Keenan, attorney for Patrick O'Connor." He told Patrick O'Connor what he had done, and O'Connor said that was not in accordance with the deed and agreement, and he would not accept it. That he met John P. O'Connor in Elkins some time subsequent, and told him what Patrick O'Connor had said. He replied that he would not pay the remaining \$900, or execute the said note, until certain equitable defects in the title to the property had been cured, for which he had brought a suit, or was about to bring a suit, to quiet the said title. That he said to him that he had better pay the amount, and he replied, "No; I have the old man fast, and I propose to hold him." Patrick O'Connor, in his deposition, when asked to state whether or not he ever authorized any one, particularly L. H. Keenan, attorney at law, to collect of the defendant J. P. O'Connor the sum of \$1,000, as part payment by said O'Connor to him for the said 205 acres of land sold to said J. P. O'Connor, denied that he had given any such authority.

This brings us to the question whether said power of attorney, executed in the circumstances surrounding its execution, authorized said Keenan to collect said purchase money. In the case of *Dyer v. Duffy*, 39 W. Va. 149, 19 S. E. 540 (Syl. point 5), this court held that "one dealing with an agent acting under written power is taken to deal with the power spread out before him, and must inspect it, to see whether the agent's act is authorized by

the power." Point 6 of the same case holds that: "One dealing with a special agent does so at his peril. He must be careful to see that the agent's authority covers the act he does." The appellee, in his brief, relies upon the case of *Hutton v. Dewing* (recently decided) 26 S. E. 197, where it was held: "If one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it, and cannot get relief against it. He has but one election to confirm or repudiate the contract, and, if he elects to confirm it, he is finally bound by it." Now, when we take this power of attorney by the four corners and read it, we perceive that Patrick O'Connor, instead of recognizing and approving said conveyance to John P. O'Connor, clearly repudiates it, and authorizes said Keenan to institute and prosecute to final hearing a proper suit, either in said Keenan's name or his own, for the purpose of setting aside and annulling said deed of conveyance, and on the 15th day of August, 1893, this suit was instituted for that purpose in the name of said Patrick O'Connor. Now, if it had been the intention of said Patrick O'Connor that said Keenan should collect this purchase money from J. P. O'Connor, and to ratify and confirm said sale to him, he certainly would not have authorized said suit to set aside and annul said deed of conveyance, nor would he have objected to receiving the \$1,000 which was paid to Keenan. And, further, it appears from the testimony that there were various matters of account existing between said Patrick and J. P. O'Connor, which must have been intended in said power of attorney, where it speaks of settling all matters of difference between them. The said Patrick having denounced the transaction with J. P. as tainted with fraud, and directed a suit to set it aside, he surely did not intend in the same instrument to go on and ratify and affirm it; and then the testimony shows that Patrick O'Connor, as soon as he was informed of the fact that J. P. O'Connor had paid the \$1,000 to Keenan, refused to receive it, and repudiated the transaction. Although Keenan may have held an executory contract from Patrick O'Connor for this tract of land, this purchase money (\$1,900), even if the deed had been properly delivered to J. P., and the transaction had been free from fraud, was not coming to Keenan, and he could not receive it, unless specially authorized so to do; and, in my opinion, he was not so authorized by said power of attorney. See *Curry v. Hale*, 15 W. Va. 867, where it is held that: "Where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk. The law presumes him to know the limit of the agent's power, and, if the agent exceeds his authority, the contract will not bind the principal, but will bind the agent." Keenan says in his testimony that, subsequent to the date of his executory contract with Patrick O'Connor, he tried to sell this land to O. C. Womelsdorff,

simply as the agent of Patrick O'Connor, thus showing that he utterly ignored the executory contract between himself and Patrick O'Connor. It appears in this case that J. P. O'Connor had obtained this deed from his old uncle, nearly 90 years of age, by representing that he wished to show it to some man in Beverly; that he was to return it in three days, if the purchase money was not paid. But, without waiting one day, he conveyed the land to Womelsdorff, for a consideration nearly double what he was to pay for it. More than a month after he received the deed and conveyed the land to Womelsdorff, becoming aware of the existence of this power of attorney, he paid \$1,000 to said Keenan, with a view, no doubt, of thereby securing a ratification of the deed he had obtained by fraud. But Patrick O'Connor refused to accept it, and thereby repudiated the act of said Keenan in receiving the same as soon as he was informed of the fact, and in a short time thereafter instituted a suit to set aside said deed on account of the fraudulent manner in which it was obtained. This prompt action on the part of Patrick O'Connor clearly indicates that it was never his intention to ratify said deed, or authorize the collection of said purchase money. That the sum of \$1,000 was paid to Keenan by J. P. O'Connor with the intention of thereby ratifying the sale by Patrick O'Connor to himself is manifest from the fact that when informed that Patrick would not accept the \$1,000, and being told by Keenan he had better pay the other \$900, he replied, "No; I have the old man fast, and I propose to hold him."

My conclusion is that the circuit court erred in holding, in the circumstances of this case, that the Roaring Creek Coal & Coke Company was an innocent purchaser of the land in controversy; and said circuit court having (as I think, properly) found that the deed dated the 1st day of June, 1893, from Patrick O'Connor to the defendant J. P. O'Connor was fraudulent and void as to the plaintiff, said J. P. O'Connor derived no title thereby, and, as a matter of course, could confer none upon O. C. Womelsdorff; and the said J. P. O'Connor, having derived no title to said land, owed no purchase money to Patrick O'Connor; and, as said Patrick O'Connor refused to accept any purchase money from him, he in no manner ratified or validated said deed; and the circuit court erred in holding that said Patrick O'Connor was entitled to any portion of the \$1,000 paid to said L. H. Keenan, or to any portion of the purchase money remaining unpaid. For these reasons the decree complained of is reversed, with costs, except so far as it holds that the deed dated June 1, 1893, from Patrick O'Connor to J. P. O'Connor, was fraudulent and void as to plaintiff.

On Rehearing.

(Nov. 26, 1898.)

On the 12th of February, 1898, a rehearing was allowed on the motion of the Roaring

Creek Coal & Coke Company. On June 8, 1898, the case was reheard and submitted.

The first point relied on by the petitioner to entitle it to a rehearing of the cause was that the decision had been based on an appeal obtained by the administrator with the will annexed of Patrick O'Connor, deceased, who, it was claimed, had no standing in court to raise the question considered and decided. It was alleged in the bill, and undenied in the answer, that the plaintiff, Patrick O'Connor, was at the time of filing said bill over 90 years of age, and had no home or means of support, his only property being the 205-acre tract mentioned in the bill. At the time the decree was rendered in the circuit court, which was appealed from, said Patrick O'Connor was still in life. After his death the appellant was duly appointed, and gave bond, as his administrator with the will annexed. When John L. Hechmer took upon himself the duties of administrator, he represented an estate with a considerable indebtedness existing against it, and the only source to which he could look for its satisfaction was the proceeds of said land which had been contracted to be sold by his testator; and, while the circuit court held that the title had been obtained from said testator by fraud, it further held that the land was then in the hands of the Roaring Creek Company, an innocent purchaser, and the estate of Patrick O'Connor was only entitled to the proceeds arising from the transfer of the fraudulent title acquired from J. P. O'Connor through O. C. Womelsdorff. Although J. P. O'Connor committed a fraud on his uncle, it is nevertheless true that Patrick O'Connor contracted to sell him the land, and when that contract was vitiated by fraud he contracted to sell it to L. H. Keenan. What effect did this contract have upon the estate? The authorities say that, when land is articulated to be sold, it becomes personalty. On this question Story's Equity Jurisprudence (section 1212) says: "Another class of cases illustrating the doctrine of implied trusts is that which embraces what is commonly called the 'equitable conversion of property.' By this is meant an implied or equitable change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible, and descendible according to its new character, as it arises out of the contracts or other acts and intentions of the parties. This change is a mere consequence of the common doctrine of courts of equity, that, where things are agreed to be done, they are to be treated for many purposes as if they were actually done. Thus, as we have already had occasion to consider, where a contract is made for the sale of land, the vendor is, in equity, immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances, the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate. On the other

hand, the money is treated as personal estate of the vendor, and is subject to like modes of disposition by him as other personalty, and is distributable in the same manner on his death. So, land articulated to be sold and turned into money is reputed money, and money articulated or bequeathed to be invested is ordinarily deemed to be land." Yet the Roaring Creek Coal & Coke Company, which claims to have been an innocent purchaser indirectly from Patrick O'Connor, in its petition for a rehearing, insists that the proceeds of this tract of land are still realty, and for that reason the administrator had no right to apply for or obtain this appeal. When the administrator assumed his trust, he took the estate as he then found it. Debts existed against it, as appears from the testimony and the will, if we may look to it for that purpose, and the proceeds of this land were all he had to look to for their liquidation. Where the personal estate of a decedent is insufficient for the payment of his debts, Code, c. 86, § 7, allows the administrator to prosecute a suit in equity to subject the real estate to the payment thereof. When this administrator looked to the records, he found a decree of the circuit court of Randolph county, holding that the deed executed by Patrick O'Connor to the defendant, dated June 1, 1898, was fraudulent and void as to his testator, Patrick O'Connor, but that the Roaring Creek Coal & Coke Company was an innocent purchaser for value without notice, and the plaintiff was not entitled to have the deeds from himself to J. P. O'Connor, and from J. P. O'Connor to O. C. Womelsdorff and from Womelsdorff to said coal and coke company, set aside, and the title and possession of said land restored to him, but that said company was entitled to have its title and possession through said deeds confirmed to it. I have endeavored, in the opinion above quoted, to show that said coal and coke company was a pendente lite purchaser, and for that reason bound by the result of the pending litigation, and for the same reason could not be properly held an innocent purchaser without notice; and I refer to and adopt said former opinion, so far as it discusses said question, and the conclusion then reached, as well. Said administrator then found said land in the possession of said coal and coke company under a fraudulent conveyance confirmed by an erroneous decree. What was he to do? A review of the facts in the light of law convinced him at once that the legal title was not in said company. The decree before him held that the deed executed by Patrick O'Connor to the defendant J. P. O'Connor was fraudulent and void as to the plaintiff. As a consequence, the deed from J. P. O'Connor to Womelsdorff was void, as J. P. O'Connor could not convey title he did not possess. Counsel for said company, in their petition for rehearing, and argument for the support of the same, contend that the administrator with the will annexed has no standing to prosecute this appeal in his own name to set aside

deeds to real estate, and reinvest the title in the heirs of the devisee of the defendant. Now, in the first place, no title has ever vested in said coal and coke company, for the reason that it was manifestly a pendente lite purchaser, and the title of its vendor has been held to be void as a result of the litigation pending at the time it became a purchaser. Now, if this appeal should be successfully prosecuted by the administrator, the result would only be to remove a cloud from the title to the land in controversy, by holding the title claimed by said company to be void as a pendente lite purchaser, the circuit court, as I have said, having held the title of John P. O'Connor fraudulent and void; and for that reason he could confer no valid title upon Womelsdorff, under whom the said company claims. That would leave the land articulated to be sold to L. H. Keenan under the agreement made between Patrick O'Connor and said Keenan dated June 23, 1893, which agreement was recorded on the next day, for a consideration of \$10 per acre.

Attention is called in the brief of counsel for said company on a rehearing to an error committed in stating a fact, to wit, as to said Keenan endeavoring to sell said land to O. C. Womelsdorff after the date of the above-mentioned agreement. This was an error committed by inadvertence, and the inference drawn from it was also erroneous; but it is immaterial, and does not affect the case. This land was articulated to be sold, and for that reason must be regarded as personalty, and the administrator surely has a right to clear away these false and fraudulent titles which inculcumber the estate which it is his duty to administer. His success in this case will not have the effect of restoring the property to the heirs at law, but will give it to the personal representative to be administered. I am therefore of opinion that the administrator has the right to prosecute this appeal.

Having expressed my views as to said company being a pendente lite purchaser in the opinion above quoted, I adopt said opinion, except so far as herein corrected, and on this rehearing hold that said Roaring Creek Coal & Coke Company was a pendente lite purchaser, and bound by the result of the litigation then pending between said parties in said suit, and was not, therefore, an innocent purchaser. The decree complained of must therefore be reversed, and the cause remanded, with costs.

BRANNON, P. (dissenting). I think the appeal ought to be dismissed because the administrator cannot maintain it. The heirs should have sued it out. When the deeds are annulled, they get back title; not the administrator. He is administrator with will annexed, but the bill does not show that it vests any title to land in the administrator. The will is produced only with the petition for rehearing, and was not a part of the record,

but it vests no estate in land in the administrator. The bill was filed, not to enforce purchase money, but, repudiating the sale and purchase money, it sought only to annul the deed and reclaim the land. The appeal seeks to reverse the decree because it did not give land by canceling the deed, and because it gave O'Connor money. The very feature of its giving purchase money is repudiated, and assigned as error. I, therefore, cannot see how the appeal can be sustained (as it is in the opinion prepared by Judge ENGLISH) on the idea of a trust arising from the sale in behalf of O'Connor for the purchase money, when that sale is alleged to be void for fraud, and the plaintiff does not go for purchase money, but repudiates it, and goes for land only. An administrator cannot prosecute an appeal from a judgment in a case involving title to land. *Vail v. Lindsay*, 67 Ind. 528.

I doubt, too, on another point. The power given by O'Connor to Keenan contemplated either a suit to cancel the deed, or a compromise with John O'Connor, as Keenan might choose, and not solely by a suit. If so, his arrangement with John was a confirmation of the deed, as it was an election to take the purchase money and condone the fraud. *Hutton v. Dewing*, 42 W. Va. 691, 26 S. E. 197. Again, if Patrick O'Connor made a sale of the land to Keenan, as the power says he did, why could not Keenan, as owner of the land, take the purchase money under the deed to John, and thus confirm that deed? Patrick had gotten, or would get, pay for the land from Keenan, under the sale to him; and Keenan would be entitled to sue for the land, or take the purchase money from John in lieu of it. I have not examined this feature of the case minutely, but it so comes to my mind.

STATE v. SPONAUGLE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 30, 1898.)

CONSTITUTIONAL LAW—TAXATION—FORFEITURES—
DUE PROCESS OF LAW—TAX TITLE—VALIDITY—
LACHES—TAX SALE—WARRANTY—ESTOPPEL.

1. That clause of section 6, art. 13, of the state constitution, forfeiting land for the failure of the owner to enter it for taxation, is not in violation of that clause of the fourteenth amendment to the federal constitution restraining states from depriving any person of life, liberty, or property without due process of law.

2. The fourteenth amendment to the federal constitution does not itself define "due process of law." What was such before its adoption continues such. It does not prohibit a state from future, new legislation, action, or proceedings necessary, in its judgment, in the administration of its government, so it bear alike on all similarly circumstanced, and be not unusual, oppressive, or arbitrary action, assailing the essential rights of the person.

3. Due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation or matters purely administrative.

4. It is with the supreme court of the United States to determine finally whether legislation

or action under state authority is due process of law.

5. What is due process of law?

6. Laches will not bar a landowner from assailing a tax sale of his land, when there is no actual possession under the tax title.

7. Laches is not imputable to the state. Statutes of limitation now run against the state.

8. A sale of land for taxes is without warranty by the state, and it is not prevented thereby from setting up its right under forfeiture for omission to enter the land for taxes either before or after the tax sale.

9. If a sale for taxes is made, and the tax purchaser pays taxes thereafter, the receipt of such taxes will not operate, on the theory of estoppel in pais by conduct, to prevent the state from setting up against the tax purchaser a title to land, by forfeiture, for failure of the former owner to enter it for taxation subsequent to or before the tax sale. If the tax title be valid, it would prevent such forfeiture for taxes after the tax sale from its own force, not on the theory of estoppel.

10. A sale of land for taxes, valid to pass title of the owner, will prevent its forfeiture for failure to enter it for taxes in the name of the former owner for years subsequent to the tax sale.

11. An omission, in a list of sales of land for taxes, to state the estate of the owner, will not annul the tax deed.

(Syllabus by the Court.)

Appeal from circuit court, Randolph county; R. W. Dalley, Jr., Judge.

Suit by the state against G. W. Sponaugle and others. Decree for plaintiff, and defendants appeal. Reversed.

Frank Woods, for appellants. Flick & Westenhaver, for the State.

BRANNON, P. This was a chancery suit in the circuit court of Randolph county, in the name of the state, against Spanaule and others, to sell a tract of 1,200 acres of land patented by Virginia to Jacob Sponaule in 1852, the state claiming title by reason of forfeiture of the land to the state because of its omission from the tax books for five successive years subsequent to 1872. Jacob Sponaule conveyed the land to his children, and they were made defendants, as also E. A. Cunningham, who claimed interests in the land by purchase from some of them. The answer of the children of Sponaule admitted the forfeiture and the liability to sale. Cunningham filed a petition setting up his interest, admitting the forfeiture, and asking to be allowed to redeem the land. This petition and cross bill attacked and sought to set aside a tax deed, and title under it, of the Condon-Lane Boom & Lumber Company. This company was made a defendant to the state's bill, as claiming title to the land; alleging that its claim was void and ineffectual against the state's title under the forfeiture, and that the land was liable to sale under its title by forfeiture. The Condon-Lane Boom & Lumber Company demurred to the bill, and answered, setting up that its claim to the land was based on a sale to Cresap in 1871 for taxes for years prior thereto delinquent in the name of Jacob Sponaule, which tax title had come by conveyance to it, and that this

sale rendered the land not taxable after 1871 to Sponaule, but to Cresap and those claiming under him, and that taxes had been charged and paid in their names for the years in which it was omitted in Sponaule's name, and for which the forfeiture was alleged to exist. It claimed that, if the land was forfeited, it took the benefit of the forfeited title, by reason of alleged possession under the color and claim of title arising from said tax deed and payment of taxes. The decree held the land forfeited, that the lumber company had no title, that its tax title was void, and allowed Cunningham and others claiming interests under Sponaule to redeem from the forfeiture. The lumber company appeals.

The demurrer and answer of the lumber company challenge the title of the state as conferred by forfeiture, and assert that it has no title under which to attack said company, and is not entitled to sell the land; and this on the theory that section 6, art. 13, of the West Virginia constitution is repugnant to article 14 of amendments to the constitution of the United States, in its provision, "nor shall any state deprive any person of life, liberty or property without due process of law." If this is so, the state has no title to the land. No definite definition—none but the most general—has been or can be given of "due process of law." The best the courts can do is to say, in each case as it arises, whether a given act or proceeding in the particular matter is due process of law. It depends how the question arises; that is, upon the matter or transaction involved. Davidson v. New Orleans, 96 U. S. 97. What would be due process if done under the police power or taxing power might not be, in many cases would not be, if not done under either of those powers. 3 Am. & Eng. Enc. Law, 714. A horse may be lawfully seized and sold, without judge or jury, for taxes; but an individual or officer or court or legislature, without trial, generally could not do this. In Davidson v. New Orleans, 96 U. S. 97, Justice Bradley said: "In judging what is due process of law, respect must be had to the cause and object of taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found arbitrary, oppressive, and unjust, it may be declared to be not due process of law." The clause of the state constitution in question makes it the duty of the landowner to put his land on the tax books, and provides that "when for any five successive years after the year 1863, the owner of any tract of land containing 1000 acres or more, shall not have been charged on such books, with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the state." This provision is to be justified un-

der the taxing power of the state. Its purpose was to raise revenue from vast quantities of land which had been persistently and intentionally omitted by the owners for years from the tax books, and escaped all taxation. What is the limit of the taxing power, except by express provision of the constitution? It scarcely has any. It is so nearly unlimited from sheer necessity. It involves the operations, nay, the very existence, of government. It is an original power, inherent in every government. *Cooley, Const. Lim.* 587, does not lay it down too broadly as follows: "The power to impose taxes is one so unlimited in force, and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden, which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the government affect more constantly and intimately all the relations of life than through the exactions made under it." "The basis of all taxation is political necessity. Without taxes, there can be no revenue; without revenue, there can be no regular government." *Burroughs, Tax'n*, 1, 3. "All subjects over which the sovereign power of a state extends are objects of taxation." Justice Field said in *State Tax on Foreign-Held Bonds*, 15 Wall. 319: "It may touch property in every shape,—in its natural condition, in its manufactured form, and in its varied transmutations. * * * It may touch business in the almost infinite forms in which it is conducted,—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited." In *Witherspoon v. Duncan*, 4 Wall. 210, the supreme court held that "the states, as a general rule, have the right of determining the manner of levying and collecting taxes on private property."

The states succeeded to the power of taxation of the English parliament after the Revolution, and possess it yet; and we must find in the federal constitution a plain—very plain—prohibition, to restrain this sovereign power, indispensable for our most numerous wants. From quotations above, we see that the state may fasten taxes upon any subject of property. Virginia, very long before the fourteenth amendment, adopted and steadily pursued the policy of holding the land itself liable for its taxes. By frequent acts she directed sale of land for taxes charged and unpaid. Acts of November, 1781; May, 1782; October, 1782; January 7, 1788; December 27, 1790; December 20, 1791; December 13,

1792; February 9, 1814; March 10, 1832; February 27, 1835; 1843; Code 1849; Act 1859. By some acts she forfeited lands charged with taxes not paid. Acts of December 27, 1790; December 13, 1792; January 29, 1803; January 20, 1807; April 1, 1831. Acts were passed forfeiting lands not entered on the tax books. Acts of February 5, 1810, and February 27, 1835. Many acts were passed from time to time, through years, giving further time to enter the lands omitted from the tax books, and to redeem lands charged with unpaid taxes. I refer to these many acts running through so many years to show a persistent, fixed policy of Virginia, in one mode and another, to hold the land itself amenable to taxes. West Virginia, since its birth, before the fourteenth amendment, pursued this policy, by adopting the Virginia law for the sale of lands for taxes, and after that amendment by her provision for such sale in her Code of 1863, and by the act of March 4, 1869, forfeiting land for nonentry for taxation. Thus, in Virginia and West Virginia these several modes of holding lands liable had become the "law of the land," as to this matter, before the amendment. Did that amendment come to overthrow this long-established law of the land? That amendment came to defend existing personal rights against unusual, arbitrary action of the states; to save the citizen his essential rights against the exercise of unwonted, unusual, arbitrary, and unequal power by the state, operating to prejudice him in such essential rights; but I cannot think that it came to defend him against the exercise by the state of its usual powers, under its fixed policy, in a governmental function so indispensable as the collection of revenue. The authorities show that the state can select its subjects of taxation, and select its mode of enforcement and collection. It can distrain personal property and sell it. It can sell realty. Why may it not impose forfeiture, if it deem that a necessary means of getting its revenue? This was "due process of law" of Virginia in this matter of taxation, and complies with the demand of the fourteenth amendment. A drastic remedy it is, and yet can you say that it is not warranted by that immense power of taxation? Coke's old definition of "law of the land" says that it is that which is according to the "old law of the land." 2 Inst. 50. "Tax laws are laws of the land, and tax proceedings conducted under equal and uniform laws are due process of law." *Bardwell v. Collins* (Minn.) 20 Am. St. Rep. 554, note (s. c. 46 N. W. 315). "Proceedings by which taxes have been assessed, levied, and collected have always been regarded as administrative, not judicial, and to constitute due process of law, within the meaning of the constitution. Such proceedings have been, from necessity, exercised by governments, during all times, by summary methods of procedure. These methods were

in exercise and existence long before the adoption of the constitution, and have never been supposed to be affected thereby." *Ruger, C. J., in McMahon v. Palmer*, 102 N. Y. 176, 6 N. E. 400. When that case went to the United States supreme court, the opinion said (what is apt in this case): "That law had been in existence over 40 years at the time of this proceeding. We do not regard the collection in this way, founded on necessity, and so long recognized by the state of New York as to be justifiably resorted to under the circumstances detailed in the act, and operating on all persons and property similarly situated, as within the inhibition of the fourteenth amendment." *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 824. A tax act is "law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it provides in order to give the rule full operation. The mode of levying is completely and exclusively within the legislative power." *Cooley, Tax'n*, 30. The author there shows that the constitution does not restrict this power under the due process clause. *Kelly v. Pittsburgh*, 104 U. S. 78. The landlord under his distress, the sheriff under his tax bill, seize and sell personalty without judicial process, and the sheriff sells land for taxes without it. Why, since the amendment, is this not unconstitutional? Because those procedures have been settled procedures under the law of the land, and are due process of law in those particular matters. So is the remedy of forfeiture adopted by the state to collect its land tax. Is such procedure necessary? That is for the state to say. But forfeiture divests the owner of title. So does the distress for rent or taxes divest the owner of personal property. It is only another mode of divestiture. It is claimed that there must be a judicial inquiry to find the fact working forfeiture and declaring the forfeiture. This is so in judicial proceedings, but not in administrative, summary proceedings. This cannot be demanded, unless you say that it is demanded by this particular mode of enforcing taxes,—forfeiture,—and not to sales or other modes; for it is undeniable that no law demands it in proceedings to collect taxes. Mr. Justice Harlan sustains this position in *King v. Mullins*, 18 Sup. Ct. 925, and cites *Murray v. Improvement Co.*, 18 How. 272, in which was considered the case where a distress warrant was issued, under an act of congress, by the solicitor of the treasury against a defaulting collector of customs, and the question was whether it was due process of law; and the court said: "Tested by the common law and statutes of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment [fifth], the proceeding authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due the

government from a collector of customs, unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings; for, though due process of law generally implies and includes actor, reus, iudex, regular allegations, opportunities, and a trial according to some settled course of judicial proceeding [citing cases], yet this is not universally true. There may be, and we have seen there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the bodies, lands, and goods of certain public debtors without any such trial. The power to collect revenue, and make all laws necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting that revenue, unless some such means be forbidden in some other part of the constitution. It may be added that probably there are few governments which do or can permit their claims for public taxes on the citizen or officer for their collection or disbursement to become subjects of judicial controversy according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." Justice Harlan cites *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, holding that: "Process of taxation does not require the same kind of notice as in a suit at law, or proceedings to take property under the power of eminent domain. It involves no violation of due process of law, when executed according to customary forms and established usage." And Justice Harlan added: "This must be so, else the existence of government might be put in peril by delays attendant upon formal judicial proceedings for collection of taxes." So great is this taxing power, that in *Com. v. Byrne*, 20 Grat. 165, a man was arrested and imprisoned under a mere license certificate issued by a commissioner of the revenue, on failure to pay the license tax as a distiller. He was held to be lawfully imprisoned, and it was said that his imprisonment did not violate the requirement of due process of law. Judge Moncure sustained it in an able opinion. The case of *Wulzen v. Board*, 101 Cal. 15, 35 Pac. 353, aptly expresses the idea I would impress as to the effect of legislation of Virginia through so many years in the matter of land taxation. That case says: "Taxes are not, as a general rule, collected by judicial proceedings; and the procedure resorted to for their imposition and collection may properly be regarded as due process of law, if it conforms to customary usages." The great opinion of Justice Curtis in *Murray v. Improvement Co.*, 18 How. 279, strongly sustains this view: "This legislative construction of the constitution,

commencing so early, when the first occasion for this manner of proceeding arose, continued through its existence, and, repeatedly acted on by the judiciary and executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was due process of law." In *Davidson v. New Orleans*, 96 U. S. 97, it is held: "This court has heretofore decided that due process of law does not in all cases require a resort to a court of justice to assert the rights of the public against the individual, or to impose burdens on his property for the public use. *Murray v. Improvement Co.*, 18 How. 272, and *McMillen v. Anderson*, 95 U. S. 87." See *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57. If there is anything settled by the United States supreme court, it is that the requirement of due process of law does not always require judicial procedure. Justice Miller said, in *Davidson v. New Orleans*, that the fifth amendment, restraining the exercise of power under federal authority without due process of law, though nearly a century old, had scarcely ever been invoked, whereas the fourteenth amendment, adopted in 1868, had filled the docket of the supreme court with cases asking that court to overthrow judgments and legislation of states; that there is abundance of evidence that there exists "a strange misconception of the scope of this provision as found in the fourteenth amendment"; and that it seems every unsuccessful litigant in a state court has made it the means of bringing his abstract opinions of the justice of state decisions and the merits of state legislation before the supreme court. He ridiculed such a construction of the amendment. So have other justices of that court. What is this amendment? Except as a limitation upon state action, it is not new, as respects the demand of "due process of law." That is simply a new application. It only demands of the states what *Magna Charta* demanded from the time our English ancestors set foot on American soil, and was in the constitutions of all the states. For the first time that amendment gave the national government a veto power upon state action upon the citizen not consonant with due process of law, but it gave no new definition of the term "due process of law," or its equivalent, "law of the land." Before it, the state had final right to say whether the act was due process; after it, the supreme court has. That is all. The definition is the same. *Eames v. Savage*, 52 Am. Rep. 757. The amendment does not say what due process is. If it had long been established as such in the state, it is due process under the amendment. *Slaughter-House Cases*, 16 Wall. 78. Legislation, action, and procedure long used by the state as usual or customary in the given case were not at once swept away because not attended with judicial inquiry. Nor does this amendment cramp the states so as to forbid the adoption of new legislation, action, or procedure which they may deem

necessary, wise, and politic in the administration of government. In either case, so it do not assail the essential right of the citizen under the principles of common, equal justice, it is valid under this amendment. *Hurtado v. California*, 110 U. S. 537, 4 Sup. Ct. 111, 202, where a new constitution dispensed with an indictment for murder, and allowed its trial on information. The opinion says: "However exceptional it [proceeding] may be, as tested by definitions and principles of ordinary procedure, nevertheless this, in substance, has been immemorially the usual law of the land, and therefore is due process of law." This constitutional law, state and federal, I repeat, is old, and its definition the same at all times; and yet legislation and procedure under state authority, and federal, too, levying taxes, seizing and selling personal and real estate for taxes, personal for rent, seizing and confiscating personality under the police power, and even selling a defaulting customs receiver's property under a warrant issued by an executive officer for a debt arising from his collection of tariff, and imprisonment under a mere license tax bill, have not been discovered to be without due process. The fourteenth amendment is highly salutary as a part of the federal constitution, properly construed and applied, as it has been thus far by that eminent tribunal, the supreme court of the United States; but it cannot be given the scope often claimed for it, practically denying to the states powers highly essential in the administration of the government. This construction has been several times repudiated by the supreme court.

How has this question of forfeiture for taxes been regarded by the Virginia courts? They have been unable to discover that it is not due process of law. It is true that in *Kinney v. Beverley*, 2 Hen. & M. 318, where the act of 1790 which provided that lands on which taxes should not be paid for three years "shall be lost, forfeited and vested in the commonwealth," Judge Tucker did express the opinion that, without office found, the state could not take title, as it was only by record the king could take title; not definitely saying the act was invalid. Judge Roane (than whom no one has a higher name among Virginia jurists) said, "I cannot for a moment doubt the power of the legislature to pass the law in question;" and he said that no inquest of office was necessary, and that such a construction would defeat collection of revenue. Judge Green's opinion does not mention the subject. So this case cannot be quoted (as it is sometimes) as against the validity of forfeiture acts, as it was decided on other points. In *Wild v. Serpell*, 10 Grat. 405, it was held that "the statutes of Virginia forfeiting land to the commonwealth for the failure of the owners to enter them upon the commissioner's books and pay taxes are constitutional," and that title vested under them in the state without judgment, decree, or inquest of office.

Several cases uphold the statute. *Staats v. Board*, 10 Grat. 400; *Levasser v. Washburn*, 11 Grat. 572; *Smith v. Chapman*, 10 Grat. 445; *Hale v. Branscum*, Id. 418; *Usher v. Pride*, 15 Grat. 190. These cases are unsatisfactory, in not discussing the matter; but they do decide it, though in but one was it expressly mentioned. In *Armstrong v. Morrill*, 14 Wall. 120, the constitutional point was not discussed, but the Virginia forfeiture acts were recognized as operative. So it was settled in Virginia. In West Virginia, our courts, in many decisions, have recognized the Virginia decisions as binding authority. *Twiggs v. Chevalle*, 4 W. Va. 463; *Smith v. Tharp*, 17 W. Va. 221. And this state adopted this forfeiture policy as her only weapon, as shown by long experience, to compel payment of taxes on vast areas of wild, unseated land, by an act in 1869, and in 1872 by the constitution containing the forfeiture clause in question, and by several later acts to enforce it. Several decisions recognize the validity of these laws, not by express decisions on the constitutional point, as our courts and bar treated the Virginia cases, and our cases in 4 and 17 W. Va., as settling it under the doctrine of stare decisis, but by recognizing these laws as binding law. *McClure v. Maitland*, 24 W. Va. 561; *Auvil v. Jaeger*, Id. 583; *McClure v. Mauperture*, 29 W. Va. 633, 2 S. E. 761; *Tebbets v. City of Charleston*, 33 W. Va. 705, 11 S. E. 23; *Hays v. Camden*, 38 W. Va. 109, 18 S. E. 461; *Wiant v. Hays*, 38 W. Va. 68, 18 S. E. 807; *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214. Judge Goff, in the United States circuit court for West Virginia, held this clause of our constitution valid in *King v. Mullins*. Titles to thousands upon thousands of acres, the homes of our people, rest upon this long line of enactment and decision; and for this court to reverse so many cases, and annul the constitutional provision, would shake those titles, and turn thousands from their homes. The rule of stare decisis binds us to adhere to them, especially as titles to property rest on those decisions. Not to do so would spread disaster, the extent of which would be appalling. And this is a consideration justly and deeply entering into the question, as the United States supreme court said, speaking through Justice Harlan, in *King v. Mullins*, decided in 1898. That court unanimously affirmed Judge Goff's decision holding valid the clause of the constitution in question. I shall not say that the opinion holds that clause, taken alone, valid, though it virtually does so. The opinion holds that as, in connection with the state constitution, the statutes to sell land as forfeited give the owner a hearing, "there is no ground for him to complain that his property has been taken without due process." In *Read v. Dingess*, 8 C. C. A. 399, 60 Fed. 21, it was held by the circuit court of appeals (Fourth circuit) that the clause of the West Virginia constitution was not against the fourteenth amendment.

Judge Goff holds the same in *Van Gunden v. Iron Co.*, 3 C. C. A. 229, 52 Fed. 851. An other element in this question is not to be overlooked. The state constitution (section 4, art. 13) provides for a sale of the forfeited land, and, by section 5, gives the owner the excess of its proceeds after paying taxes. This relieves the forfeiture clause from the charge of being arbitrary spoliation and confiscation of property; gives to it the hue of being only a step necessary to collect the taxes, showing that after that the state regards his right by holding in trust for him. I therefore reach the conclusion that this forfeiture clause is not repugnant to the fourteenth amendment.

A point that is pressed against the state constitution is that it, ipso facto, divests the owner of his title, and vests it in the state, without judicial inquiry,—without what is called "office found" at common law. If this is so, it is within the power of the state, under the tax power, to do so. "A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the government. It may be after a judicial investigation, or by taking possession directly under the authority of the government, without these preliminary proceedings." *U. S. v. Repentigny*, 5 Wall. 267, 268. Can it, indeed, be said that the owner has irretrievably lost his land, without a hearing to contest the forfeiture? It is beyond doubt that the state has power to forfeit land, and vest title in itself, for delinquency or nonentry for taxes, if it leave a door open for hearing. If the constitution had declared a forfeiture, and expressly given a hearing, no question could arise. It has declared a forfeiture, and has not shut the door against the owner to contest it. It simply declares that, if a fact exist, forfeiture ensues, as a legal consequence. It only says that a certain offense shall involve a certain penalty. All criminal or penal laws do this, but final conviction and penalty are to come after trial. It seems to me, we cannot consider the clause invalid, when privilege of contestation is not denied. Under the law before the act of 1882, a decree in a proceeding to sell land as forfeited was, while conclusive upon strangers, only prima facie evidence of forfeiture as against the owner. *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214; *Strader v. Goff*, 6 W. Va. 257. In fact, *Twiggs v. Chevalle*, 4 W. Va. 463, holds the jurisdiction as limited and special, and based only on forfeiture; and, if the land was not in fact forfeited, the decree would be void. It is perhaps immaterial whether prima facie or not, it surely not being conclusive. So, when the owner's title is in any way assailed, he can deny the forfeiture. It may be questioned whether the party claiming under the forfeiture must

not show it as an original proposition, as the owner was no party. The forfeiting provision does not give the state or a third party taking title possession, but merely vests title, if forfeited. When sued by them, he can contest the forfeiture. If the state could, she has not enacted that he shall be ousted by force; and, therefore, if she or her purchaser desire possession, they must sue, and he can defend, or he can sue the state's tenant or purchaser in possession. This seems, from authority, adequate hearing, if any were required. How is the party prejudiced? Where the door was open to a taxpayer to enjoin, though a bond were necessary, it did not render an act giving a right to levy a tax not due process. *McMillen v. Anderson*, 95 U. S. 37. Justice Miller said that as he could sue to recover back the money, as an illegal tax, that would free it from the charge of being without due process. In *Railway Co. v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697, there were statutes providing for the destruction of diseased horses; and the court held that these acts are within the police power of the state, and, further: "They are not within the prohibition of the fourteenth amendment to the federal constitution, because, although they authorize the abatement of such nuisances in advance of a judicial adjudication of the fact of nuisance, yet they do not make the determination of the officials as to that fact conclusive, and only permit their acts in abating the nuisance to be justified by proof of the actual existence of such nuisance. Plaintiff, however, contends that the determination of the officials that the prescribed disease exists is to be made without notice to the property owners, and without affording them an opportunity to be heard, and on this ground claims that these acts are obnoxious to the constitutional provision invoked. If the legislature by these acts has made the determination of these officials as to the existence of the common nuisance a conclusive adjudication upon the rights of the property owner, then it is perfectly obvious that this legislation cannot be supported. It has been settled in this state that it is not within the power of the legislature to impart to a determination of this sort a conclusive character, as against the property owner, and legislation intending that result was held to be futile. *Hutton v. City of Camden*, 39 N. J. Law, 122. An examination of the acts in question clearly shows that there was no intent in the legislative mind to make the conclusions of the officials decisive of the right of the property owner as to the existence of that condition of things which these acts declared would constitute in these cases a common nuisance, and would justify its abatement by the destruction of the animals diseased. The right of the property owner is not thereby barred, on the one hand, nor is the justification of the officials made effective, on the other hand, by reason of their

adjudication, but by reason of the fact that the common nuisance declared by the acts existed, and so existed as to permit the officials to exercise the power of abatement. What the acts authorize is the abatement of an actual nuisance. They afford no protection to any invasion of the rights of property in any other case." The court say in conclusion: "But if the property owner is not deprived of a right to contest the existence of such conditions, and to obtain redress, as for a trespass, if they are not shown to have existed, such legislative acts would not infringe any constitutional provision." So, in *Lawton v. Steele*, 152 U. S. 142, 14 Sup. Ct. 499, where a statute authorized officers to destroy nets used in violation of the statute, without any judicial proceedings to ascertain the fact of such violation, the court say: "Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain. If not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute." In *Read v. Dingess*, 60 Fed. 27, 8 C. C. A. 395, the court said: "But if the act, in every case of its commission, involves the forfeiture, nothing remains but to ascertain the facts of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the state to enforce the forfeiture." Also, *Health Dept. of City of New York v. Rector, etc., of Trinity Church*, 145 N. Y. 32, 39 N. E. 833, and *People v. City of Yonkers*, 140 N. Y. 23, 35 N. E. 320; *Branson v. Gee* (Or.) 36 Pac. 527. Statutes of limitation take land from one man and vest it in another. Why does no one claim that they violate the constitution? I suppose, because they allow him a hearing afterwards. And the acts of 1872-73, providing for selling the land, gave him right to redeem his land, and so to pay what he justly owed the state. But since the act of 1882, and especially under that of 1893, for the sale of forfeited land, the proceeding is a regular chancery suit,—must be such,—and the owner must be a party, and is entitled to make full defense against the forfeiture; and surely this is a full hearing before decree, and satisfies the demand for "due process of law." Under the latter statute (chapter 24, Acts 1893) this proceeding was had. It was held by the United States supreme court in *King v. Mullins* (1898) that, taking the clause of the constitution and statute of 1882 in connection, the demand of the fourteenth amendment was satisfied, and the proceeding valid. That is our adequate defense for this decision. I am myself now free from doubt as to the correctness of our holding on this question.

It is claimed that the state is prevented

by laches from assailing the tax deed under the tax sale to Cresap in 1871, 22 years having passed from the tax deed to the date of this suit. No possession was ever held under the tax deed. The express statute of limitations did not, therefore, bar the state, and laches does not. Where the adverse claimant of land has no actual possession, the other claimant need not sue. Until then it is mere cloud, never maturing as title. *Battin v. Woods*, 27 W. Va. 58. Delay in bringing suit to annul a tax deed is not imputable as laches to the owner. *U. S. v. Insley*, 130 U. S. 263, 9 Sup. Ct. 485; *Cook v. Lasher*, 42 U. S. App. 42, 19 C. C. A. 654, and 73 Fed. 701; *Sommers v. Ward*, 41 W. Va. 80, 23 S. E. 520. The statute of limitations does not, at common law, apply to the state. *Hall v. Webb*, 21 W. Va. 322. Our statute now applies limitations to the state, like individuals. Code 1891, c. 85, § 20. But no statute applies laches to the state, and the common-law rule says that it does not apply to it. 12 Am. & Eng. Enc. Law (1st Ed.) 56.

It is further raised, as a question, that as the state sold to Cresap for taxes, and collected taxes for years from those claiming under that title, it is estopped by this conduct from claiming forfeiture for nonentry in Sponaugle's name in after years,—the very years which the owners under the tax sale were paying taxes for. Now, as the state at a tax sale sells, not her own land, but only such title as the taxed party has, and by her sale and deed makes no warranty whatever, this estoppel cannot be maintained. And the forfeiture alleged accrued several years after this sale. *Camden v. Alkire*, 24 W. Va. 681. An estoppel in pais against the state from asserting a title to escheated land is not made out by assessment of taxes, and sale and conveyance for taxes, and the assessment and collection of taxes from the purchaser at the tax sale. An auditor's deed made in consummation of a sale for taxes cannot bar the assertion by the state of any claim or right to the land. The court says the deed is without warranty, and has not, as an estoppel, the force which a quitclaim deed has to pass title in the grantor at its date. *Reid v. State*, 74 Ind. 252, 280. If it is contended that payment by the tax purchasers of taxes under their title paid the taxes on the land, so that it may be said to the state, "You have already gotten tax once on the land, and you cannot enforce a forfeiture for taxes for the same years in the name of the original owner, whose title we got by the tax sale, we having acquired the land under his title," the response is: "That is so if your tax deed is valid, because there was no title left in the original owner to be taxed, but not so if your tax title is void. If valid, you defeat forfeiture by superiority of your tax title, not by estoppel from conduct, as it does not bind the state in this matter; but, if void, the title was left in the old owner, to be forfeited for taxes, and the state

is not bound merely by conduct." And, as to double taxation, *Simpson v. Edmiston*, 23 W. Va. 680, holds that there is no privity between former owner and tax purchaser, their claims being hostile, and payment by the tax purchaser does not discharge the state demand for taxes against the former owner, if lawful demand she had against his title as yet good; and, if he wants to deny the validity of the tax sale and keep his title good, he must still keep the land on in his name, just as in case of two stranger titles.

I come, in conclusion, to a very important question: Is the tax sale to Cresap efficient to pass title? It is alleged to be void because of irregularity in the sale lists apparent. If void, leaving title in Sponaugle, the state acquired title by forfeiture; but, if valid, it divested Sponaugle of title, leaving no land in him to be entered for taxes, and the state had no longer claims to taxes from him. We have concluded that this sale is valid.

One ground of irregularity is that in the column of the list of sales in which the estate (whether in fee or life) of the owner is to be stated there is a blank as to this tract, and so the estate is not given. Code 1868, c. 81, § 25, it will be seen, makes sedulous efforts to cure numerous specific irregularities, so as to confer upon purchasers, effectually, such title as the party charged with taxes owned, and also inserts the general provision that the purchaser shall take such title "notwithstanding any irregularity in the proceedings under which the grantee claims title, unless such irregularity appear on the face of the proceedings of record in the office of the recorder, and be such as materially to prejudice the rights of the owner." First, I must say that there would be a presumption of a fee. A deed, under our statute, confers a fee, unless a less estate is stated; and even in a tax-sale list it would be a fair presumption. But who would be misled by it? And, so the owner be not misled, it is no matter as to others. How could he be misled? He would surely know his own estate without information from this list. How does this unsubstantial slip prejudice him? And the same section says, "And no irregularity in the manner of laying off the real estate so sold, or in the plat, description or report of the surveyor or other person, shall, after the deed is made, invalidate the sale or deed." This is a strong curative provision. The sale list is a "report" under it, and the "estate" pertains to the "description." I know the books tell us that, in times past, tax sales were looked upon as forfeitures, and the proceedings must be rigidly regular; but these doctrines do not apply in full force in West Virginia, and ought not to, because our tax-sale system is, and long has been, so large and important to the state in collecting delinquent revenue, and to many buying at her sales, and so important, too, in quieting title and settling the waste places, that the legislature has, time and time again, in many acts, be-

as far back as 1814, sought to mitigate and qualify, if not abolish, the strict law before prevailing, by which almost any irregularity would annul a tax sale, and provide that only substantial errors, capable of doing harm to the former owner, and not doing him, and thus prevent timely redemption, should avoid such sale. Each one of these acts has gone further than its predecessor in this effort of liberalization. I refer to this legislation in *Winning v. Eakin*, 19 Va. 19, 28 S. E. 757, as did Judge Holt in *Heatherly*, 36 W. Va. 613, 15 S. E. 221. Under this rigid procedure, tax sales are a myth, conferring on the purchaser a right of lawsuit, and as certain defeat; and the state had to buy in, herself, vast quantities of lands, which lay in her hands many years wild and unsettled, paying no taxes, and losing her revenue. Even to-day, with this legislation, everybody regards tax titles as dangerous shadows. The state offers no protection. The purchaser pays the taxes, and the innocent purchaser is dispossessed, and the delinquent landowner is not compensated. True, it seems hard that he should lose his estate for a pittance, but whose fault is it? Is it the fault of the innocent purchaser? This state of things is not the fault of the legislature. It has seen the bigness of the evil, and often tried to remedy it. Any one looking at its acts must see that it seeks to protect the innocent purchaser, to the extent of relieving him from unsubstantial errors by clerical officers, and technical defects not affecting the owner. The courts should be required to execute a plain purpose of the law, and not to nullify it. And especially so more difficult, after the sale has been completed by a deed, to annul the sale. The legislature itself so intends, as above seen. *Winning v. Eakin*, supra. I am aware that in *Wills v. Dils*, 18 W. Va. 764, the opinion is expressed that the defect in question violates the law; but the syllabus does not announce such a law. And in *Barton v. Gilchrist*, 19 W. Va. 230, the same opinion is expressed, and it may be called obiter, and is not in the syllabus.

Whether irregularity is, as alleged, that the deed does not show in whose name the land was charged for three out of four years in which it was sold. It shows as to one year confessedly, and a sale for that year's taxes would be as efficacious as four. It would call the owner to redeem. But, looking beyond the printed to the manuscript, we find it plain that it was sold for four years.

Whether defect alleged is that in the affidavit to the sale list the sheriff swears that the list contains a true account of all the lands sold by "me during the present year or nonpayment of taxes due thereon for the years 1863, 1864, 1865, 1866, 1867, 1868, and 1870 (or some of those years)." The words in parentheses are claimed to overstate the whole sale proceeding of Randolph

county. This affidavit is intended, perhaps, more to enforce a true account to the treasury than for the benefit of the landowner. By the unnecessary use of the words of surplusage, the sheriff meant to say some tracts were sold for some years, some for others, but the years named covered the years for which this land was sold. Now, it is the list that tells for what particular years the owner's land is sold, and Sponaugle had but to look at it; and that told him his land was sold for 1865, 1866, 1867, and 1868. He should look at the list for this specification, rather than the affidavit, but read both together. The affidavit does not say or intimate that the land was sold for any other than those four years. The years it specified include all the years for which any tract was sold, and the list tells for what particular years a particular tract was sold.

Twenty-two years after the tax deed to Cresap, it is attacked. During all this long period Cresap and his alienees have paid taxes. This, as said above, would not help them, if their tax title were bad; but it is a satisfaction to a court, in rendering judgment, to feel sure that substantial justice is done. The present owners, on the faith of this title, spent a large sum in acquiring the land. The former owners failed to pay taxes charged, let the land be sold, failed to redeem, and afterwards failed to charge their land. They have always been in default, likely because the land was of little value; but now that this land is in reach of the West Virginia Central Railroad, which has pierced that mountain wilderness, and given it life and enterprise, and made land very valuable, and the lumber company is carrying on large operations in cutting timber on its land very near the line of this tract, the Sponaugle claimants come in to redeem. The suit is in the name of the state, it is true; but the contest is between them and the company, as the state has only a tax claim, and the Sponaugle representatives applied to redeem, and filed a cross bill to assail the tax title, and thus it is their suit. On which side is the equity. If we go by it? But the law decides it for the Condon-Lane Boom & Lumber Company. Therefore we reverse the decree, and dismiss the state's bill and the Cunningham cross bill.

HOGE et al. v. TURNER.

(Supreme Court of Appeals of Virginia. Jan. 12, 1899.)

FRAUDULENT CONVEYANCES — WITNESS — COMPETENCY OF HUSBAND OR WIFE — TRADING AS "AGENT"—ACTS AND DECLARATIONS OF AGENT—PRESUMPTION OF OWNERSHIP—PRACTICE—MODIFICATION OF INSTRUCTIONS.

1. Under Acts 1893-94, p. 722, and Acts 1897-98, p. 753, removing the incompetency of husband and wife to testify for or against each other, except "In any proceeding by a creditor to avoid or impeach any conveyance, gift, or sale from the one to the other on the ground of fraud or want of consideration," and preserving the

rules of evidence at common law in cases of such nature, it was error to admit the wife of a judgment debtor to testify in an action on her behalf, on an indemnifying bond given to the officer by the judgment creditor of her husband, on the levy of an execution on certain personal property of which she claimed to be the lawful owner, where the question of fraud was raised by defendants' pleas, though her testimony was restricted to the issues in such cause other than that of fraud, as the interest of her husband in such controversy rendered her incompetent.

2. Code 1887, § 2877, provides, *inter alia*, that if any person transact business as a trader, with the addition of the word "Agent," and fail to disclose the name of his principal, by a sign placed conspicuously at the house wherein such business is transacted, and also by a notice in a newspaper, or if any person transact such business in his own name, without such addition, all the property and choses in action used in such business shall, as to the creditors of such person, be liable for his debts. *Held*, that such provision makes all the property, etc., acquired or used in such business, absolutely liable for the debts of such trader, whether contracted in the particular business or not, and without regard to knowledge of the principal, if any, on the part of the creditor.

3. Any one conducting such business in person is not within the statute referred to, and need not comply with its provisions.

4. Though, as a general rule, agency cannot be proved by the declarations or acts of the alleged agent, such declarations as were heard and such acts as were known, without being repudiated, may bind the alleged principal, on the ground of acquiescence therein.

5. In a contest between a wife and the creditors of her husband, the husband is presumed to be the owner of all property acquired, or of which the wife may be in possession, during coverture.

6. Where an instruction, without qualification, was calculated to mislead the jury, it was error to refuse, on the ground that it was tendered too late, a modification, requested during the argument, correctly propounding the law.

Error to circuit court, Augusta county.

Action by Logan Turner, sergeant of the city of Staunton, for the benefit of Jennie Bowers, against Charles E. Hoge and another, late partners, doing business under the firm name and style of Hoge & Hutchinson, on an indemnifying bond taken by plaintiff on levying an execution on a stock of merchandise, under a judgment in favor of defendants and against one George Bowers, the husband of said Jennie Bowers. Defendants interposed eight pleas, as follows: (1) Of conditions performed generally; (2) of non damnificatus; (3) that defendants did indemnify, etc.; (4) special plea of failure to comply with the agency act; (5 and 6) special pleas of fraudulent transfer; and (7 and 8) special pleas of fraud. There were verdict and judgment in favor of plaintiff, and defendants bring error. Reversed.

The first eight assignments of error are as follows: (1) Error in allowing Jennie Bowers, the wife of the execution debtor, to testify as a witness, over defendants' objection to her competency, on any and all points involved in the cause, except on the issues of fraud raised by the fifth, sixth, seventh, and eighth pleas. (2) Error in giving, on plaintiff's motion, the following instruction to the

jury: "The court instructs the jury that although they may believe from the evidence in this case that the business conducted at No. 17 West Frederick street, Staunton, Va., was conducted by George Bowers in his own name, as agent, without disclosing his principal, by publication for two successive weeks in a newspaper, and by a sign posted at his place of business, yet if they believe from the evidence in this case that Jennie Bowers was his principal, and that the defendants knew this when the property of the business was levied on and sold, that then the defendants are liable, and the plaintiff is entitled to a verdict." (3) Error in giving to the jury, on plaintiff's motion, the following instruction: "The court instructs the jury that if they believe from the evidence in this case that Mrs. Jennie Bowers was the owner of the stock of goods and the business conducted at No. 17 West Frederick street, and that she conducted said business in person on the premises, then no agent employed by her was required to disclose his principal, by a sign, in letters easily to be read, placed conspicuously at his said house where said business was conducted, or by notice published for two weeks in a newspaper, or otherwise to comply with or conform to the provisions of section 2877 of the Code of Virginia, and the jury must find a verdict for the plaintiff." (4) Error in giving to the jury, on motion of plaintiff, the following instruction: "The court instructs the jury that neither the declarations nor the acts of George Bowers can be considered in this case to prove that he was the agent of his wife, Mrs. Jennie Bowers, to conduct her business in his name as agent, at the Jesser Building, in Staunton,"—the "Jesser Building" being the same building as that referred to elsewhere in the cause as "No. 17 West Frederick Street." (5) Error in refusing to give the following instruction, on request of defendants: "The court instructs the jury that if they believe from the evidence that at the time of the acquisition by the plaintiff, Jennie Bowers, of the property levied on and sold under the execution of Hoge & Hutchinson, her husband, George Bowers was insolvent, then the presumption of law is that he furnished her with the means to purchase or acquire such property, and that such property is therefore subject to be levied on for his debts contracted prior thereto, and that the burden of showing that he did not in fact furnish her with the means to acquire said property is upon the plaintiff to prove affirmatively, by a preponderance of evidence, to the satisfaction of the jury, that he did not do so; and, in considering the evidence adduced by her on that point, the jury must disregard evidence tendered by her on the witness stand, just as if she had not testified at all, her evidence on that point being entirely inadmissible and illegal,"—and in giving in lieu thereof the following instruction: "The court instructs the jury

that it devolves upon the plaintiff to show by satisfactory evidence that the money with which she bought the stock of goods from Wm. E. Craig, trustee, was her own money, and belonged to her separate estate." (6) Error in refusing to give, on request of defendants, the following instruction: "The court instructs the jury that the plaintiff, Mrs. Jennie Bowers, is not a competent witness in this cause, and that, in considering this case, they must entirely exclude all the evidence given by her, and totally disregard the same, and dismiss it from their minds as completely as if she had never testified in this cause at all." (7) Error in refusing to give the following instruction, on request of defendants: "The court instructs the jury that if they believe from the evidence that at the time the execution of Hoge & Hutchinson involved in this cause was levied upon the property at No. 17 West Frederick street, on the 29th day of January, 1897, the execution debtor, George Bowers, was then conducting a store at the said storeroom as agent for his wife, the plaintiff, the said Jennie Bowers, under the style of 'George Bowers, Agent,' and that he had failed to disclose the name of his principal by a sign, in letters easily to be read, placed conspicuously at the house where such business was conducted, and also by a notice published two weeks in a newspaper printed in the city of Staunton, and that the said property so levied upon was acquired by the said George Bowers, agent, in such business, then they must find for the defendants, notwithstanding, they may further believe that said property really belonged to said plaintiff, Jennie Bowers, and had been bought and paid for by her, and though she was bound for all the purchases made and debts contracted by the said Bowers as agent, and that the same was well known to the defendants." And (8) error in refusing to give the following instruction, tendered by defendants during the closing argument of plaintiff's counsel: "The court instructs the jury that though they may believe from the evidence that the plaintiff, Mrs. Jennie Bowers, did not instruct or authorize her husband, George Bowers, to have her licenses transferred to George Bowers, agent, or to have her business advertised as that of George Bowers, agent, yet if they further believe from the evidence that after her said husband had had her licenses so transferred, and had so advertised the business, the plaintiff, Mrs. Jennie Bowers, knew of her husband's action in those respects, and did not correct or repudiate them, then by her silence and acquiescence, after having knowledge of her husband's said acts, she ratified them, and made them just as binding on her as if she had authorized them in advance."

A. C. Braxton, for plaintiffs in error. Chas. Curry and L. W. H. Peyton, for defendant in error.

RIELY, J. By the common law, husband and wife are incompetent to testify for or against each other. Neither of them is admissible as a witness in a cause, civil or criminal, to which the other is a party. The rule applies to all cases in which the interests of the other party are involved. 1 Greenl. Ev. §§ 234, 345, and *William & Mary College v. Powell*, 12 Grat. 372, 382.

This prohibition against the competency of husband and wife to testify for or against each other is not confined to the case where the husband or wife is a party to the record. It applies equally where he or she is not a party, but yet has an interest directly involved in the suit, and would therefore, according to the common law, be incompetent to testify. In that case the other would also be incompetent. 1 Greenl. Ev. § 341; 29 Am. & Eng. Enc. Law, 624; *Murphy's Adm'r v. Carter*, 23 Grat. 487; *Farley v. Tillar*, 81 Va. 270.

Where a husband has transferred property to his wife in fraud of the rights of a creditor, the latter, if the subject of the transfer be personal property, and was made by deed or other conveyance, has two remedies,—he may institute a suit in equity to impeach the conveyance on the ground of fraud, have it set aside, and the property subjected to the payment of his debt; or he may proceed at law, obtain a judgment for his debt, and, in disregard of the conveyance, levy his execution upon, and sell, the property fraudulently transferred. *Harvey v. Fox*, 5 Leigh, 444; *Green v. Spaulding*, 76 Va. 411; 4 Minor, Inst. (1st Ed.) 818.

It has been held time and again by this court that, in a suit in equity by a creditor to impeach a conveyance from a husband to his wife for fraud, neither the husband nor the wife is competent to testify, upon the ground that both are directly interested in the result of the suit. *William & Mary College v. Powell*, supra; *Burton v. Mills*, 78 Va. 470; *Perry v. Ruby*, 81 Va. 317; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Crabtree v. Dunn*, 86 Va. 953, 11 S. E. 1053; *De Farges v. Ryland*, 87 Va. 404, 12 S. E. 805.

Upon the same principle, both husband and wife are equally incompetent in a suit on an indemnifying bond by the wife, where the creditor has elected to proceed at law. It is true that to the suit in equity both husband and wife would be parties, while in the suit upon the indemnifying bond the wife is alone a party to the record; but the matter in controversy—the alleged fraudulent transfer—is as much an issue in the one case as in the other. Neither the husband nor the wife, as we have seen, could testify in a suit in equity to impeach for fraud a conveyance from a husband to his wife, because both are interested in the result of the suit; and, for the same reason, neither of them is competent to testify where the question of fraud is being tried in a proceeding at law. The husband, though not a party to the record, is di-

rectly interested in the result of the suit, and this, as we have seen, is sufficient to disqualify the wife as a witness.

At common law a party to the record could not be a witness for himself or a co-sutor in the cause. Disqualification by reason of interest, with certain exceptions, has been long since removed in this state by statute (Code 1887, §§ 3345-3349); and Mrs. Bowers, in the case at bar, would not be incompetent to testify by reason of her own interest. A wife is competent to testify where the cause is her own, and her husband has no interest in the result of the suit, although he is a party to the record, if only a nominal party. *Frank v. Lillienfeld*, 33 Grat. 377; *Hayes v. Association*, 76 Va. 225; *Farley v. Tillar*, 81 Va. 275; *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132; *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Thomas v. Sellman*, 87 Va. 683, 13 S. E. 146.

It was not the interest of Mrs. Bowers that rendered her incompetent to testify in the present case, but the interest of her husband. He had an interest directly involved in the suit, which at common law would have rendered him incompetent to testify; and his wife, because of the interest that at common law would have excluded him, was also incompetent. The recent acts passed by the general assembly removing the incompetency of husband and wife to testify for or against each other expressly retain the prohibition against competency "in any proceeding by a creditor to avoid or impeach any conveyance, gift or sale from the one to the other on the ground of fraud or want of consideration." and expressly preserve the rules of evidence at common law in cases of that nature. Acts 1893-94, p. 722; Acts 1897-98, p. 753. The circuit court restricted the testimony of Mrs. Bowers to the issues in the cause other than that of fraud. It is difficult to see how she could testify at all in the case without her evidence affecting that issue, and the testimony given by her goes far to confirm this; but, however that may be, it was decided by this court, in *Steptoe v. Read*, 19 Grat. 1, that, if a witness is competent to give evidence at all in a cause, he may be examined upon any matter in the record, and is not competent for one purpose only. The principle laid down in that case has been frequently acted upon by the courts of the commonwealth, and been followed by this court without question. *Carter v. Hale*, 32 Grat. 119; *Brock's Adm'r v. Brock*, 92 Va. 173, 23 S. E. 224.

We are therefore of opinion that the court erred in admitting Mrs. Bowers to testify at all in the case. This disposes of the assignment of error based upon the sixth as well as the first bill of exceptions.

The main question in the case is the proper construction of section 2877 of the Code. This section provides, in substance, among other things, that if any person transact business as a trader, with the addition of the word "Agent," and fail to disclose the name of his principal, by a sign, in letters easy to be read,

placed conspicuously at the house wherein the business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town, or county wherein the same is transacted, or if any person transact such business in his own name, without any such addition, all the property stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for his debts.

The purpose of the legislature in enacting the statute (as the title of the original act passed March 28, 1839, shows) was to prevent persons carrying on business under false or fictitious names and firms. The object was to prevent fraud; to compel any person transacting business as a trader to disclose the name of the real owner of the business, if any other there be; to prevent any shifting or evasion of ownership and liability for debts in case of controversy; and to preclude the assertion of secret claims of ownership against creditors of him who has conducted the business, possessed the property, and appeared to be its owner.

The language of the statute is plain, explicit, and imperative. It leaves no room for exception or qualification. If any person, as is alleged in this case, transact business as a trader in his own name with the addition of the word "Agent," or in his own name without such addition, and fail to comply with the provisions of the statute, it makes all the property, stock, and choses in action acquired or used in such business absolutely liable for his debts, whether contracted in the particular business or not, and without regard to knowledge by the creditor of the principal, if principal there be. Knowledge or want of knowledge plays no part in the application of the statute. That is an immaterial matter. The only question is whether the person was doing business as a trader, within the meaning of the statute, and has complied or failed to comply with its positive requirements.

The state of Mississippi has a statute very similar to ours. It is, in fact, almost in the exact words of our own. Code Miss. 1890, § 1300. Her statute has repeatedly come before her court of appeals for construction, and that court has uniformly held that the provisions of the statute must be complied with, and that knowledge as to the principal or true owner by creditors of the person transacting the business, in case of noncompliance with the requirements of the statute, did not affect the question of the liability of the property used in the business for his debts. *Gumbel v. Koon*, 59 Miss. 264; *Quin v. Myles*, Id. 375; *Wolf v. Kahn*, 62 Miss. 814; *Paine v. Lock Co.*, 64 Miss. 175, 1 South. 56; *Hamblet v. Steen*, 65 Miss. 474, 4 South. 431.

The only case which has been brought to our attention, or which we have been able to find, in which this court has placed a different construction upon the statute from the one we have given it, is that of *Trevillian v. Powell*. In the several other cases in which the

statute has been under consideration by this court, no such construction is advanced as was given in that case. *Bank v. Kent*, 16 Grat. 257; *Penn v. Whitehead*, 17 Grat. 503; *Bank v. Cringan*, 91 Va. 347, 21 S. E. 820; and *Benjamin v. Madden*, 94 Va. 68, 26 S. E. 392.

The case of *Trevillian v. Powell* was never officially reported, but is to be found in the *Quarterly Law Journal* for 1856 (page 257). The circuit court in that case gave to the statute the same construction that we have, but, on appeal to this court, its judgment was reversed. The case was decided by a court of three judges, two of whom concurred in the reversal, and one dissented. No opinion was filed, and we are unable to ascertain the reasons of the majority of the court for their conclusion, the order that was entered containing the mere statement that the person "did not transact business as a trader, 'with the addition of the word "Agent,"' according to the true intent and meaning of the statute." Under these circumstances, we do not feel called upon to consider ourselves as bound by that case, especially as we are all of opinion that the statute should receive a different construction, and a construction, so far as our experience goes, that has uniformly been given to it by the lower courts of the commonwealth. The circuit court therefore erred in giving for the plaintiff the instruction set forth in bill of exceptions numbered 2, and in refusing to give the instruction for the defendant set forth in bill of exceptions numbered 7.

The court did not err in giving to the jury the instruction set forth in bill of exceptions No. 3. If Mrs. Bowers conducted the business in person, then the case did not come within the statute, and there was no requirement on her to do anything required by its provisions. Whether she, in fact, did conduct the business in person, was a matter dependent upon the evidence; and, the record showing that there was evidence tending to prove this, it was proper for the court to give the instruction set forth in bill of exceptions numbered 3.

The instruction set out in bill of exceptions No. 4 and that set out in bill of exceptions No. 8 will be considered together. It is settled law that the declarations or acts of an agent cannot be received to prove his agency. That fact must be proved by other evidence, and must be first established before his declarations or acts are admissible as evidence. *Fisher v. White*, 94 Va. 236, 26 S. E. 573; *Mechem*, Ag. §§ 109, 716; *Sanford v. Pollock*, 105 N. Y. 450, 11 N. E. 836.

It is contended by counsel for plaintiffs in error that the declarations and acts of George Bowers, the husband of Jennie Bowers, to the effect that he was her agent, were made in her presence or brought home to her knowledge without being repudiated, and that, such being the case, she was bound by his declarations and acts, and that the instruction set

out in the fourth bill of exceptions should have been given with this qualification. The record does not show that the court was asked thus to qualify the instruction at the time it was given; but during the concluding argument of counsel for the plaintiff, in order to meet a contention made by him in his address to the jury,—that, in determining whether Jennie Bowers was bound by any acts of George Bowers as her agent, they could not consider anything said or done by him as tending to establish the fact of such agency, although Jennie Bowers may have heard such words or known such acts without repudiating them,—the counsel for defendants tendered an instruction embodying a qualification of the general principle enunciated in the prior instruction; but the court refused to give it, for the reason that it was tendered too late. The instruction thus asked for by counsel for the defendants, and set forth in bill of exceptions No. 8, correctly propounded the law, and should have been given at the time it was offered, as the instruction contained in bill of exceptions No. 4, without explanation or qualification, was calculated, under the circumstances and in view of the evidence, to mislead the jury.

The instruction asked for by the defendants, which is set forth in the fifth bill of exceptions, correctly stated the law, and should have been given by the court. It but enunciated the law as it had been held by this court. *Yates v. Law*, 86 Va. 117, 9 S. E. 508; *Grant v. Sutton*, 90 Va. 771, 19 S. E. 734; *Kinnier's Adm'r v. Woodson*, 94 Va. 711, 27 S. E. 457. The instruction given in lieu of it did not fully propound the law applicable to the case. It wholly ignores the presumption of the law, in a contest between a wife and the creditors of her husband, that the husband is the owner of all property acquired or of which the wife may be in possession during the coverture. The instruction asked for by the defendants embodied this presumption, and they were entitled to have it stated to the jury. The instruction given was not the equivalent of the one refused, and the court erred in rejecting the latter and giving its own.

The judgment of the circuit court, for the reasons herein given, must be reversed, the verdict set aside, and the case remanded for a new trial to be had in accordance with the views expressed in this opinion.

ROANOKE ST. RY. CO. v. HICKS et al.
(Supreme Court of Appeals of Virginia. Dec. 1, 1893.)¹

BILL OF DISCOVERY — SPECIFIC PERFORMANCE — TRUST FUND.

1. A bill cannot be maintained against corporations alone, as one for discovery, they being unable to answer under oath.

2. A bill does not seek specific performance

¹ Rehearing denied.

² For opinion on application for modification of opinion, see 22 S. E. 790.

of a contract of a corporation to deliver bonds, which alleges that the bonds agreed to be delivered were secured on the corporation's property at the time of the contract, and that such bonds and the mortgage securing them have been canceled and destroyed, and another mortgage given to secure a later issue of the bonds, thus making it impossible to specifically execute the contract, and the bonds sought to be reached being of the later issue.

3. A deed of trust conveying all the property of a corporation for the benefit of all who are or may be holders of stock of a certain issue does not create a trust fund for benefit of creditors of the corporation, though it contains the resolution of the stockholders authorizing it, reciting that it was deemed expedient to execute a mortgage and issue bonds, the money derived from the sale thereof to be used for the payment of the corporation's outstanding indebtedness and for improvement, and though it contains a provision that the trustee deliver a certain amount of the bonds to the corporation, to be applied to the payment of their outstanding indebtedness, and such other uses as the directors shall determine.

Appeal from circuit court of city of Roanoke.

Bill by R. R. Hicks, trustee, and others, against the Roanoke Street-Railway Company and another. Decree for complainants, and said company appeals. Reversed.

Watts, Robertson & Robertson, Richard M. Venable, and S. Hamilton Graves, for appellant. Scott & Staples and Eppa Hunton, Jr., for appellees.

HARRISON, J. In the view taken of this case, the only point that need be considered is raised by the demurrer which calls in question the right of appellee to maintain his suit in a court of equity.

The material allegations of the bill are that the appellee Rogers in the year 1889 sold and conveyed to the appellant a tract of land, for which he was to receive from appellant certain stock, and "\$40,000 worth" of its first mortgage bonds, then secured upon the property of appellant; that he has never received these bonds, and that they have been canceled and retired; that subsequently, on the 1st day of May, 1892, the appellant executed another mortgage, conveying all of its property to the Fidelity Insurance, Trust & Safe-Deposit Company of Philadelphia, as trustee, to secure \$500,000 of its bonds, to be issued according to the provisions of said mortgage; that there was a large indebtedness on the part of appellant, which was to be provided for by this mortgage and the issue of bonds thereunder, and that a part of the indebtedness to be thus provided for was the obligation of appellant to deliver \$40,000 worth of its first mortgage bonds to appellee; that a large part of said bonds had never been issued, and that a large part of those issued had not been sold, but had been deposited as collateral by appellant to secure its obligations to certain of its stockholders; that at the time of the execution of this mortgage the Fidelity Company, and the stockholders for whose security bonds had been deposited as collateral, employed counsel to examine

the books, papers, and documents of appellant, and became thereby fully apprised of the contract under which appellee had conveyed the tract of land, and of the obligation of appellant to deliver the \$40,000 worth of bonds as the consideration therefor, and were fully apprised of the fact that said bonds had not been delivered, and that appellant was still obliged to deliver the same whenever demand should be made therefor; that by said last-mentioned mortgage distinct provision was made for the payment and discharge of all of the obligations of appellant, and that the \$500,000 of mortgage bonds so provided to be issued were by the terms of the mortgage created a trust fund, to be held by the Fidelity Insurance, Trust & Safe-Deposit Company in trust for the benefit of all parties to whom appellant was indebted or under any contractual obligations, and that it thereby became the duty of appellant to execute and deliver to the Fidelity Company, trustee, \$40,000 worth of said mortgage bonds, and that it was the duty of the Fidelity Company to deliver said bonds to appellee; that on the 23th day of March, 1894, appellee, through his trustee, to whom he had made an assignment, had made application to appellant for the issue and delivery of said bonds, and that it had declined to deliver the same; that inasmuch as appellant had by its mortgage deed of 1892 created its mortgage bonds, to the amount of \$500,000, as a trust fund for the protection of all parties to whom it was under obligation, and among others for the protection of appellee, therefore appellee was entitled to compel appellant and the Fidelity Insurance, Trust & Safe-Deposit Company to execute and deliver to his trustee, to whom he had made said assignment for the benefit of his creditors, and thereafter for his own benefit, said \$40,000 worth of bonds.

The bill then proceeds to propound certain interrogations to appellant:

(1) Whether appellant had ever delivered to appellee or his trustee the \$40,000 worth of bonds?

(2) How much of the \$500,000 of bonds provided for in the mortgage of 1892 have been issued, how many are in the hands of the Fidelity Company, and how many of those issued does appellant still retain an interest in?

(3) Whether or not any of the bonds had been delivered to stockholders or other persons as collateral security for moneys advanced appellant, how much money had been realized by appellant on said bonds, and in whose hands, and to whom, were said bonds delivered?

The prayer of the bill is that the appellant railway company and the Fidelity Company, trustee, be required to issue and deliver \$40,000 worth of the bonds of 1892, with interest coupons attached thereto, and that appellant be required to pay the interest, at the rate of 6 per cent., that has accrued since the date

the sale of the land to appellant, and that necessary steps be taken to give appellee complete relief according to the statement of case in the bill, and such general relief might be entitled to.

Three grounds are urged in support of the equity of this bill, which will be considered in the following order:

First, that it is a bill for discovery, and that when a court of equity takes possession of the suit upon this rightful ground of jurisdiction, it will proceed to dispose of the case on its merits.

It is true that, if a party is properly in equity for a discovery, the court having possession of the subject will proceed to decide the case without turning the party round to a court of law, unless, indeed, the discovery sought and obtained in order to be used in a pending common-law action. *Lyons v. Lyons*, 6 Gratt. 427.

Without discussing other imperfections in this bill for discovery, it is sufficient to say that it cannot be maintained as such, for the reason that no one is made a party defendant who can answer under oath. There are but two parties defendant, and each is a corporation. The object of a bill of discovery in equity is to enable one party to search the conscience of his antagonist, and to compel him to make disclosures upon oath which are necessary to the preservation of the rights of the former, which he otherwise cannot be able to prove. Corporations cannot answer under oath, but only under a common seal; and for this reason, in order to prevent a failure of justice, it has been the settled law in this country and in England, when a discovery is desired, to make such of the officers or individual corporations as are supposed to be personally acquainted with the facts wanted, parties defendant along with the company itself. The influence of this practice has made it a necessity, notwithstanding the general rule in equity, that a mere witness shall not be made defendant to a bill. 1 Minor, 444, pp. 642, 643; *Thomp. Corp.* § 7409, etc., and cases there cited.

The second ground urged in support of the equity of the bill is that it seeks to enforce the specific performance of the contract of appointment to deliver to appellee \$40,000 worth of first mortgage bonds. This contention is wholly untenable.

The bill, on its face, declares that the contract to deliver the bonds was dated in 1889, and that the bonds to be delivered were at that time secured on the property of appellant by mortgage deed. If the right to specific performance exists, it is the right to demand the bonds secured by the mortgage of 1889; and yet the bill and exhibits filed with it show that this mortgage and the bonds secured thereby have been canceled and annulled, thus making it impossible to specifically execute the alleged contract.

The third ground urged in support of the

jurisdiction of the court is that the bill sets out facts which show that there is, or at least should be, in the hands of appellant a trust fund in which appellee is entitled to participate, and that equity will take jurisdiction to ascertain what that fund is, where it is, and to have it administered.

The mortgage of 1892, which the bill undertakes to interpret as creating a trust fund for the benefit of appellee, is filed with the bill, and made a part thereof. It begins by reciting the right of appellant, under its charter, to borrow money for the use of the corporation, and to secure such loans on its property. It recites the fact that appellant had acquired all of the bonds secured under the mortgage of 1889, and had canceled the same, and secured from the trustee named in that mortgage a release of the same of record. It recites that the stockholders had unanimously resolved that the appellant company should issue \$500,000 of new bonds, and secure the same by mortgage or deed of trust upon its property. It then proceeds to convey all of appellant's property to the Fidelity Insurance, Trust & Safe-Deposit Company, in trust for the equal pro rata benefit and security of the several persons or corporations who may be or shall become holders of any of the bonds issued thereunder. The language in the mortgage relied on in part as creating the bonds a trust fund is found in the resolution of the stockholders authorizing the mortgage, and is as follows:

"Whereas, it is further deemed expedient and for the best interest of this company that another mortgage or deed of trust should be executed and new bonds issued for the sum of \$500,000; the money derived from the sale of said bonds to be used for the payment of the outstanding indebtedness of the company, and for betterments and improvements, for the further extension and improvement of its railroad system, the introduction of electricity as a motive power, and for the more efficient operation of the same."

This language sets forth the necessity for creating the mortgage, and explains the purpose of issuing the bonds; but it creates no trust to deliver any of these bonds to any creditor of appellant, or to sell the bonds and pay the proceeds to any creditor. A debtor may borrow money upon his property for the purpose of paying his general debts, but he does not thereby create a trust fund and constitute himself a trustee, who can be impeached by such creditors in a court of equity, and made to account to them for the money so borrowed.

Language further relied on as creating a trust fund is the provision in a subsequent portion of the mortgage that the trustee named in the deed shall certify and deliver \$200,000 of the bonds to appellant, "to be applied to the payment of the present outstanding indebtedness, and to such other uses as the board of directors shall determine." What has been said in respect to the resolution of the stock-

holders is equally applicable to the language here relied on. The trustee is thereby charged with the duty of certifying and delivering to the debtor \$200,000 of the bonds, but appellant took the same subject to no trust that it can be called upon to administer in a court of equity.

This deed of trust or mortgage is in the usual form for such purposes. The only trust created or intended to be created thereby is carefully defined. The property is conveyed to the trustee named, to be held by him in trust and confidence for the equal pro rata benefit and security of the several persons and corporations then holding, or who may become holders of, any of the \$500,000 of bonds issued thereunder. The deed does not secure, and was not intended to secure, or create, a trust fund for the benefit of the creditors of appellant. Its indebtedness, together with the necessity for improving and enlarging its business, is only referred to as a reason for creating the mortgage and issuing the \$500,000 bonds thereunder.

The appellee conveyed the land in question to appellant without reserving any lien to secure the consideration therefor, and, if he has any valid claim against appellant,—as to which no opinion is expressed,—his remedy is a plain and adequate one at law for damages.

For these reasons the decree complained of must be reversed, the demurrer sustained, and the bill dismissed.

STATE v. JEFFCOAT et al.

(Supreme Court of South Carolina. Feb. 8, 1899.)

INDICTMENT — SELLING INTOXICATING LIQUORS — STATEMENT OF OFFENSE — CONSTITUTIONAL LAW — SURPLUSAGE.

1. Act March 6, 1896, § 43 (22 St. at Large, p. 148), providing that indictments for the sale of intoxicating liquors may charge a series of sales on the same day or on divers days to one or to different persons, naming one, and stating the others to be unknown, is repugnant to Const. 1895, art. 1, § 18, requiring one accused of crime to be fully informed of the nature and cause of the accusation.

2. An indictment for selling intoxicating liquors which charges a complete offense is not invalid because, in addition thereto, it charges sales to divers other persons unknown to the grand jury, such averment being surplusage, which may either be stricken or disregarded.

Appeal from general sessions circuit court of Lexington county; George W. Gage, Judge.

Lzlar Jeffcoat and another were indicted for selling intoxicating liquors, and from an order quashing the first count of the indictment the state appeals. Reversed.

J. Wm. Thurmond, for the State. P. H. Nelson and G. T. Graham, for respondents.

POPE, J. The circuit judge, when this case was called for trial, on the motion of respondents' attorneys, granted an order quashing the first count in the indictment. The state now appeals from this order. The first count of

the indictment was in this language: "That Lzlar Jeffcoat and Bill Jeffcoat, * * * on the first day of December in the year of our Lord one thousand eight hundred and ninety-seven, and on divers other days, both before and since that day, up to the taking of this inquisition, willfully and unlawfully did sell, barter, exchange, and deliver to one Richard Peel, and to divers other persons to the jurors aforesaid unknown, spirituous, malt, and other liquors containing alcohol and used as a beverage, to wit, one gill molasses rum, for 5 cents, against the form of the statute in such cases made and provided, and against," etc. The contention of the appellant is that by the use of the words in the count in question, "and to divers other persons to the jurors aforesaid unknown," said count was in accord with the provisions of the forty-third section of the act of the general assembly entitled "An act to provide for the election of the state board of control, and to further regulate the sale, use," etc., "of intoxicating and alcoholic liquors or liquids," etc. Approved March 6, 1896. See 22 St. at Large, pp. 123-149. The language of the section (43) is as follows: "That in any indictment for the sale of intoxicating liquors it shall be competent to charge a series of sales on the same day or on divers days up to the finding of the true bill to one person or to different persons, naming one and stating the others to be unknown, in the same count as was formerly the practice in indictments for retailing liquors without license in this state, and the prosecuting officer shall not be required to elect which particular sale he will rely on, but may offer proof of all, and proof of any one of all the sales will sustain the verdict. * * *" This court, in *State v. May*, 45 S. C. 512, 23 S. E. 518, held that the words "and to divers other persons" might be stricken out of any count where they occur as surplusage. The appellant, however, insists that the foregoing case was decided just after the constitution of 1895 was adopted, and before the passage of the act of 1896, quoted above, as to its forty-third section. It is claimed by appellant that the language of the constitution of 1868, under which *State v. May* was decided, is quite distinct from the language of the last constitution. Let us see if there is any virtue in this position.

In section 13 of article 1 of the constitution of 1868 these words occur: "No person shall be held to answer for any crime or offense until the same is fully, fairly, plainly, substantially and formally described to him." It is patent that "fully" would have answered all the ends of this requirement of the constitution of 1868. But section 18 of article 1 of the constitution of 1895 provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to be fully informed of the nature and cause of the accusation." Are not these words as strong as those employed in the constitution of 1868? It seems to be so.

... true, not so many words are employed in the latter instrument to convey the same idea as in the former, but that is of no significance. In both the accused is required to be "fully" informed as to the nature and cause of the accusation. But now let us see if section 43 of the act of 1896, *supra*, makes any change in the law by providing that a count in an indictment may charge the offense of selling spirituous liquors to a certain person "to divers other persons to the jurors aforesaid unknown." In the light of our decisions, the words "to divers other persons," when they occur in an indictment, set forth no criminal offense. Such words are surplusage. See *State v. Cassety*, 1 Rich. Law, 90; *State v. Gage*, *supra*. And it does not add anything to a charge against a certain person when the words "and to divers other persons," etc., are added in the same count. *State v. Cassety*, *supra*. Frankness compels us to say that when the general assembly declared, in this section of the act of 1896, that this language, "to divers other persons," etc., in the same count in an indictment with a charge against a person whose name was given, was in accordance with previous practice in this state, such was a mistake. As long ago as the year 1844 the court of appeals in this state declared that such words charged no offense, and should be stricken as surplusage. See *State v. Cassety*, *supra*. Unless, therefore, it can be discovered that such words, "and to divers persons aforesaid unknown," can be made to amplify an offense of selling liquors to a certain person whose name is given, in accordance with well-recognized legal principles, the argument is at an end. We dare not undertake such a project. It has been well said that every indictment must set forth all the elements of an offense, and no omission in an abatement can be supplied by innuendo. This is the doctrine of our courts. *State v. Anderson*, 1 Rich. Law, 178; *State v. Powell*, Rich. Law, 374; *State v. Rushing*, 2 Nott & C. 560; *State v. McKettrick*, 14 S. C. 353. It is our opinion, therefore, that the general assembly could not, by the use of the words "and to divers other persons," etc., make a new offense. Such words occurring in a count in an indictment which properly charges a particular individual by name with an offense cognizable under the law may either be disregarded as surplusage, or stricken from the count on motion. But in this case Judge Gage did more; he quashed the count. This he was in error. A distinct offense was alleged in the first count against the defendants for their sale to Richard Peel. We must reverse the order appealed from solely on the ground that there was an offense alleged against the defendants for their alleged sale of liquor to Richard Peel, but not because the words "and to divers other persons to the jurors aforesaid unknown" were properly stricken. It is the judgment of this court that the order appealed from be reversed, and the prosecution be remitted to the circuit court.

WILKINS et al. v. TOWN COUNCIL OF GAFFNEY CITY et al.

(Supreme Court of South Carolina. Feb. 8, 1899.)

MUNICIPAL CORPORATIONS — LAYING RAILROAD TRACKS IN STREET—CONSENT OF ABUTTERS—CONDEMNATION.

Under Acts 1894, p. 1002, § 14, authorizing the town council of Gaffney City to close up, widen, or alter a street by condemnation in case the abutters refuse consent, the council has no authority to permit a railroad to lay its tracks in a street, where consent was refused, without condemnation and compensation.

Appeal from common pleas circuit court of Cherokee county; George W. Gage, Judge.

Bill by W. J. Wilkins and others against the town council of Gaffney City and the Ohio River & Charleston Railway Company. There was a decree for defendants, and plaintiffs appeal. Reversed.

Jas. F. & John R. Hart and Butler & Osborne, for appellants. N. W. Harden, G. W. S. Hart, and J. C. Jefferies, for respondents.

GARY, A. J. This is an action to restrain the town council of Gaffney City from granting to its co-defendant the use of Johnson street in said town for the purpose of extending its track. His honor, Judge Gage, granted a temporary injunction, which he afterwards dissolved, and the appeal is from that order.

Several questions are presented by the exceptions, one of which is that the town council of Gaffney City was without jurisdiction to grant to its co-defendant the right to lay its track in said street. The question as to jurisdiction will first be considered. In order to ascertain what powers were conferred upon the town council of Gaffney City, it will be necessary to refer to its charter. Section 13 (Acts 1894, p. 1002) contains the following provision: "The intendant and wardens shall have full and exclusive control over all streets, roads, ways, and bridges in the said town, and it shall be their duty, to keep them open and in good repair; and for that purpose they are invested with all the powers of county board of commissioners, for and within the corporate limits of said town." Section 14 is as follows: "The town council of Gaffney City shall have full power and authority to open new streets in said town and to close up, widen, or otherwise alter those now in use, or which may hereafter be established, wheresoever in their judgment the same may be necessary for the improvement and convenience of said town, and to name and change present names of streets. Should the land owner or owners through whose premises such street or streets may run refuse his, her, or their consent to such action of the town council, in opening, closing up, widening, or altering such street or streets, the said town council shall have the right to condemn such land for the purpose aforesaid, according to the provisions of the law now of force for

condemning land for public use." The intention of the act was to confer upon abutting landowners the right to compensation for damage to their property in consequence of opening, closing up, widening, or altering of the streets. The right to condemn according to the provisions of the law imposes the corresponding duty to render compensation for the damages sustained. The provisions of the law for condemning land for public use show that compensation must be made to the landowner before the highway is established. Rev. St. § 1179. It would be both an alteration and a partial closing of the street for the railway company to lay its track through it. *Paris Mountain Water Co. v. City Council of Greenville*, 53 S. C. 82, 30 S. E. 699; *Garraux v. Same*, 53 S. C. 575, 31 S. E. 596. The town council, upon the refusal of the plaintiffs, did not have the right to take their land for the purpose of opening, closing, widening, or altering the street, except under condemnation proceedings. It therefore was without jurisdiction in the premises to delegate to the railway company a power which it did not possess, and which the railway company is attempting to exercise. Upon the refusal of the landowners, the jurisdiction of the town council over the streets, for the purpose of opening, closing, widening, or altering, does not arise until compensation has been made to the landowners under condemnation proceedings.

This conclusion renders unnecessary a consideration of the questions raised by the other exceptions. It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for such proceedings as may be necessary to carry into effect the views herein announced.

STATE v. KENDALL.

(Supreme Court of South Carolina. Feb. 8 1899.)

HIGHWAYS—OBSTRUCTING—OPENING—EVIDENCE—PROCEEDINGS OF COMMISSIONERS—COLLATERAL ATTACK—CHARGE.

1. In a prosecution for obstructing a highway, the actual physical opening of the highway can be shown as well by witnesses with knowledge of the fact as by secondary evidence as to the contents of lost proceedings before the commissioners touching the laying out of the highway.

2. The proceedings of county commissioners in laying out a highway are quasi judicial, and hence cannot be collaterally attacked for mere irregularities.

3. In a prosecution for obstructing a highway, a charge that the jury could not convict, unless the statutory requirements as to laying out the highway had been strictly complied with, was properly refused, since the highway might have been laid out by the consent of the landowner, and also because the proceedings before the commissioners were final on the issue of compliance, except for jurisdictional defects.

4. Failure to charge on a certain point will not be reviewed, in absence of a requested charge, the court having substantially charged the law applicable to the case.

Appeal from general sessions circuit court of Beaufort county; R. C. Watts, Judge.

C. G. Kendall was convicted of obstructing a highway, and he appeals. Affirmed.

W. S. Tillinghast, for appellant. G. Duncan Bellinger, Atty. Gen., for the State.

GARY, A. J. The defendant was convicted for obstructing a public highway, whereupon he appealed upon exceptions, the first four of which allege that the presiding judge erred in permitting witnesses to testify, of their own knowledge, that the public highway described in the indictment had been laid out and opened to the use of the public by the county commissioners, against the objection of the appellant that, the original proceedings before the county commissioners relative to the laying out and opening of the highway having been lost, evidence as to the contents of the proceedings was the next best evidence. Upon cross-examination the defendant's attorney brought out the evidence to which he had made objection upon the direct examination. The defendant testified that he was in possession of a part of the stolen records, and he introduced in evidence the petition for a public highway, and a copy of the finding of the referees. Furthermore, the objection was not made to the testimony on the ground that the state had it in its power to offer better evidence than that introduced. *Hobbs v. Beard*, 43 S. C. 370, 21 S. E. 306. But, waiving these objections, the exceptions cannot be sustained. The actual physical opening of the highway by the county commissioners to the use of the public was a fact which undoubtedly could be as well established by the testimony of witnesses who testified of their own knowledge as by secondary evidence as to the contents of the lost proceedings before the county commissioners touching the laying out of such highway. The highway might have been laid out by the consent and acquiescence of the owner of the land, in which case there would have been no necessity for a compliance with the requirements of the statute in such cases. Now, whether the requirements of the statute had been complied with in laying out the highway was quite a different fact from the actual, physical opening of the highway to the use of the public. These exceptions are overruled.

The fifth exception submits that the presiding judge erred in holding that the defendant could not attack collaterally the proceedings of the county commissioners in laying out the highway for want of jurisdiction. This exception seems to have been taken under a misapprehension, as his honor ruled that the appellant had the right to attack the said proceedings for jurisdictional defects, and allowed him to introduce testimony for the purpose of showing that the county commissioners did not acquire jurisdiction of him in said proceedings.

The sixth and ninth exceptions complain of his honor's ruling that in this case the defendant could not attack the proceedings

the county commissioners in laying out a highway on the ground that there were irregularities in the proceedings. The person who laid out the highway under the provisions of the statute constituted a quasi judge. *State v. Stackhouse*, 14 S. C. 417. The general rule is that the final judgment of a court cannot be collaterally attacked for irregularities in the proceedings, and there is no reason why this principle should not apply to a court that is quasi judicial. The exceptions are overruled.

The seventh and eighth exceptions allege that the presiding judge erred in refusing to direct the jury that they could not convict the defendant unless all the statutory requirements as to laying out a public highway had been strictly complied with. For his error to have charged as requested would have eliminated from the consideration of the jury the question whether there was acceptance on the part of the defendant to opening of the highway. It would also have been error for him to have charged as requested, because in that case the jury would have been compelled to acquit if they had found that said proceedings were in any respect irregular, which, we have before stated, would not have rendered the proceedings null and void. These exceptions are overruled.

The tenth exception imputes error to the trial judge in not charging the proposition law therein stated. His honor substantially charged the law applicable to the case, and if the appellant desired a more extended charge, it was his duty to embody his propositions in the form of a request to the jury. This exception is overruled. Judgment affirmed.

SHULL v. CAUGHMAN.

Supreme Court of South Carolina. Feb. 8, 1899.)

ISSUES—DEFECT—DISMISSAL AND NONSUIT—ERROR—AMENDMENT.

Under Code, § 165, authorizing defendant to demur to a complaint where a defect of form appears on the face; and section 169, providing that failure to object to a complaint by error or answer shall be deemed a waiver,—error of parties cannot be first urged on a motion for nonsuit.

Grounds of exceptions to a refusal to nonsuit will not be considered which were not presented or passed on with the motion for nonsuit.

A motion to dismiss will not lie for defect of parties.

Under Code, § 142, providing that no action shall abate by death of a party if the cause of action survive, and that in case of death the court may allow the action to be continued by the party's representative, the court amended its order of substitution, during the term it is entered, by substituting heirs of the deceased party in place of his executor.

Appeal from common pleas circuit court for Lexington county; Ernest Gary, Judge.

Action by Sue A. Shull against Frances T.

Caughman. Upon death of the latter, J. A. Muller was substituted as administrator c. t. a. of her estate. There was an order substituting the heirs of defendant for the administrator, and he appeals. Affirmed.

The following is the order of the lower court, with the exceptions thereto:

"This cause came on to be heard before me at the September term, 1898, of the court of common pleas for Lexington county. It involved the title to a lot of land in the town of Lexington, and the trial before me was the second one brought for the recovery thereof; the first having resulted in favor of the defendant, Mrs. Frances T. Caughman. While the second action was pending, and after issue joined, Mrs. Frances T. Caughman died; whereupon, and within 12 months thereafter, an order was duly obtained, substituting for her, as defendant in the cause, J. A. Muller, as administrator cum testamento annexo of the estate of the said Frances T. Caughman. When plaintiff closed his case in chief, Mr. Crawford, for the defendant, moved for a nonsuit, on the ground that the proof was not sufficient to sustain the action. This motion, after argument, was refused, when he made a further motion to dismiss the complaint. This motion was also refused. Then a demurrer was interposed, on the ground that the complaint did not state facts sufficient to constitute a cause of action. I sustained the demurrer, with leave granted to the plaintiff to amend the order of substitution, making the devisee under the last will and testament of Mrs. Frances T. Caughman a party defendant, provided said amendment be served upon defendant's counsel within 20 days from the rising of the court."

"The defendant herein appeals to the supreme court from the order, dated 5th October, 1898, of his honor, Judge Ernest Gary: (1) For that his honor should have granted the motion for a nonsuit interposed by the defendant, because the proof adduced by plaintiff was not sufficient to sustain the action, said proof being totally insufficient to establish a cause of action. (1a) For that the nonsuit should have been granted, because the proof adduced by plaintiff was totally insufficient to establish her cause of action, in that there was no evidence whatever that a trespass had been committed on the property at issue. (2) For that his honor should have granted the motion to dismiss the complaint, because the action was brought against a wrong and sole defendant, and, therefore, had to fail, as there was no proper or necessary party defendant before the court. (3) For that said error appeared at the trial after plaintiff's proof was in, and that, necessarily, it gave rise to either an adverse verdict or a nonsuit, and such error cannot be amended by substituting a right defendant, who is in no manner before the court, for a wrong defendant, entirely un-

connected with any other party to the cause. (4) For that his honor erred in allowing an amendment to the order of substitution, including therein a new and independent party defendant, in a cause of action such as that at bar, when that decision embodied a demurrer, granted after the plaintiff had rested her case, on the ground that there were not facts stated sufficient to constitute a cause of action, which decision was but another form of sustaining the nonsuit asked for, to wit, that the proof was not sufficient to sustain the cause of action."

Andrew Crawford, for appellant. Meetze & Muller, for respondent.

GARY, A. J. The appeal herein is from an order of his honor, Judge Gary, which, together with appellant's exceptions, will be set out in the report of the case. We will first consider whether there was error on the part of the presiding judge in refusing the motion for an order of nonsuit. Rule 18 of the circuit court contains the following provisions: "A motion for a nonsuit must be reduced to writing by the moving counsel, or by the stenographer under the direction of the court, stating the grounds of the motion." Upon appeal to this court the party who made the motion in the circuit court cannot rely upon any grounds except those upon which the motion was made in the circuit court. *Graham v. Seignious*, 58 S. C. 132, 31 S. E. 51. Although the appellant did not comply strictly with this requirement, still it sufficiently appears in his argument on circuit that the motion was based on the ground that the heirs (or devisees, if there was a will), and not the administrator, were the proper parties defendant. Section 165 of the Code is as follows: "The defendant may demur to the complaint when it shall appear upon the face thereof either: (1) That the court has no jurisdiction of the person of the defendant or the subject of the action; or (2) that the plaintiff has not legal capacity to sue; or (3) that there is another action pending between the same parties for the same cause; or (4) that there is a defect of parties, plaintiff or defendant; or (5) that several causes of action have been improperly united; or (6) that the complaint does not state facts sufficient to constitute a cause of action." The objection urged by the appellant should properly have been made by demurrer, under subdivision 4 of said section of the Code. Section 169 of the Code is as follows: "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." The case of *Mickle v. Construction Co.*, 41 S. C. 894, 19 S. E. 725, and the cases therein cited, show that the objection to the com-

plaint, by what is called an "oral demurrer at the trial," comes too late when it arises under subdivision 2, hereinbefore mentioned. For reasons equally as strong, an objection properly arising under subdivision 4 of said section cannot be urged upon a motion for a nonsuit. This principle is sustained, also, by the cases of *Dawkins v. Mathis*, 47 S. C. 64, 24 S. E. 990, and *Jennings v. Parr*, 51 S. C. 181, 28 S. E. 82, 402.

The appellant, in his exceptions, relies upon other grounds; but, as they were not presented when he made the motion for nonsuit, and the presiding judge did not rule upon them, they will not be considered.

We will next consider whether the presiding judge committed error in refusing to dismiss the complaint. It does not appear upon what ground the appellant moved to dismiss the complaint, unless, by inference, it was on the ground upon which he made the motion for a nonsuit. If this be the case, there is not provision of the Code, nor any law in this state, allowing a defendant to make a motion to dismiss a complaint on the ground that there is a defect of parties defendant.

The last question for consideration is whether the circuit judge erred in granting the plaintiff leave to amend the order of substitution by making the devisee under the will of Mrs. Caughman a party defendant. Section 142 of the Code provides as follows: "No action shall abate by the death, marriage, or other disability of a party * * * if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative in interest." It was to carry into effect this provision that the circuit judge amended his first order of substitution. The first order had been granted by him at that term of the court, and, if he had seen fit, he could have withdrawn it altogether from the file, and passed another order in the case. In the case of *State v. Fullmore*, 47 S. C. 34, 24 S. E. 1026, the court says: "It is scarcely necessary to cite authorities to sustain the principle that the presiding judge was not in error in modifying his first order in such manner as he saw fit." The court then quoted with approval the language of Mr. Black, in volume 1, § 153, of his work on Judgments, as follows: "The authorities all hold that a court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them, for cause appearing, or may, to promote justice, revise, supersede, revoke, or vacate them, as may in its discretion seem necessary." Instead of being error to correct the order of substitution, it would have been against the spirit of section 142 not to have made such correction. Order affirmed.

INTERSTATE BUILDING & LOAN ASS'N
v. OUZTS.

Supreme Court of South Carolina. Feb. 8,
1899.)

INTERSTATE BUILDING AND LOAN ASSOCIATIONS—BORROWERS
AND NONBORROWERS—PAYMENT OF LOAN.

Where a borrower's contract with a loan association, and its by-laws in force when a loan is made, confer no power restricting his right to participate in the profits, such association cannot, by a subsequent by-law, where a series is used of both borrowers and nonborrowers, take the former's profits to one-half, and allocate the latter full profits on all their shares.

Where, under a contract with a loan association, a borrower's indebtedness will be extinguished when his payments and profits on the loan equal the amount of the loan and 8 per cent interest, a complaint by such association for foreclosure of a mortgage is properly dismissed, where the payments and profits equal the loan and 8 per cent. interest.

Appeal from common pleas circuit court of York county; J. C. Klugh, Judge.

Appeal by the Interstate Building & Loan Association against J. P. Ouzts. There was judgment for defendant, and plaintiff affirmed.

The following is the decree of the lower court:

On November, 1889, J. P. Ouzts became the owner, by subscription, of five shares of stock of the Interstate Building & Loan Association of Columbus, Ga., in what is known as No. 5. By the terms of his contract of subscription, he was required to pay five dollars for admission, which carried his subscription of stock for one month, and the sum of ten cents per month on each share until the stock should mature to the value of one hundred dollars per share. W. H. Ouzts subscribed for ten shares of the said stock in the time, and subsequently transferred his shares to J. P. Ouzts, whereby he became the owner of fifteen shares in all of said stock. On J. P. Ouzts applied to the said building and loan association for a loan of \$750; the same being granted to him, on November 24, 1890, he executed his bond to the association in the penal sum of fifteen hundred dollars, conditioned for the payment of the said loan, at its principal office in the city of Columbus, Georgia, so long as it should continue to exist, or as may be provided by its charter, by-laws, rules, and regulations, the sum of twelve and $\frac{75}{100}$ dollars monthly (of which the sum of nine dollars is to be paid on or before the maturity of the installments due on said shares of stock, the sum of three and $\frac{75}{100}$ dollars as interest on the actual sum advanced to said J. P. Ouzts), to be paid on or before the first Wednesday of each and every month, until the maturity of the stock borrowed, and, until the maturity of the stock borrowed, shall perform the covenants contained in the mortgage or other instrument of writing securing this bond, and, until the maturity of the stock borrowed, shall pay the interest on the sum of ten per cent. on the amount of the loan, and shall stand to and

abide by the charter, by-laws, rules, and regulations of said association (and, upon the final settlement with the association, it to retain, as installments on said stock and interest, no greater sum than the sum actually advanced, with interest thereon at the rate of 8 per cent. per annum). To secure the payment of this bond, he assigned his fifteen shares of stock to the association, as collateral security, and executed to it a mortgage of the real estate set forth in the complaint; and subsequently, by agreement with the association, he substituted therefor real estate also described in the complaint, whereupon the lien of the mortgage on the first mentioned real estate was released. He performed the obligations of his bond punctually, by the payment each month of the installments of stock and interest until December, 1895, when he stopped paying the same, and has paid nothing thereon since. Thereafter this suit was brought to foreclose said mortgage, and for a sale of the mortgaged premises, and the application of the proceeds of sale to the payment of costs, taxes, and such liability of the defendant upon the said bond as may be determined and ascertained. The defendant denies that anything is due on plaintiff's demand, pleads payment in full, and that the claim of plaintiff is usurious, and sets up a counterclaim for the forfeiture by reason of the usurious interest which he alleges that plaintiff received.

"The counterclaim and the plea for usury cannot be sustained under the recent decisions in this state. Pursuant to an order heretofore made in the case, the master has taken the testimony, and reported that the amount due on the mortgage debt is the sum of \$490.87, which finding he bases upon a statement of the plaintiff made without reference to the contract between it and the defendant, and unsupported by the terms of their agreement. In this 'statement' the plaintiff arbitrarily confiscates one-half of the defendant's stock, by dividing his shares into two classes, one of which it calls 'common' or 'loan' stock, and the other 'premium' stock, and then canceling the so-called 'premium' stock. The terms of the contract creating the debt do not authorize such a proceeding, and there is nothing in the evidence to show that the defendant has ever consented to it. The defendant's contract is fully set forth in the bond. By it he borrowed from the plaintiff \$750, and transferred his fifteen shares of stock, undivided, as a collateral security, and bound himself to continue to pay monthly his installments on said shares of stock as he had done before under the terms of his subscription, and also the interest at the rate of 6 per cent. per annum on the sum borrowed, until the stock borrowed on should mature. Under the by-laws of the association, the stock was to mature when it reached the value of \$100 per share. Upon maturity of the stock, the loan and interest being thereby fully paid, these shares were to be canceled and thenceforth void. Under this last-mentioned provision, if

the defendant in this case had continued his payments until the maturity of his stock, his fifteen shares worth \$1,500 would have been canceled in payment of a debt of \$750, upon which all the time he had been paying 6 per cent. interest. Such a contract would be unconscionable, and no court would enforce it. The plaintiff association doubtless, in recognition of this principle, has inserted in its bond the stipulation that upon final settlement it would retain no more than the sum borrowed and 8 per cent. interest thereon.

"Such, then, is the contract between the parties, and upon it the defendant's liability must be ascertained. The 'statement' by which the plaintiff claims a balance due it of \$490.87 (which includes a fee of 10 per cent. for its attorney) is not warranted by the contract, and must be disregarded. His liability will be the sum borrowed (\$750) less the value of the collateral at the time when he made default, with interest at the rate of 8 per cent. per annum. The date at which he made default is the third Wednesday in December, 1895, which, by reference to the calendar, is ascertained to be the 18th. Now what was the collateral, his fifteen shares of stock, worth at that time? It does not appear that the stock was put up in open market, and sold. The building and loan association declares, through the lips of its secretary and general manager, that it is now the owner of the transfer, and seeks to burden the stock with enormous accumulations of dues and interest and fines. This cannot be allowed. The value allowed by the association itself is stated to be the amount paid on the stock, with two-thirds of the profits earned added. It appears from the printed statement of the association for the year 1895 that the profits earned by this stock up to July of that year was \$20.79 per share. This on fifteen shares would amount to \$311.85, two-thirds of which would be \$207.90. This is the nearest ascertainment of the profits which the data at hand admits of. The stock profit up to December, 1895, would be somewhat more, but it would be speculation merely to attempt to estimate it. Now, the amount paid on each share was 60 cents a month, of which 8 cents was applied to expenses and 52 cents to the loan fund. The amount paid on these fifteen shares to the loan fund up to December, 1895, not including the admission fee, which, by the gratuity of the association to its stockholders, was equal to one monthly installment, was \$561.00. Add to this the two-thirds profits, \$207.90, and we have the value of the collateral by the association's own method of ascertaining it,—\$769.50,—which more than pays the defendant's debt. The finding of the master is overruled, and it is ordered, adjudged, and decreed that the complaint be dismissed, with costs."

The exceptions of appellant are as follows, viz.: "(1) Because his honor, the circuit judge, erred in holding that the master based his finding of the amount due by the defendant

to the plaintiff 'upon a statement of the plaintiff made without reference to the contract between it and the defendant, and unsupported by the terms of the agreement.' (2) Because his honor, the circuit judge, erred in holding in said 'statement the plaintiff arbitrarily confiscates one-half of the defendant's stock, by dividing his shares into two classes, one of which he calls "common" or "loan" stock, and the other "premium" stock, and then canceling the so-called "premium" stock.' (3) Because his honor, the circuit judge, erred in holding that the 'statement by which the plaintiff claims as balance due it \$498.87 (which includes a fee of 10 per cent. for its attorney) is not warranted by the contract, and must be disregarded.' (4) Because his honor, the circuit judge, erred in overruling the finding of the master as to the amount due by the defendant to the plaintiff. (5) Because his honor, the circuit judge, erred in so construing the contract between the plaintiff and defendant, under the charter, by-laws, rules, and regulations of the plaintiff association, as to find that 'the value of the collateral, by the association's own method of ascertaining it, is \$769.50, which more than pays the defendant's debt.' (6) Because his honor, the circuit judge, erred in sustaining the plea of payment, and in dismissing the complaint on that ground."

Sheppard Bros., for appellant. N. G. Evans, for respondent.

GARY, A. J. The facts of this case are set forth in the decree of his honor, Judge Klugh, which, together with the appellant's exceptions, will be set out in the report of the case. We will first consider whether the plaintiff had the right to restrict the defendant in the participation of the profits to the extent of those made by only one-half of his shares of stock. Neither the contract entered into between the parties, nor the by-laws of the association of force when the loan was made, conferred any such right. By-laws were afterwards adopted, in 1894, giving the association the right to retire one-half of the shares of stock of a shareholder when a loan was made to him; but these by-laws did not have the effect of destroying the right of the defendant to one-half the number of his shares of stock. The appellant's attorneys, in their argument, thus set forth the operation of the two-share plan: "The member desiring to anticipate the ultimate value of his shares receives from the association an advance of \$50 a share in full liquidation and final redemption of the share. The member undertakes to pay interest at the rate of 6 per cent. on the sum actually advanced, and to continue payments of dues until the share matures. The association, however, having redeemed the share at \$50, only undertakes to mature it to that value, and, when the share reaches the value of \$50, the loan is repaid. The effect of this transaction is strictly to reduce

the maturity value of shares loaned upon from \$100 to \$50, but for the sake of convenience in the distribution of payments and profits, and otherwise, one-half of the number of shares loaned upon are treated as being practically dead; in other words, the member, in obtaining an advance, is considered as having converted the number of shares advanced upon into one-half that number of loan shares. It will be seen that the effect is the same whether the maturity value of the whole number of shares advanced upon be reduced to \$50. or whether one-half that number of shares are allowed to stand as of the full maturity value of \$100. Under the plan adopted, the association, instead of maturing the full number of shares to the value of \$50 each, undertakes to mature one-half of that number to the full value of \$100. All profits which would be apportioned to the full number of shares are apportioned to half the number, so that the member actually receives on these shares the full benefit of all profits earned. The dues paid on the extra shares are distributed as profits to all participating shares in the series, so that the member receives his proportionate share of all such payments, whether made by him or by other borrowers. In this way, while the actual cost of the advance may be more or less than 6 per cent., depending upon the success of the association's business, no premium is paid by the borrower. If there is any lack of strict mutuality in the plan, it must inhere in the favor shown the borrower, in that, under the contract, he cannot be required to pay in the aggregate more than the sum actually advanced, with interest thereon at the rate of 8 per cent." The plaintiff's testimony shows that a series of stock was issued every month since the organization of the association. The following appears in the testimony of Mr. C. E. Black, the secretary of the association: "Q. The payments made by him, that would mature 15 shares of stock, and the payments made by an investor, that would mature 15 shares of stock, would be the same, would it not, except for the interest paid by the borrower? A. It would, the difference being that the borrower gets his money in advance." From this statement and other circumstances in the case, the court has reached the conclusion that a series is composed of both borrowers and nonborrowers. Such being the case, it is at once apparent that it would work a great hardship to require a borrower to pay dues on all his shares of stock, and to allow him profits on only one-half thereof; while the nonborrower would be entitled to profits on all his shares of stock, especially when, as in this case, there was no such by-law in existence when the loan was made. The defendant was therefore entitled to profits on all his shares of stock.

We will next consider the manner in which the amount alleged to be due under the mortgage should be determined. It was the intention of the parties to the contract that the

defendant's indebtedness under the mortgage should be extinguished whenever his payments of dues and the profits on his shares of stock equaled the amount of the loan, with interest at the rate of 8 per cent. per annum. The plaintiff's testimony shows that the defendant made 72 payments on account of dues on his shares of stock, amounting to \$648, and 60 payments on account of interest on the advance, amounting to \$225. The circuit judge finds that the profits earned by this stock up to July, 1895, were \$20.79 per share, which on 15 shares amounted to \$311.83, two-thirds of which is \$207.90. These three sums aggregate \$1,080.90. The loan was \$750. Interest at the rate of 8 per cent. per annum up to 18th December, 1895, when default was made, amounts to \$304. These two sums aggregate \$1,054. It thus appears that the defendant paid to the plaintiff an amount more than sufficient to extinguish his indebtedness. The circuit judge therefore properly dismissed the complaint.

These views practically dispose of all the questions raised by the exceptions, and render unnecessary a consideration of the additional grounds upon which the respondent relied to sustain the judgment of the circuit court. It is the judgment of this court that the judgment of the circuit court be affirmed.

STATE v. STEPHENSON.

(Supreme Court of South Carolina. Feb. 20, 1899.)

DISAGREEMENT OF JURY—DISMISSAL—DISCRETION OF COURT—REVIEW—FORMER JEOPARDY.

1. Whether a jury should be discharged for inability to agree is within the sound discretion of the court.

2. Under Rev. St. § 2409, providing that when a jury returns without a verdict the court may state anew the evidence and law applicable, and send them out for further deliberation, but, if they return a second time, they shall not be sent out again without their consent, unless they ask for further explanation of the law, it was not an abuse of discretion to dismiss a jury which returned twice without a verdict, and were sent back without further instructions, and after about 16 hours returned a third time and announced that they could not agree.

3. Where a jury is dismissed for a legal cause, and there is evidence tending to show the existence of the cause, the discretion of the trial court will not be disturbed.

4. A trial which results in the dismissal of the jury for failure to agree is not a former jeopardy, where there was no abuse of discretion in dismissing the jury.

Appeal from general sessions circuit court of Kershaw county; George W. Gage, Judge.

J. H. Stephenson was indicted and tried for rape, and the jury was dismissed for failure to agree. From an order overruling a plea of former jeopardy interposed at a subsequent trial, defendant appeals. Affirmed.

W. D. Trantham and E. D. Blakeney, for appellant. J. Wm. Thurmond, for the State.

JONES, J. Appellant was indicted for rape, and the case was submitted to a jury

at the February, 1898, term of the court of general sessions for Kershaw county. The jury, after deliberating thereon for some 15 or 16 hours, failed to agree upon a verdict; and the presiding judge, Hon. D. A. Townsend, thereupon discharged the jury and ordered a mistrial. At the ensuing June term, upon his arraignment for trial, appellant interposed the plea of former jeopardy, which was overruled. He now appeals from the order overruling his plea of former jeopardy.

The presiding judge, Hon. G. W. Gage, based his ruling upon the following facts stated in his order: "That late in the day at the February term, at the first week of the term, this case went to the jury. The jury had been in their room some time, and unbidden returned to the box. When asked by the clerk if they had agreed upon a verdict, they declared they had not. When asked by the trial judge if they wanted further instructions, they made no answer. The trial judge ordered them to return to their room. Again, before the adjournment of the court, in the night, the trial judge sent for the jury, and asked them if it was likely they would soon agree upon a verdict. The foreman replied negatively. They were returned to their room for the night. The next morning, at the convening of court, or soon thereafter, the trial judge sent for the jury. They came in court, and they were asked if they had agreed upon a verdict. The reply was, they had not. Thereupon they were discharged, and a mistrial entered." We quote from the order of the circuit judge as follows: "I understand this to be the rule of law: that, after a jury has been charged with the consideration of a case, it cannot be withdrawn from the jury, except from necessity. One of the necessities referred to by law is inability of the jury to agree; that is to say, when a case has been submitted to a jury, if the jury is unable to agree upon a verdict, the necessity of the case requires that the jury be discharged, and a mistrial ordered. There is nothing else to do. That is the necessity. The question here is, when shall that necessity appear, and how shall it appear? Of course, it is a matter in the discretion of the presiding judge; and when I say 'discretion' I mean a wise discretion,—discretion governed by law,—because any other sort of discretion is not a wise discretion, but a dangerous discretion, and one not tolerated by law. But the first question is, how must that necessity appear? It is clear to my mind, if at this time, after being out all night, the jury had come in and said, 'We cannot agree,' the necessity then would have arisen; and it would have appeared, by the best evidence,—by the presence and declaration of the jury,—that they could not agree. But is the presiding judge confined to that degree of necessity? Suppose the jury were to stay out a week, and never said they could not agree; are the hands of the circuit judge tied until the jury themselves tell him they cannot agree, or can he exercise his

discretion when it is manifest to him from other sources that the jury cannot agree? Now, that is a delicate question. My own judgment as to the better way to ascertain necessity is to ascertain it from the jury themselves; but, sitting as a trial judge, I do not feel warranted in holding that the declaration of the jury is the only method by which that necessity shall appear. But if, upon a consideration of the case, and upon the length of time the jury have been in, and the fact the jury had been out once themselves, and made the declaration that they had, not agreed upon a verdict, and upon a consideration of the fact that one other return on their own motion would have entitled them to a discharge, *nolens volens*, by the court, I think the circuit judge had enough to warrant his conclusion that a verdict by the jury was an impossibility, and to justify his discharging them. After coming into court once unbidden, after being asked again if they could agree that night, and the answer being given that they could not, and after being brought into court in the morning, after being out all night, I think there was sufficient in the case to warrant the circuit judge to exercise the legal discretion lodged in him." Appellant contends, upon the facts stated, that Judge Townsend was not authorized to discharge the jury, and that Judge Gage erred in not sustaining the plea of former jeopardy.

This principle of the common law is embodied in section 17, art. 1, of our state constitution: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or liberty." According to the decisions of this state, and the weight of authority elsewhere, it may be stated as a general rule that one is in jeopardy when a legal jury is sworn and impaneled to try him upon a valid indictment in a competent court, unless the jury, before reaching a verdict, be discharged with the prisoner's consent, or upon some ground of legal necessity, or the verdict, if rendered, be set aside according to law. In this state the inability of the jury to agree upon a verdict is regarded as presenting a case of legal necessity authorizing the discharge of the jury. *State v. McKee*, 1 Bailey, 651, followed in *State v. McLemore*, 2 Hill, 680, and recognized in *State v. Briggs*, 27 S. C. 85, 2 S. E. 854, and *State v. Richardson*, 47 S. C. 170, 25 S. E. 220. In the two cases first cited it is further held that the determination of the question whether or not the jury are unable to agree must rest in the sound discretion of the trial judge. These principles are also supported by the weight of authority in other jurisdictions. 11 Am. & Eng. Enc. Law, 954, 955, and cases cited. See notes to *State v. Moor*, 12 Am. Dec. 547, and cases cited. In the case of *Thompson v. U. S.*, 15 Sup. Ct. 74, the court, citing *U. S. v. Perez*, 9 Wheat. 579, *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171, and *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, say: "These cases clearly establish the law of this court

that courts of justice are invested with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury, and that the defendant is not thereby twice put in jeopardy, within the meaning of the fifth amendment to the constitution of the United States." See, also, *Com. v. Purchase*, 2 Pick. 521,—a strong case, and very much like the one at bar. If, then, the inability of the jury to agree is a legal cause for the discharge of the jury, and the ascertainment of the existence of the cause must rest in the sound legal discretion of the trial court, it follows that the jury need not be kept together until the court is compelled by law to discharge the jury, for that would deny that he had any discretion. When the time arrives for the adjournment of court at the expiration of the term, the jury is discharged by operation of law, and not by the discretion of the court. *State v. McLemore*, supra. Rev. St. § 2409, provides: "When a jury, after due and thorough deliberation upon any cause, return into court without having agreed upon a verdict, the court may state anew the evidence, or any part of it, and explain to them anew the law applicable to the case, and may send them out for further deliberation; but if they return a second time without having agreed upon a verdict, they shall not be sent out again without their own consent unless they ask from the court some further explanation of the law." In this case the jury returned into court the third time after deliberating upon the case for about 16 hours, and announced that they had not agreed, and did not ask for further instructions. Whether or not the section quoted has strict application to the facts of this case, it implies that verdicts may not be coerced in this state by confinement of the jury after they have maturely deliberated upon the case and failed to agree, and that the judge is not required to remand the jury, if, after due deliberation, they come into court without agreeing upon a verdict, and without asking for further instructions. Whether a jury charged with the trial of a case may be discharged before rendering a verdict must necessarily rest in the discretion of the court, exercised according to established principles. If the court discharge a jury for a cause not recognized as a legal one, the discretion exercised is not a sound legal discretion, and may be reviewed in this court in a proper case. So, also, if the court discharge a jury arbitrarily or capriciously, or without evidence or facts going to show a legal cause, this court would hold the discharge unlawful. But, if the discharge is made for a cause recognized as legal, as the inability of the jury to agree, and there is evidence tending to show the existence of the cause, which satisfies the trial judge of its existence, this court cannot review the facts before the trial judge, and hold

his action illegal, because this court may reach a different conclusion. It is only for abuse of discretion, or the exercise of discretion in violation of established rules, that this court would declare the discharge of a jury before verdict unlawful. We cannot say that there was nothing before the trial judge to justify him in concluding that there was no reasonable expectation that a verdict could be reached, under all the circumstances of the case. Nor do we find anything in the case indicating any abuse of discretion. It follows that Judge Gage did not err in overruling the plea of former jeopardy.

The attorney general argued with force that the appeal in this case is premature, inasmuch as there is no judgment of conviction and sentence against the defendant; citing *State v. McKettrick*, 13 S. C. 439; *State v. Shirer*, 20 S. C. 402; *State v. Burbage*, 51 S. C. 284, 28 S. E. 937. We have deemed it best to pass upon appellant's exception without expressly ruling upon the question whether the appeal is premature. The order overruling the plea of former jeopardy is affirmed.

Ex parte WORLEY.

(Supreme Court of South Carolina. Feb. 8, 1899.)

HOMESTEAD — CHATTEL EXEMPTIONS — SURVIVING CHILDREN.

1. Rev. St. § 2129, giving a certain homestead exemption in a decedent's property to his widow and children, includes children of age living apart from their parents as heads of families.

2. The chattel exemption allowed out of a decedent's personal estate to his surviving widow and children must be apportioned between them.

Appeal from common pleas circuit court of Horry county; George W. Gage, Judge.

Petition by Emaline Worley for the assignment to her of the homestead exemption in the real and personal property of her deceased husband, Coleman Worley. From an order setting aside the return of the homestead commissioners, and directing the writ of the clerk to be amended, petitioner appeals. Affirmed.

Ferd. D. Bryant, for appellant. Robt. B. Scarborough, for respondents.

GARY, A. J. The case states the following facts: Coleman Worley died in 1895, leaving, as his heirs at law, his widow, Emaline Worley, and his two sons, Jackson Worley and Rey Worley, the issue of a previous marriage, both of whom were of age at the time of the death of the intestate. Prior to and at the time of the death of intestate, the said Jackson Worley, an unmarried man, lived with his father, as a member of his family, and he still lives with petitioner, his step-mother, in the residence of the intestate. The other son, Rey Worley, lived then and still lives apart, on land of his own, being married,

and is himself the head of a family. On the 17th of January, 1896, Rey Worley was duly appointed administrator of the personal estate of the intestate, and, having duly qualified as such, obtained from the proper authority an order for the sale of the personal property, which was sold. On the 12th of March, 1896, Emaline Worley filed a petition with the clerk of the court of common pleas, praying that homestead be assigned and set off to her in the real and personal property of the intestate. Commissioners were duly appointed, and made return, setting off to the petitioner, as her homestead, a tract of land containing 900 acres, more or less, valued at \$1,000, and, as her personal property exemption, the sum of \$30.55, due by her to the administrator for articles purchased by her at his sale, together with the sum of \$469.45 of the amount in the hands of the administrator, making the total amount, \$500. To this return Jackson Worley filed exceptions, which were heard by the circuit judge, who rendered a decree adjudging that the petitioner was not entitled to any homestead exemption, and that her petition be dismissed. From this decree the petitioner appealed to the supreme court, which reversed the circuit decree, and remanded the case to the circuit court, for the purpose of carrying out the views announced in its opinion. What was done thereafter appears in the decree of his honor, Judge Gage, which is as follows:

"Upon the call of this cause the petitioner's attorney submitted a 'proposed amendment' of the return made herein by homestead commissioners, on 18th June, 1896. The proposed object of the proposed amendment was to conform the return to the views of the supreme court, as expressed in this cause and set out in the last or eighth paragraph of the opinion. See 49 S. C. 60, 26 S. E. 949. The petitioner's attorney desired an order confirming the return of 18th June, 1896, so amended, and directing the administrator of Coleman Worley to pay into the hands of Emaline Worley, for a homestead exemption in personal property, \$469.45 of money in the administrator's hands. The 'proposed amendment,' after a preamble, concludes with this 'declaration,' to wit: 'That it was their intention to do only what the law directed in the premises; that they did not suppose it was in their power, nor did they have the remotest thought, of limiting or restricting the benefit of the homestead, but simply appraised the same, and made return thereof, as they were directed, believing that the law provided this to the petitioner, as the widow and the head of the family of her deceased husband, for the enjoyment of herself and such of the family as remained with her.' The attorney for the other two heirs at law of Coleman Worley (sons) resisted the proposed amendment as irregular and without legal status, and resisted the payment of the \$469.45 of the money in the administrator's hands over to the petitioner's hands. The return of homestead commissioners, dated 18th

June, 1896, was adjudged by the supreme court to be unlawful, if by it the homestead was set off to the widow alone. The return was not in totidem verbis before the supreme court. All that court knew about its terms was gathered from an indefinite reference to its terms, made in Judge Aldrich's decree. In my judgment, that return does limit the homestead to the petitioner alone, and by inference excludes the two sons of Coleman Worley from its benefits. The writ issued by the clerk directed the commissioners to set the homestead off to the said Emaline Worley, widow of the said Coleman Worley,—'such portion of the said land as you value at \$1,000, and she may select, and also set apart to her, of the personality of the said deceased, money or property, or both, to the amount and value of \$500.' The return followed the writ, and undertook to set aside 'for the petitioner, as her homestead, all the tract of land,' etc.; and it further undertook to set aside 'to the petitioner, as her personal property exemption,' personal property, of the value of \$500, of which sum \$469.45 was money in the administrator's hands. If the return is, in this respect, repugnant to the law as stated in the opinion of the supreme court it is essentially wrong. The commissioners had no power to amend it. They can only follow a direction by the clerk, and the direction has the same infirmity as the return; and, were the amendment within the power of the commissioners, it does not mend the defect in the original. This court can order the writ to be so amended as to direct the homestead to be set aside to the widow and children of Coleman Worley, deceased, and can set aside the return made 18th June, 1896, and direct a new return to be made, by the same or other commissioners, as the clerk may direct, in conformity with the amended writ. The next issue betwixt the parties is the right of the petitioner to have \$469.45 in money paid into her hands by the administrator, as part of a personal property exemption. This issue was made in the fourth exception to the return, when it came before Judge Aldrich. The judge did not pass upon that question, nor has the supreme court passed upon it. But that question is not properly before this court. When a new return is made, in conformity with the opinion of the supreme court, exceptions may be taken to it on the ground last stated. It is ordered, therefore, that the return of the homestead commissioners, made 18th June, 1896, be set aside: that the writ of the clerk be so amended as to require the homestead to be set off to the widow and children of Coleman Worley, deceased; and that a new return be made in conformity thereto."

The petitioner appealed, alleging that the circuit judge erred in certain particulars, the first of which is as follows: "It appearing to the court that there were in existence but two of the children of Coleman Worley, one of whom resided apart from the family resi-

dence, on premises of his own, and was himself the head of a family, and the other residing in the family residence, and that this condition existed both at the time of the death of the intestate and ever since, in directing that the writ of the clerk be so amended as to require the homestead to be set off to the widow and children of Coleman Worley, deceased, and that a new return be made in conformity thereto, without any direction or indication as to which of said children are entitled to participate in the use of such homestead." The appellant contends that this court, in its former opinion, denied that only Emaline Worley and Jackson Worley had the right to claim the homestead exemption. After stating elsewhere that the homestead was intended for the benefit of the "widow and children," the opinion concludes as follows: "There is only one other matter remaining to be considered, as to which the court feels some embarrassment, arising from the fact that the return of the homestead commissioners is not before us. The fifth exception to that return imputes error to the commissioners in assigning the homestead to Emaline Worley alone, whereas, if assigned at all, it should be for the benefit of the respondent Jackson Worley, as part of the family of the said Coleman Worley, as well as for the benefit of the said Emaline Worley. Now, what the return does contain we do not know, as it is not before us; but, from a remark made in the circuit decree, which will be presently quoted, we suppose that the circuit judge considered that in the return the homestead was assigned to Emaline Worley exclusively. It does not appear that the circuit judge passed specifically upon this fifth exception; for, while he does quote what he designates as the 'fifth exception,' the quotation shows, beyond dispute, that he was really considering the sixth, and he nowhere else alludes to the point raised by what is really the fifth exception, unless it be when he uses the following language: "To grant the demand of the petitioner is to give her the *exclusive* use of 900 acres of land and \$500 in money, during her life, at the expense of the children of her deceased husband by his first wife, and in utter disregard of their rights as heirs at law and distributees of the estate of their father." (Italics ours.) From this language, it may be reasonably inferred that the circuit judge regarded the return as assigning the homestead to the petitioner, Emaline Worley, for her exclusive use and benefit. If the return does in fact so provide, then in that respect it was erroneous, and should be corrected. Section 2129, Rev. St., expressly provides that when the intestate dies leaving a widow and children, the widow and children—not the widow alone—shall be entitled to the homestead exemption. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to

that court, for the purpose of carrying out the views herein announced."

The language just quoted, when considered in connection with the entire opinion, shows that the principal question discussed and decided was whether the widow was entitled to homestead, and, incidentally, whether she alone was entitled to homestead. The language of the court is comprehensive enough to include the right of both the sons to the enjoyment of the homestead. But, even conceding that the decision does not go to the extent of deciding that Rey Worley was entitled to participate in the enjoyment of the homestead, let us see what his rights are. In the case of *Yoe v. Hanvey*, 25 S. C. 94, it is admitted that the homestead creates no new estate, and that neither the constitution nor the statutes enacted in conformity to it undertake to divest any previous estates. The majority of the court, however, in that case, held that the adult children of the deceased did not have the right to partition the land which had been assigned to the widow as a homestead, and that the widow was entitled to enjoy it, like dower, during her lifetime. In the case of *Ex parte Ray*, 20 S. C. 248, the court says: "We do not understand the homestead laws as designed to alter or in any way affect the statute for the distribution of intestate's estates, and they do not even purport so to do." The right of homestead is simply a shield that protects certain property from attachment, levy, and sale; and it has never been held by this court, except in the case of *Yoe v. Hanvey*, that the homestead laws had any other effect. The conclusions of the court in that case were not in accord with the admitted principles therein stated, nor with other cases in this state bearing upon the question. The correct view upon the subject was expressed in the dissenting opinion of Mr. Chief Justice McIver in *Yoe v. Hanvey*. As that case was not based upon sound principles, and is antagonistic to other cases in this state, it is hereby overruled; in fact, it was practically overruled by the former opinion in this case. These views show that there was no error on the part of the circuit judge in ordering that the writ be so amended as to require the homestead to be set off, not only to the widow, but to Jackson Worley and Rey Worley also.

The next particular alleging error is as follows: "In refusing to entertain the petitioner's motion for an order directing the administrator to pay over to the petitioner, as the widow and head of the family of Coleman Worley, the chattel exemption in his hands, arising from the sale of the personal property of said Coleman Worley." Even if the motion had been entertained, the appellant would not have been entitled to such an order. The said property was subject to partition among the widow and children, just as any other property of the intestate. The views hereinbefore expressed in consider-

ing the first exception render unnecessary any further consideration of the question raised by this exception, which must be overruled, as the order was free from error. In order to prevent confusion in the distribution, it may be well to state that the petitioner must account for the \$30.55, amount due for purchases made by her. It is the judgment of this court that the order of the circuit court be affirmed.

SHIVER v. ARTHUR et al.

(Supreme Court of South Carolina. Feb. 8, 1899.)

DEED INTENDED AS A MORTGAGE — EVIDENCE — BURDEN OF PROOF.

1. Recital of a consideration, in a deed, larger than a debt due from the grantor to the grantee at the time it was executed, is evidence that it was intended as an absolute conveyance, and not a mortgage.

2. That a grantor did not surrender possession of land, conveyed by deed absolute on its face, until two years after it was made, does not show that the deed was intended as a mortgage only, where the grantor, in a suit to redeem, alleged that she subsequently surrendered possession to the grantee, but did not claim that such possession was given so that the rents and profits might extinguish her indebtedness.

3. Plaintiff conveyed lands, by deed absolute on its face, to a mortgagee thereof, for an adequate expressed consideration, exceeding the amount of the mortgage. The grantee took possession, and three years later sold the land. Plaintiff made no demand for an accounting of the rents, but subsequently sued to redeem, alleging the deed was intended to be a mortgage; testifying merely that, under the agreement, when the deed was executed the land was to come back to her when her indebtedness was paid. *Held*, that such allegation was not supported by the evidence.

4. On the introduction of evidence showing that a deed absolute on its face was intended as a mortgage, the presumption that the deed is what it purports to be is rebutted, and it is then incumbent on the grantee to prove that the deed was intended to be an absolute conveyance.

Appeal from common pleas circuit court of Sumter county; Ernest Gary, Judge.

Suit by Martha E. Shiver against William L. Arthur and others to require defendants to account for rents from land conveyed by plaintiff by a deed absolute on its face, which it was claimed was a mortgage. Decree for plaintiff, and defendants appeal. Reversed.

The following are the decree and exceptions:

Decree.

"On the 14th day of January, 1885, the plaintiff, Martha E. Shiver, executed and delivered to the defendant W. L. Arthur a deed of conveyance, absolute and regular on its face, conveying to the said Arthur a tract of land containing two hundred acres, more or less, situated in Sumter county. It appears that prior to the execution of said deed the plaintiff had various business transactions with the mercantile firm of W. L. Arthur & Bro. at Camden, of which firm the said W. L. Arthur was a member. It also appears

that said firm had made advances to the plaintiff with which to conduct the farming operations on the premises in the deed above mentioned. To secure the amount of such advances, the plaintiff during the years 1883 and 1884 had executed mortgages over the said premises. The mortgage executed in 1883 was to secure the payment of the sum of eight hundred dollars, and the one executed in 1884 was to secure the payment of one thousand three hundred and forty-five dollars and eighty-two cents. I do not understand that, at the time of the execution of the deed, it was contended that both mortgages were due and outstanding. I take it that the mortgage executed in 1883 was merged or extinguished by the later mortgage of 1884. The defendant Arthur testified that: 'The note and mortgage marked "Exhibit A" (executed in 1883) in this action were given by Martha E. Shiver to secure advances to be made to her in her agricultural business for that year. The note and mortgage marked "Exhibit B" (executed in 1884) in this action were given by Martha E. Shiver to secure the amount due by her at that date; she being allowed until the fall of 1884 to pay up the amount due by her, if she should be able to do so. Not having paid anything on said mortgage debt, Martha E. Shiver executed deed marked "Exhibit C" in this action, by which she conveyed the lands to me in satisfaction of the amount then due by her as expressed in said deed.' It should be observed in this connection that the consideration expressed in the deed is \$1,547.67. The mortgage marked 'Exhibit B' is given to secure the payment of a sealed note bearing date the 2d of February, 1884, for the sum of \$1,345.80, and payable on 1st November after date, with interest at the rate of ten per cent. At the time the deed was executed, the mortgage debt was overdue only two months and twelve days. Allowing interest on the amount of the debt at the rate of ten per cent. per annum, there would be due at the time the deed was executed only \$1,368.25. The consideration expressed in the deed could not be the correct amount due on the mortgage debt. The deed recites that the consideration is \$1,547.67. The plaintiff contends that, although the deed purports on its face to be absolute, yet, at the time that it was executed, it was understood and agreed, whenever she paid the debt, the place was to come back to her. As she expressed it: 'The place should come back to me when the money was paid. The money was that I owed Arthur & Bro. on the mortgage.' The defendant contends for just the opposite. He testified: 'This deed was intended by both her and myself to be an absolute, unconditional conveyance of the said land. It was never stipulated nor intended that it should be held as a mortgage, or by way of security for the indebtedness.' Upon the solution of this question of fact the result of this case depends. The cause was heard

by me upon the pleadings, the evidence reported by the master (a part of which was taken by him, and a part under agreement and by commission), and upon the arguments of counsel in the cause.

"In 3 Pom. Eq. Jur. § 1196, quoted with approval in the recent case of *Petty v. Petty*, 52 S. C. 54, 29 S. E. 406, it is said: 'Any conveyance of land, absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of repurchase, or other written agreement, may, in equity, by means of extrinsic and parol evidence, be shown to be in reality a mortgage, as between the original parties,' etc. The principle upon which this doctrine is founded is that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance, when it was understood at the time to be intended as a security, and in reality as a mortgage. In the case of *Hall v. Hall*, 41 S. C. 163, 19 S. E. 305, the supreme court held that the burden of proof of showing a new and independent transaction subsequent to the execution of the mortgage rests upon the grantee in such cases. Mr. Justice McGowan, who wrote the opinion of the court in that case, said: 'Exceptions 1, 3, and 4 make but a single point, viz. upon whom rests the burden of proof that the purchase of the equity of redemption by the mortgagee from the mortgagor was a fair transaction for a sufficient consideration? Now, this case was one between the mortgagor and mortgagee. In such case the mortgagee has a position of influence and power in respect to the mortgagor, especially after condition broken. Under our law, even after the debt is due, the mortgage of land is still but a security for the debt, and the mortgagee has duties to perform somewhat in the nature of a quasi trustee. He cannot take possession of the land without foreclosure or an open public sale, and any such agreement inserted in the mortgage itself will be held void, as being contrary to the very nature of the mortgage.' The same case was again before the supreme court (45 S. C. 41, 22 S. E. 777), and Mr. Justice Pope, in commenting on the former case, said: 'A full history of the issues involved in this action is set forth in the opinion of Mr. Justice McGowan in *Hall v. Hall*, 41 S. C. 163, 19 S. E. 305. By that judgment the case was remanded to the circuit court for a new trial, at which the defendant was required to make it plain that the conveyance made to him in the year 1880 by the plaintiff, Louisa Hall, for the 484 acres of land, was clearly and voluntarily made, upon a separate and independent contract of sale, disconnected from the mortgage contract, and also that the plaintiff knew the character and effect of the papers she signed, and that she signed voluntarily and intelligently.'

"Considering the fact that the deed does

not recite the true amount that was claimed to be due on the mortgage executed in 1884, and the further fact that the grantor did not surrender possession at the time that the deed was executed, and from a careful consideration of the evidence in the cause, coupled with the earnest effort on the part of the plaintiff, after the long lapse of time, to have the deed declared a mortgage, I am of the opinion that the plaintiff's contention should prevail, and that the deed, though absolute on its face, was simply intended as a security for the amount due the defendant, and is therefore, in effect, but a mortgage. I believe the plaintiff is sincere in her version of the transaction, and that at the time she executed the deed she only intended and believed that she was parting with her farm upon the condition that when she could raise the money the defendant would reconvey the same to her. It is therefore ordered and adjudged that the said instrument is a mortgage, and given to secure the amount due by the plaintiff to the defendant. It is further ordered that the cause be recommitted to the master for Sumter county, to take an accounting, and report to this court the amount due the defendant by the plaintiff. In making up said account, either party to the cause is hereby permitted to offer any further evidence that may be competent tending to show the amount due by the plaintiff on the said indebtedness; and said master is further directed, in making said account, to ascertain the value of the rents and profits of the said premises since the defendants have been in possession of the same, and what taxes and other expenses or improvements, if any, the defendant has expended or put upon the same during said time. Upon the coming in of said report the court will then adjust the final equities between the parties."

Exceptions.

"(1) That his honor erred in not sustaining the plea of the statute of limitations made in the amendment to the answers of the defendants William L. Arthur and Caroline W. Arthur. (2) That his honor erred in not holding that there was a variance between the allegations in the complaint and the proof offered by the plaintiff, and should have held that, while the complaint stated a case for having an absolute deed declared to be a mortgage, the evidence of the plaintiff, if it proved anything, only went to show an agreement to reconvey the land. (3) That his honor erred in holding that the evidence offered by plaintiff was sufficient to defeat the terms of the deed, and convert the same into a mortgage. (4) That his honor erred in not holding that the plaintiff was barred by laches, in failing for so long a time to assert her claim, if any she had. (5) That his honor erred in holding that the burden of proof in this case was on the defendants, but should have held that the burden of proof was on the plaintiff to sustain the allegation

of her complaint that her deed absolute was intended as a mortgage. (6) That his honor erred in not holding that, if the burden of proof was on the defendants, they had successfully borne such burden. (7) That his honor erred in holding that the plaintiff did not surrender the possession of the land to W. L. Arthur. (8) That his honor erred in holding that the consideration expressed in the deed of Martha E. Shiver to W. L. Arthur was not the amount due by her to him at the date of such deed. (9) That his honor erred in that he did not find in favor of the defendants upon the preponderance of the evidence, and that he erred in not dismissing the complaint herein. (10) That his honor erred in not sustaining the plea of the statute of limitations as to defendants' accountability for rents received more than six years prior to the commencement of the action. (11) That his honor erred in not directing the basis of the accounting ordered by him to be upon interest at ten per cent. per annum in favor of the defendants, upon the debt due by the plaintiff."

J. T. Hay and Lee & Moise, for appellants.
Fraser & Cooper, for respondent.

GARY, A. J. The facts out of which this controversy arose are stated in the decree of the circuit judge, which, together with the exceptions, will be set out in the report of the case.

We will first consider the findings of fact upon which the circuit judge rested his conclusions, as if the burden of proof was upon the defendants. The plaintiff bases her cause of action on the alleged fact that the deed absolute on its face was by agreement of the parties intended as a mortgage, and not upon the fact that the transaction was a conditional sale. We state this fact because some of the circumstances relied upon by the plaintiff might have a tendency to show that there was a conditional sale, but which are inconsistent with the theory that the deed was intended as a mortgage. The first circumstance relied upon by the circuit judge to show that the deed was intended as a mortgage is that the deed does not recite the true amount that was claimed to be due on the mortgage in 1884. If the deed was intended as a security for the indebtedness existing at the time of its execution, it seems that it would have been natural to have inserted in the deed, as the consideration therefor, the exact amount of such indebtedness, and that the inference to be drawn from the fact that the amounts are not the same rather tends to show that the deed was based on other considerations than simply the security of the indebtedness. Another circumstance relied upon by the circuit judge is that the grantor did not surrender possession of the land at the time the deed was executed. The fourth paragraph of the complaint, however, alleges "that for the year 1886 the plaintiff lived on

the said tract of land, and used and enjoyed one-half of the rent, and the said William L. Arthur the other, worth about one hundred dollars, and on or about the 1st day of January, 1887, the plaintiff surrendered the use and occupation of the said tract of land, except the dwelling house, to the said William L. Arthur, who, without her consent, by himself or his agents took possession of the said dwelling house, and ever since that time has had the entire use and occupation of the said tract of land, appropriating to himself, or such uses as he saw fit, the rents and profits of the same, and has, ever since the deed of conveyance was made, paid the taxes on the said land, and used the same as his own property." If the deed was intended simply as a mortgage, the plaintiff was entitled to the possession of the land, and the rents and profits thereof. Her conduct was wholly inconsistent with that of a mortgagor. She does not allege that the land was put in the possession of the grantee in order that the rents and profits might extinguish her indebtedness. The presiding judge also speaks of the earnest effort on the part of the plaintiff, after the long lapse of time, to have the deed declared a mortgage; but the defendants as earnestly contend that it was an absolute deed, and not a mortgage.

We will now state some of the circumstances showing that the deed was not a mortgage: (1) The plaintiff's testimony is very meager, and she nowhere pretends to give the exact terms of the agreement under which the land was to be restored to her. Her answer to the following question is substantially all her testimony on this point, to wit: "Q. What was the agreement between you and Mr. Arthur at the time you executed the deed in evidence, from yourself to Mr. Arthur? A. That the place should come back to me when the money was paid." (2) Her long delay, when she knew as far back as 1885 that the grantee denied that she had any right to redeem. (3) The fact that Arthur had a mortgage on the land when the deed was executed tends to show that it was not his intention to take another mortgage. (4) The acts of ownership over the land exercised by Arthur, even to the extent of selling it in 1888. (5) The consideration stated in the deed was not inadequate,—certainly not to any great extent. (6) The failure to demand an accounting of the rents and profits after Arthur took possession. These circumstances, as well as others which, if it was deemed necessary, could be mentioned, satisfy the court that the preponderance of the testimony is against the claim of the plaintiff.

In order to settle the practice as to the burden of proof in such cases, the court takes occasion to state it as follows: (1) An instrument of writing is what upon its face it purports to be. (2) The complaint must contain the necessary allegation that the deed, though absolute on its face, was intended as a mortgage. (3) This allegation must be

sustained by testimony prima facie showing that it is true. When this is done, it removes the presumption arising from the fact that a paper is presumed to be what its face imports. (4) When this is done, it is incumbent on the mortgagee to remove the inferences that may be drawn from such prima facie showing. This is sometimes spoken of as the burden of proof, but it is simply making it incumbent on the mortgagee to disprove the case as then made. In the case of Hall v. Hall, 41 S. C. 163, 19 S. E. 305, it was incumbent on the mortgagee to explain the transaction, because the facts and circumstances made a prima facie showing in favor of the mortgagor; and that case, as thus construed, in no way conflicts with the principles herein announced. The views herein expressed are in harmony with the case of Petty v. Petty, 52 S. C. 54, 29 S. E. 406.

These conclusions render unnecessary a consideration of the other exceptions. It is the judgment of this court that the judgment of the circuit court be reversed, and the complaint dismissed.

BARNWELL et al. v. MARION.

(Supreme Court of South Carolina. Feb. 14, 1899.)

APPEAL—REVIEW—PLEADING—DEMURRER—PARTIES—GUARDIANS—MORTGAGES—FORECLOSURE—RIGHT TO SUE.

1. A point not raised in the trial court, nor considered nor determined there, is not properly before the appellate court.

2. On demurrer to a complaint alleging that the bond sued on had been assigned to plaintiff as guardian of certain minors, defendant cannot object that the complaint fails to allege plaintiff's appointment as guardian.

3. Under Code, § 134, authorizing the trustee of an express trust to sue without joining those for whose benefit the action is prosecuted, and construing such trustee to include a person in whose name a contract is made for the benefit of another, a guardian who is the assignee of a bond made payable to a certain trustee or his assigns may sue on it without joining his wards.

4. Where a mortgage provided in one place that suit "might" be brought by the trustee in case of default, and in another that suit "must" be brought on demand in writing of a majority of the mortgagees, a demand in writing is not necessary to authorize the trustee to sue on default.

5. A requirement that a demand on the trustee by a majority of the mortgagees to bring suit shall be in writing is sufficiently complied with where suit is brought in the name of all the mortgagees.

Appeal from common pleas circuit court of Charleston county; O. W. Buchanan, Judge.

Suit by Joseph W. Barnwell, trustee, and individually, and as agent and guardian, and others, against Sophia Francis Shepherd Marion. There was a judgment overruling demurrers to the complaint, and defendant appeals. Affirmed.

The following are the exceptions: "First. The presiding judge erred in overruling the demurrer of the defendant to the complaint herein, on the ground that it appears upon

the face of the complaint that there is defect of parties plaintiff, in the omission of the minor children of N. B. Barnwell as plaintiffs. Second. Because the presiding judge erred in overruling the oral demurrer interposed by the defendant on the ground that the complaint does not state facts sufficient to constitute a cause of action, on the following grounds: (1) Because said mortgage, foreclosure of which is sought, is alleged in the complaint to have been made to Joseph W. Barnwell, trustee, whereas the said complaint is not brought by Joseph W. Barnwell as trustee; (2) because there is no allegation in the said complaint of a demand, in writing, of the assignee of a majority in interest of the bonds secured by said mortgage outstanding at the time of said demand upon said trustee, to institute foreclosure proceedings; (3) because there is no allegation in the complaint of any appointment whatsoever of Joseph W. Barnwell, plaintiff, as guardian of the minor children of N. B. Barnwell."

Bryan & Bryan, for appellant. Langdon Cheves, for respondents.

McIVER, C. J. It appears from the allegations of the complaint that the defendant, Mrs. Marion, on the 22d day of May, 1894, duly executed her bonds, six in number, payable to Joseph W. Barnwell, trustee, for the respective amounts mentioned in the complaint, aggregating in the whole the sum of \$40,000, and, to secure the payment of the said bonds, the said defendant, on the same day, duly executed her mortgage on the real estate described in the complaint, to the said Barnwell, trustee, as aforesaid; that one of said bonds, to wit, for the sum of \$17,000, was assigned by said Joseph W. Barnwell, trustee, to said Joseph W. Barnwell, as guardian of the minor children of N. B. Barnwell; another, to wit, for the sum of \$8,666.67, was assigned to the plaintiff, Ann Josephia Wilson; another, to wit, for the sum of \$6,933.33, to S. L. Howard and said Joseph W. Barnwell, as trustee of Anna L. Walker and child, and said S. L. Howard has died leaving said Joseph W. Barnwell sole surviving trustee; another, to wit, for the sum of \$4,000, was assigned to said Joseph W. Barnwell as agent; another, to wit, for the sum of \$3,000, was assigned to the plaintiff Ellen F. Hayne; and the remaining bond, for the sum of \$400, was assigned to said Joseph W. Barnwell individually; and that the defendant has made default in the payment of the said bonds according to their tenor and effect. The prayer of the complaint is that an account may be taken of the amount due on said bonds; and that judgment may be entered against defendant for the amount found due, including the amount paid out by said trustee for taxes on the mortgaged premises, with interest thereon and counsel fees and commissions of said trustee; and that, in case the amount so found to be due shall not be forthwith paid, the real es-

tate now subject to said mortgage be sold, and the proceeds applied to the amount so found due; and that the defendant and all persons claiming under her since the commencement of this action be barred and forever foreclosed of all equity of redemption in said premises. The mortgage, among other covenants, contains the following: "That in case of default in the payment of the principal or interest of said bonds, or any part thereof, said trustee should have the power to institute proceedings for the foreclosure of said mortgage, and that, upon the demand in writing of the assignee of a majority in interest of the bonds secured by said mortgage, outstanding at the time of said demand, said trustee should, upon being secured his proper costs, charges, and expenses, forthwith institute such proceedings." And the complaint contains the following allegations: That all of the assignees of said bonds have demanded that suit be brought for the foreclosure and collection of the amount due upon said bonds and mortgage, and have become parties to this suit, in order to signify their consent, and demand that the same be brought by said trustee, Joseph W. Barnwell. To this complaint the defendant filed two demurrers: "First. Because it appears upon the face of the complaint that there is a defect of parties plaintiff, in the omission of the minor children of N. B. Barnwell as plaintiffs. Second. Because the complaint does not state facts sufficient to constitute a cause of action; and, for a specification of the deficiencies in the complaint, the following are stated in accordance with the rule of court: (1) Because the mortgage is alleged to have been made to Joseph W. Barnwell, trustee, whereas the complaint is not brought by Joseph W. Barnwell as trustee; (2) because there is no allegation in the complaint that a demand, in writing, from the assignees of a majority in interest of the bonds secured by the mortgage, upon the said trustee, to institute proceedings for foreclosure of said mortgage." These demurrers were overruled by his honor, Judge Buchanan, and from his judgment to that effect the defendant appeals, upon the several exceptions set out in the record. These exceptions raise the following questions: (1) Whether there was a defect of parties plaintiff in the omission of the minor children of N. B. Barnwell as plaintiffs; (2) whether the fact that the complaint is not brought by Joseph W. Barnwell as trustee is fatal on demurrer; (3) whether the absence of any allegation that a demand, in writing, from the assignees of a majority in interest of the bonds secured by the mortgage, had been made for the bringing of this action, is fatal on demurrer; (4) whether the absence of any allegation in the complaint of the appointment of Joseph W. Barnwell as guardian of the minor children of N. B. Barnwell is fatal to the complaint on demurrer.

The point raised by the second question, having been very properly abandoned on the

argument here, need not be further considered; and, inasmuch as the point involved in the fourth question was not raised by either of the demurrers in the court below, and was not, so far as appears, either considered or determined by the circuit judge, it is not properly before us for review. We may add, however, that, even if such point were properly before us, we do not think it could be sustained, for the action is based upon a bond secured by a mortgage which is practically payable to Joseph W. Barnwell, as guardian of the minor children of N. B. Barnwell; and hence no allegation or proof of his appointment as such guardian was necessary, for the demurrer admits the allegation that the bond had been assigned to Joseph W. Barnwell, as guardian of the minor children of N. B. Barnwell, and thus the defendant would be estopped from raising any issue as to that matter. *Woodberry v. Dye*, 10 Rich. Law, 31. The first and third questions, as above stated, therefore, only remain to be considered and determined.

As to the first question, to wit, whether the minor children of N. B. Barnwell are necessary parties, we do not see how there can be doubt, in view of the express provisions of the Code, as they have been construed in several of our cases. The bond and mortgage upon which this action is based are not before us; but, in the absence of any evidence to the contrary, we must assume that they are in the usual form,—that is to say, that the bond is made payable to Joseph W. Barnwell, trustee, his executors, administrators, or assigns, and that the mortgage was drawn accordingly. When, therefore, the bond for \$17,000 was assigned to Joseph W. Barnwell, as guardian of the minor children of N. B. Barnwell, the practical legal effect, so far as the question under consideration is concerned, was the same as if the bond of defendant had originally been made payable to Joseph W. Barnwell, as guardian of the minor children of N. B. Barnwell; and to an action for the enforcement of the contract evidenced by such bond and mortgage the minor children of N. B. Barnwell were not necessary parties. Section 132 of the Code provides that "every action must be prosecuted in the name of the real party in interest *except* as otherwise provided in section 134"; and the provision in section 134 is that "a trustee of an express trust * * * may sue, *without joining with him the person for whose benefit the action is prosecuted*," and then proceeds to declare that a "trustee of an express trust, within the meaning of this section, *shall* be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." (Italics ours.) As is said in *Johnson v. Dawkins*, 20 S. C., at page 532, the effect of these two sections, when construed together, is the same as if the statutory provision read as follows: "Either the real party in interest or the party with whom a

contract is made for another may institute an action on such contract." To the same effect, see *Billings v. Williamson*, 6 S. C. 119, recognized and followed in *Carroll v. Still*, 13 S. C. 430. There can be no doubt that the contract here sought to be enforced was made with Joseph W. Barnwell, as guardian of the minor children of N. B. Barnwell, in his name as such, for the benefit of said minor children; and hence, under the express terms of the Code, as construed in the cases above cited, he may maintain this action "without joining with him the person for whose benefit the action is prosecuted." To same effect, see, also, 9 Enc. Pl. & Prac. 932, where it is said: "In some certain cases a guardian may maintain an action, suit, or other proceeding in his own name, * * * or when the action is on an express contract made with him in the course of the guardianship, as when the action is on a promissory note or other commercial paper made to him *eo nomine*, or on securities assigned to or taken by the guardian in his own name." This, it seems to us, is conclusive of the first question, and there was therefore no error in overruling the demurrer for defect of parties. The provisions of the Code prescribing how a guardian ad litem of an infant must be appointed, which have been relied upon in the argument, do not state, or even touch the question, as to when a minor is a necessary party to an action. They only prescribe the manner in which a minor must be made a party,—when it is necessary that he should be made a party. Hence neither those provisions nor the cases cited to show how strictly such provisions must be followed are pertinent to the present inquiry. Our only concern here is whether the minor children of N. B. Barnwell are necessary parties to this action, not as to how they should be made parties. Until it is shown that they are necessary parties, the inquiry as to how they should be made parties, in a case where it was necessary to make them such, is wholly speculative, and therefore need not be pursued.

Nor are we able to perceive what application the act approved the 5th of January, 1895 (21 St. at Large, p. 816), as amended by the act of 9th of March, 1896 (22 St. at Large, p. 194), which has been cited by the counsel for appellant, has to the present case. The sole objects of that act, as we understand it, were (1) to forbid the sale of mortgaged premises by the mortgagee, under a power of sale contained in the mortgage (commonly called "Scotch Mortgage"), until the amount of the mortgage debt has been judicially ascertained, or such amount has been admitted, in writing, by the mortgagor, and entered upon the records of the register of mesne conveyances; (2) to change the rule as previously declared in *Warren v. Raymond*, 12 S. C. 9, *Parr v. Lindler*, 40 S. C. 193, 18 S. E. 636, and *Cook v. Jennings*, 40 S. C. 204, 18 S. E. 640, whereby no judgment

in an action of foreclosure of mortgage could be entered for the amount of the mortgage debt, or any deficiency thereof, until after a sale of the mortgaged premises, and an application of the proceeds thereof to the mortgage debt, when, if any deficiency appeared, a judgment might then be entered, and execution issued for such deficiency; so that now the court may, in action for foreclosure, render judgment for the amount of the mortgage debt, and at the same time direct a sale of the mortgaged premises, the officer making such sale being required to credit upon such judgment the proceeds of the sale. We do not see why a guardian, in a case like the present, where the bond and mortgage have been assigned to him as guardian, may not maintain an action in his own name as guardian, without joining with him his ward, for the foreclosure of the mortgage, and, at the same time that he obtains an order for the sale of the mortgaged premises, also recover a judgment for the amount of the mortgage debt, as provided for in the act just referred to, just as he could recover judgment for the amount due on an ordinary promissory note, unsecured by a mortgage, which was made payable to him as guardian, or transferred to him as such.

Cases have been cited which arose and were decided prior to the adoption of the Code of Civil Procedure, for the purpose of showing that a ward is a necessary party to an action for foreclosure of a mortgage of real estate of which the ward is the real and beneficial owner. The case which seems to be mainly relied upon is *Moore v. Hood*, 9 Rich. Eq. 311. In that case the action was brought against the guardian of plaintiffs, who had been appointed as such by the proper tribunal in North Carolina, but had subsequently removed to this state for the purpose of obtaining an account for the full value of certain slaves belonging to the wards. It was contended by the guardian that he was not liable to account, because the slaves had been sold under an order of a court in North Carolina, having jurisdiction of the subject-matter, and that the guardian had already accounted for the proceeds of such sale. It appeared, however, that this order of sale was obtained under an *ex parte* proceeding by the guardian, to which the wards were not made parties; and it was claimed that the slaves were sold for much less than their real value, though not through any fault of the guardian. It was held that the wards were necessary parties to any proceeding for the sale of their property, and hence the guardian was liable to account for the full value of the slaves sold under this *ex parte* proceeding. This was based upon the doctrine that the legal title to the chattels belonging to the wards was not in the guardian, but in the ward; and hence the sale of these slaves made under an order obtained in an *ex parte* proceeding did not divest the legal title of the wards,

for the sale made under such an *ex parte* proceeding was not materially distinguishable from a sale made by the guardian of his own motion, which is voidable at the option of the wards. How that case affects our present inquiry it is somewhat difficult to perceive.

The case of *Long v. Cason*, 4 Rich. Eq. 60, has likewise been referred to, mainly for the purpose of showing that the legal title to ward's chattels is not in the guardian,—a point which we do not deem it necessary now to consider. But that very case evidently implies that a guardian may institute an action in his own name for the recovery of the amount due on a chose in action belonging to the ward's estate; for, in that case, one of the points decided was that a ward was barred by the statute of limitations from the recovery of a claim which his guardian had failed to prosecute within the statutory period; and Wardlaw, Ch., in delivering the opinion of the court, used this language: "I apprehend that a guardian has plenary right to receive money coming to his ward, and to prosecute, compound, and acquit any debt or liability to the ward. He always acts under responsibility to his ward for the faithful and judicious performance of his trust, and is liable for any fraud, gross negligence, or other breach of trust." Even Dargan, Ch., in his separate opinion, concurring in the result, but carefully guarding himself against being committed to the doctrine that the guardian is possessed of any legal estate in his ward's chattels or choses in action, admits that the guardian, in a case like the one now before the court, may bring the action in his own name, for he says: "If a guardian should take a note or other security, payable to himself, for the rents and profits of his ward's real estate, or, calling in the ward's choses, should reinvest them in other securities, payable to himself, in these and similar cases I should have no hesitation in saying that the statute of limitations would run against the guardian, and, through the guardian, against the infant ward, for the reason that the legal estate in such securities was vested in the guardian." This necessarily implies that he thought the guardian might maintain, in his own name, an action in a case like the one now under consideration.

The case of *McDuffie v. McIntyre*, 11 S. C. 551, decided since the adoption of the Code of Procedure, has also been cited by counsel for appellant. In that case, real estate belonging to the wards had been sold under the order of the court of equity, and a bond which represented a portion of the proceeds of such sale had been turned over to their guardian. This bond the guardian undertook to sell to a third person, and it was held that the guardian had no power to make such sale. How that decision (the correctness of which is not questioned) can affect the question which we are now called upon to determine, it is not easy to perceive. Here

no question is presented as to the right of a guardian to sell either specific chattels or choses in action belonging to his ward's estate; and the only question here presented is whether a guardian to whom a bond secured by a mortgage of real estate has been assigned *eo nomine* can maintain an action for the foreclosure of such mortgage in his own name, without joining with him his wards; and this, as we have seen, the guardian is expressly authorized to do by the provisions of the Code of Procedure, as construed by the cases hereinabove cited. In addition, we have two other cases, decided since the adoption of the Code, which, though not precisely in point, do, by analogy, support the view which we have adopted. In *Ashley v. Holman*, 15 S. C. 97, it was held that if the committee of a lunatic becomes chargeable for profits made by the labor of the lunatic, and then die, the succeeding committee may maintain an action against the executors of the deceased committee for an account of such profits, in his own name, without joining the lunatic as a party. So, in *Oathcart v. Sugenhimer*, 18 S. C. 123, it was held that a lunatic was not a necessary party to an action brought by his committee where equitable relief is sought in the court of chancery, for the benefit of the lunatic. Now, if it be true, as was said by Butler, J., in *McCreight v. Aiken*, 3 Hill (S. C.) 337, and repeated by McGowan, J., in *Oathcart v. Sugenhimer*, *supra*, that "the legal relation of a committee to a lunatic is analogous to that of guardian and ward," then these two cases do, by analogy, support our view.

We have not deemed it necessary to go into any examination of the cases cited from other states, for two reasons: (1) Because we think our own decisions, which are authoritative, are quite sufficient for the determination of the question which we are called upon to decide; (2) because, in some of the states from which cases have been cited, the nature of a mortgage has not been changed by statute, as it has been here by our statute of 1791, as explained in *Simons v. Bryce*, 10 S. C., at page 368 et seq. Hence in those states which still recognize a mortgage of real estate as a conveyance of the legal title, it is not difficult to understand, where foreclosure of a mortgage of real estate made to a ward is sought, why it is thought necessary that the ward should be a party to an action for foreclosure for the purpose of divesting him of the legal title, which had been vested in him by the mortgage. Here, however, where a mortgage of real estate does not operate as a conveyance of the legal title, no such necessity can arise.

The only remaining inquiry is that presented by the third question above stated, to wit, whether the absence of any allegation in the complaint that a demand, "in writing," has been made by the assignees of a majority in interest of the bonds secured by the mortgage, that this action should be brought, is

fatal on demurrer based, upon the ground that the facts stated in the complaint are not sufficient to constitute a cause of action. Without stopping to inquire whether a demand in writing is one of the facts necessary to constitute "a cause of action," and assuming, without deciding, for the purposes of this inquiry only, that it is, we think it clear that no such allegation was necessary. The terms of the covenant in the mortgage, as set forth in the sixth paragraph of the complaint, as copied above, show conclusively that such covenant contains two provisions as to bringing the suit,—the first permissive, and the second imperative. The suit "may" be brought "in case of default in the payment of the principal or interest of said bonds, or any part thereof." The suit "must" be brought upon the demand, in writing, of the assignees of a majority in interest of the bonds. It is clear, therefore, that no demand in writing was necessary to authorize the bringing of the action. Besides, even if such demand was necessary, it was sufficiently complied with by the bringing of the action in the name of all of the assignees; and this, as we understand, was conceded by appellant's counsel, provided the court should conclude that the guardian had the right to bring the action in his own name, without joining with him his wards. But, whether conceded or not, we think it was sufficient. There was no error, therefore, in overruling the demurrers. The judgment of this court is that the order overruling both of the demurrers be affirmed, and the case remanded to the circuit court for such further proceedings as may be necessary.

MOORE et ux. v. HURTT.

(Supreme Court of North Carolina. Feb. 21, 1899.)

MORTGAGES—RIGHT OF POSSESSION—DEMAND —WAIVER.

Where, in an action by a mortgagee for the possession of the mortgaged chattels, the mortgagor denies the mortgagee's right of possession, and sets up a verbal agreement that he was to retain possession, the necessity of demand before suit brought is obviated, since a demand would have been futile.

Appeal from superior court, Craven county; Norwood, Judge.

Action by James W. Moore and wife against Stephen F. Hurtt. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Simmons, Pou & Ward and L. J. Moore, for appellants.

CLARK, J. This is an action to obtain possession of personal property embraced in a mortgage executed by the defendant to the plaintiff. The action was begun before maturity of the debt secured by the mortgage. The answer denied the plaintiff's right to have possession. The court below, being of opinion that failure to prove a demand before ac-

tion brought was fatal, sustained a demurrer to the evidence and dismissed the action. In this there was error. In the absence of an express stipulation to the contrary, the mortgagee is entitled to take possession of the mortgaged property at any time before or after maturity of the debt or breach of condition. *Hinson v. Smith*, 118 N. C. 503, 24 S. E. 541. Here there was no stipulation in the mortgage that the mortgagor should retain possession, and, though a verbal agreement to that effect was set up in the answer, there was no evidence to sustain it. The sole purpose in requiring a demand before action is that the defendant shall not be taxed with costs when the plaintiff could have obtained the object of his action by simply making demand. When, therefore, the defendant sets up a defense to the action, it appearing that a demand would have been futile, the courts do not hold that the omission to make demand is fatal. In this case the answer averred that the plaintiff was not entitled to possession of the property by reason of an alleged verbal agreement to the contrary. The omission to make the demand (which, when made and acceded to, would avoid costs) was therefore immaterial. *Woolen Co. v. McKinnon*, 114 N. C. 681, 19 S. E. 761; *Buffkins v. Eason*, 112 N. C. 162, 16 S. E. 916; *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931; *Heath v. Morgan*, 117 N. C. 504, 23 S. E. 489; *McQueen v. Smith*, 118 N. C. 569, 24 S. E. 412. New trial.

HOWELL et ux. v. NORFOLK & C. R. CO.
(Supreme Court of North Carolina. Feb. 21, 1899.)

NONSUIT—EVIDENCE.

On motion for nonsuit, every proposition which there is evidence tending to establish must be taken as proved.

Appeal from superior court, Edgecombe county; Norwood, Judge.

Action by W. R. Howell and wife against the Norfolk & Carolina Railroad Company. From a judgment of nonsuit, plaintiffs appeal. New trial.

Gilliam & Gilliam, for appellants. John L. Bridgers, for appellee.

FURCHES, J. This is an action for damages to plaintiffs' land by the overflow of water caused by the negligent and unskillful manner in which the defendant constructed its road. Upon the close of the plaintiffs' evidence, the court intimated the opinion that plaintiffs could not recover, and plaintiffs submitted to a judgment of nonsuit, and appealed.

There are no grounds set out in the statement of the case why the court was of the opinion that plaintiffs could not recover; and we would have been at a loss to know upon what grounds the opinion of the court was founded, if they had not been stated by defendant's counsel in his brief. We learn from

this that there were two grounds that appeared to his honor as defects, that influenced him to come to the judgment he did: First, that plaintiffs failed to allege and prove that they were the owners of the land alleged to be damaged; and, secondly, that it appeared to his honor that plaintiffs were tenants in common with other persons, and that this was not alleged in the complaint. It is not necessary that we should consider whether possession would not entitle plaintiffs to at least nominal damages, nor is it necessary that we should consider whether one tenant in common could not maintain such an action, which is trespass or in the nature of trespass, as neither of these questions is presented by the record. Nor is it necessary that we should decide that any proposition, necessary to be proved by plaintiffs, was established. It is sufficient in such cases of nonsuit, where it is our duty, to take every proposition, when there is evidence tending to prove it, as proved. The plaintiffs allege their ownership in fee simple. There was evidence tending to prove that one Knight owned the land before defendant constructed its road, in 1889; that he died, and it descended to his heirs at law, six in number; that it had been divided between them under proceedings in court; that embankments four feet high had been made along the stream 50 years ago, to prevent the overflow of water on plaintiffs' land, and that these embankments had been constantly kept up for 50 years; that the lands mentioned in the complaint were two of the shares of the Knight lands, one of them falling to the feme plaintiff in the division, and the other share she acquired by purchase from one of the other heirs of said Knight; that there was evidence tending to prove the negligent construction of the road by the defendant, the damage caused thereby, and the amount of said damage. This being so, we can see no ground upon which the ruling of the court below can be sustained, and there must be a new trial. New trial.

SHARPE et al. v. LOANE et al.

(Supreme Court of North Carolina. Feb. 21, 1899.)

INJUNCTION—TRESPASS—IRREPARABLE INJURY.

Injunction does not lie to restrain a solvent person from cutting timber on lands, since that is not an irreparable injury.

Appeal from superior court, Hertford county; Brown, Judge.

Action by Millie Sharpe and others against C. D. Loane & Co. for an injunction. From an order dissolving an injunction pendente lite, plaintiffs appeal. Affirmed.

Winborne & Lawrence, for appellants. Francis D. Winston, for appellees.

FAIRCLOTH, C. J. The plaintiffs and defendants claim to be the owners of certain lands in Hertford county, called "Cow Island,"

and in this action the plaintiffs ask for an injunction against the defendants to prevent trespassing on said lands. The alleged trespass consists in cutting timber trees and removing them to defendants' mill, and converting them into lumber for marketable purposes. It is conceded that defendants are solvent, and able to respond in damages for any injury the plaintiffs may sustain. After reading affidavits and hearing the arguments, his honor required the defendants to enter into sufficient bond to protect the plaintiffs, and to render and file a statement of the trees, etc., removed, with the clerk at stated periods, and dissolved the restraining order theretofore granted, from which the plaintiffs appealed.

No special or irreparable damage is alleged, —only such as above stated. Will a court of equity enjoin an ordinary trespass? The rule has ever been that it will not, unless it is shown that the injury will be irreparable and incapable of a just compensation in money value. *Ousby v. Neal*, 99 N. C. 146, 5 S. E. 901. The plaintiffs admit that the authorities are against them, and cite *Gause v. Perkins*, 56 N. C. 177, *Lumber Co. v. Wallace*, 93 N. C. 22, and *Lewis v. Lumber Co.*, 99 N. C. 11, 5 S. E. 19, but insist that the principles announced in those cases are unjust and inequitable. They cite no authority in support of their view, and the argument fails to satisfy us that their proposition is true. The case of *Gause v. Perkins*, supra, is an exhaustive review of the subject, referring to many decided cases prior thereto, and the decisions since have simply repeated the principle of that case. While this court is always ready to correct any error, it would hesitate to overrule a long and uniform list of decided cases, in harmony with all the text writers, unless it should feel a strong and clear conviction that an unjust rule had prevailed. The present case fails to produce such a conviction. Affirmed.

STATE v. WHIDBEE.

(Supreme Court of North Carolina. Feb. 21, 1899.)

FALSE PRETENSES.

To constitute the crime of obtaining goods under false pretenses, there must be a false statement as to an existing fact; and therefore where a purchaser pretended to pledge in payment of goods a check which the seller knew, or should have known, had no existence at the time, a failure to apply such check or its proceeds according to agreement will not constitute the crime.

Appeal from superior court, Dare county; Hoke, Judge.

Action by the state against J. B. Whidbee. From a judgment for defendant, plaintiff appeals. Affirmed.

The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant stands indicted for obtaining goods under a false pretense. On July 12, 1897, the defendant cer-

tified in writing that he had received of Fulcher "Twenty-four dollars in merchandise, the amount of my check for the quarter ending October 30, 1897, which check I hereby pledge in payment of same." He failed to apply said check or the proceeds thereof according to agreement. The defendant moved to quash the indictment on the ground that it stated no indictable offense, which motion was allowed, and the state solicitor appealed.

There was no error. The offense charged does not fall within the meaning of the Code (section 1027). The fact that the defendant did not have, and could not have, the check for the quarter from August 1st to October 30th, was plain on the face of the writing, and was, or ought to have been, known to the prosecutor; and, whatever the motive was, it was not a fraudulent representation. Suppose the defendant had certified on July 12th that he would represent the firm of A. & Co. of New York during the same quarter; there would be no false statement of an existing fact, and the prosecutor would see and know it. Affirmed.

SWAIN v. BURDEN, Sheriff.

(Supreme Court of North Carolina. Feb. 21, 1899.)

PROCESS—FALSE RETURN—AMENDMENT.

Even after suit has been commenced against a sheriff for false return as to the manner and date of service of a summons, the trial court may, in its discretion, allow the sheriff to amend the return so as to conform to the facts, where the error arose from ignorance of the law, and no injury resulted therefrom.

Appeal from superior court, Bertie county; Norwood, Judge.

Action by Joseph Swain against W. G. Burden, sheriff. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff brings this action to recover \$500 penalty, under section 2079 of the Code, upon the alleged ground that the defendant sheriff made a false return upon a summons issued in the action entitled "Joseph Swain against Furzey A. Phelps, Executrix of Asa Phelps, and John Johnson and John Johnson, Jr., Defendants." The summons was issued November 13, 1897, and indorsed by the sheriff as follows: "Received Nov. 13, 1897. Served Feb. 10, 1898, by reading to each defendant. W. G. Burden, Sheriff Bertie County, by W. J. Burden." The sheriff moved for permission to amend the return upon the summons, and in support of the motion filed the following affidavit: "That he has been sheriff of Bertie county since December, 1896; that it is a large county, and he finds that the prompt service of process demands that he keep a deputy, and that he appointed his son W. J. Burden, a young man of sober habits and good character, active and energetic, as such deputy; that he knew nothing of the defect in the service until some time after the

return of the summons; that he employed counsel to ask leave to amend his return so that the same should speak the truth in all respects; that he has no knowledge about the service, except such as is contained in the affidavit of W. J. Burden [which follows]; that he has been prompt in the discharge of his official duties, and no harm has come to the plaintiff or any other person by reason of said return, and plaintiff has not been delayed in his action by reason of said defective service, or by reason of said return, because the defendant executrix, etc., entered an appearance to the action. And for these reasons, and for those stated in the affidavit of W. J. Burden, he asks that he be allowed to amend the return in the manner stated in the affidavit of W. J. Burden, and that he be allowed to indorse on the same: 'Served December 4, 1897, on John Johnson, and served December 13, 1897, on John Johnson, Jr., and on February 11, 1898, the said summons was read to Mrs. Furzey A. Phelps, executrix of Asa Phelps, by Robert J. Shields, to whom my deputy, W. J. Burden, had sent the same. W. G. Burden, Sheriff, by W. J. Burden, D. S.' Affiant respectfully submits that he and his deputy are entirely free from any desire to delay the plaintiff in the action, and are both friendly to the plaintiff, and that any falsity in the return is the result of ignorance on the part of said deputy, and not from any corrupt intent." The affidavit of W. J. Burden states: That he is the son of W. G. Burden, the sheriff, and was acting as his deputy, and on November 13, 1897, received the summons in the action, which was returnable to February term, 1898. That on December 4, 1897, he served the same personally on John Johnson, but failed to note on the summons the date thereof. That on December 13, 1897, he served it personally on the defendant John Johnson, Jr., but failed to note the same. "That prior to the return day, and in ample time to have the summons served, this affiant sent it to R. J. Shields, a justice of the peace living near Mrs. Phelps, the other defendant, and asked him to serve the same on her. Shields returned the summons to this affiant, and this affiant, without intending to make any false return, and believing that the service on Mrs. Phelps by said Shields was lawful and regular, and thinking that the date when it was served on the other defendants was immaterial, and believing that the return showed that he had served the summons ten days before court, he made the return as set out; and he is informed that Shields did not read the summons to Mrs. Phelps until February 11, 1898, and that the reading of it by Shields to Mrs. Phelps was not in law a service as he has been informed, and, wishing truthfully to return the same, he asks that he may be permitted to amend the return by indorsing thereon that said summons was served on John Johnson the 4th day of December, 1897, and on John Johnson, Jr., the 13th day of December, 1897, and that on the 10th day

of February, 1898, R. J. Shields, at the request of this affiant, read the said summons to Mrs. Furzey A. Phelps, executrix of A. Phelps, the other defendant. And this affiant is informed that no damage has accrued to plaintiff by reason of his failure to serve the summons regularly on her, for the reason that by her lawful attorney she appeared in court and entered an appearance in said action, thereby curing any defect in the service of the summons. That in making said return he had no intention to state falsely any facts in regard to its service, but that he made the same with honest intent, and belief that he was complying with the law, and with no intent to deceive." The court allowed the motion of the defendant, and ordered that the sheriff be allowed to so amend his return in the manner asked for. The plaintiff excepted and appealed. The plaintiff resisted the motion upon the following grounds: "(1) That it did not appear that the original return was made by inadvertence or excusable mistake, and that said motion is without merit. (2) For the reason that the return as amended would not be a proper and lawful return to the summons. (3) For the reason that said Jos. Swain, the plaintiff, had commenced an action against the said sheriff, based on said false return; and to support this ground of objection the plaintiff introduced the record in a suit wherein said Jos. Swain was plaintiff and W. G. Burden, as sheriff, was defendant, from which it appeared that the summons therein was issued on the 3d day of May, 1898, returnable to September term, 1898, of Bertie superior court, and which was placed in the hands of the coroner on May 10, 1898, and the said summons was duly served on May 11, 1898; and the complaint which was filed therein at the time the summons was issued is as follows: [Setting out the allegations of the complaint, and the demand for the penalty of \$500 allowed under section 2079 of the Code.]" The motion of the sheriff for leave to amend was made during the term of May court, 1898, and on the 5th day of May, 1898, and then entered of record. The court overruled the plaintiff's objection, and gave judgment as appears above.

Martin & Peebles, for appellant. Francis D. Winston, for appellee.

FAIRCLOTH, C. J. This is an action against the defendant, as sheriff, for the penalty of \$500 for a false return, as provided in Code, § 2079. After the action was begun, the defendant, on affidavits, moved the court to be allowed to amend his return so as to speak the truth. The motion was allowed, and the plaintiff appealed.

The only matter for this court is the power of the superior court judge to allow the amendment to be made. The power of the judge to allow amendments in process, etc., is broad, both by statute and the inherent power of the court. The experience of every

lawyer demonstrates the propriety and policy of the exercise of such power in many cases. Without it, justice would often suffer, and the rights of litigants would be sacrificed. The necessity for such power grows out of business transactions of men, and their liability to make mistakes and oversights. The public good and private interest of the people justify and require the lodgment of such power in the court, and experience has so demonstrated. All will agree that in meritorious cases the power should be exercised. We must assume that the power will be used only in proper cases, and in all others it will be withheld. Who can better discriminate than the presiding judge? We think, from the authorities and the reason of the matter, that the discretionary power must always be present with the presiding judge. Judges, like all other citizens, are amenable for any abuse of their powers or misconduct, and we like to assume that their duties will be performed faithfully and honestly. This question has been so often under review, as appears from the citations under section 2079 of the Code, that we find nothing new to add to what has been said. In the recent case of *Steelman v. Greenwood*, 113 N. C. 355, 18 S. E. 503, and the cases noted therein, the question is well considered and decided. affirmed.

BROWN v. BROWN.

(Supreme Court of North Carolina. Feb. 21. 1899.)

ALIENATING HUSBAND'S AFFECTIONS — PERSONS LIABLE — PARENT OF HUSBAND — MALICE.

1. A parent is liable in damages for inducing his married child to abandon his wife, only where he did so maliciously.
2. A parent's willfully inducing a married child to abandon his wife is not necessarily malicious, as the parent's acts may have been with good motives.
3. Where a parent induces his married child to abandon his wife without proper investigation, or from recklessness, or through dishonest motives, malice is presumed.

Appeal from superior court, Pasquotank county; Norwood, Judge.

Action by Lizzie Brown against Jesse R. Brown. There was a judgment for plaintiff, and defendant appeals. Reversed.

G. W. Ward and Pruden & Pruden, for appellant. E. F. Aydlott, for appellee.

MONTGOMERY, J. The only question (raised by demurrer to the complaint) for decision when this case was here before (121 N. C. 8, 27 S. E. 998) was whether a married woman, abandoned by her husband, could maintain, without the joinder of her husband, an action in tort. The court held that such an action could be maintained. The present appeal is before us on exceptions to the charge of his honor.

The complaint contains three alleged causes of action: The first, that the defendant, unlawfully, wrongfully, and wickedly intending

to injure the plaintiff and to deprive her of the society and aid of her husband, destroyed the affection of her husband towards her, and caused him to leave and abandon her; second, that he commenced against her a false and malicious prosecution for an alleged assault and battery upon her husband; and, third, for the false arrest and imprisonment of the plaintiff based upon such charge.

The defendant is the father of the plaintiff's husband, and in his answer there is a denial of the material allegations of the complaint.

The issues arising on the pleadings as to the last two causes of action were found in favor of the defendant, and therefore do not concern the appeal. The first issue was in these words, "Did defendant alienate the affection of the plaintiff's husband, and cause him to abandon her, as alleged in the complaint?" The second issue was, "If so, what damage has plaintiff sustained?" His honor, in substance, instructed the jury that, if they should find that the defendant willfully caused the plaintiff's husband to forsake and abandon her, the plaintiff would be entitled to recover, and the jury should answer the first issue, "Yes." And, as to the measure of damages, the court charged the jury that if they should find that the defendant caused the plaintiff's husband to willfully forsake and abandon her, and that it was not done with malice, they should give only such actual damages as the plaintiff had sustained. There was error in those instructions. The complaint, in substance, alleged that the conduct of the defendant was malicious. The charge of his honor was that, if the jury should find that the defendant willfully caused the husband to abandon the wife, then the first issue (which raised the question of malice in the defendant) should be answered in the affirmative. The word "willfully" does not mean "maliciously." "Willfully" implies that "an act done in that spirit is done knowingly and obstinately and persistently, but not necessarily maliciously." *State v. Massey*, 97 N. C. 465, 2 S. E. 445. It cannot be that the law disregards the tender relations of kinship, and natural affection between parent and child, and the duties which such relations impose, even though the child is married. In case of unhappiness and disagreements between the married couple, it is almost impossible to conceive of indifference on the part of the parent to such conditions, and certain it is that the child naturally turns to the parent for comfort and advice under such circumstances. There are laws of natural affection and of natural duty, and municipal law will not obstruct their free operation as long as they are not abused. The presumption, in fact and in law, in all such cases, must be and is that the parent will act only for the best interest of the child and for the honor of the family. In *Reed v. Reed* (Ind. App.) 33 N. E. 638, where the defendant was the

father of the plaintiff's husband, and the cause of action the same as that in the case before this court, it was said: "The law recognizes the right of the parent in such cases to advise the son or daughter; and when such advice is given in good faith, and results in a separation, the act does not give the injured party a right of action. In such a case, the motives of the parent are presumed good until the contrary is made to appear." It was further said in that case that "these rules have been generally applied in cases where the suit was brought by the husband for the alienation of his wife, and we see no reason why they should not, with proper modifications, prevail when the wife is the plaintiff." In *Westlake v. Westlake*, 34 Ohio St. 621, the plaintiff was, as is the case in this action, the wife of the defendant's son, and the cause of action like the one alleged in the present case. The defendant there requested the court to charge the jury that, "if you find that the defendant caused the separation, yet you shall not render a verdict for the plaintiff unless you find the defendant maliciously caused the separation." The court refused to give the instruction, and upon the appeal of the defendant the appellate court said: "This charge ought to have been given. The term 'malice,' as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another. *Weckerly v. Geyer*, 11 Serg. & R. 39, 40. If the conduct of the defendant was unjustifiable, and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged." We are of the opinion, after having given the matter the serious consideration which it deserves, that, before a parent can be held liable in damages for advising his married child to abandon his wife or her husband, the conduct of the parent should be alleged and proved to be malicious; that the willful advice and action of the parent in such a case may not be necessarily malicious, for the parent may be determined and persistent and obstinate in his purpose to cause the separation, and yet be entirely free from malice,—in fact, have in view the highest good of his child. Our opinion, however, is that the malice necessary to be alleged and proved is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove, to the satisfaction of the jury, that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose; the law presuming malice from such conduct in actions of this nature. Error.

AGENT v. WILLIS.

(Supreme Court of North Carolina. Feb. 21, 1899.)

MARRIAGE LICENSE—LIABILITY FOR WRONGFUL ISSUANCE—DILIGENCE.

At 2 a. m. two men asked a register of deeds to issue a license to marry a girl residing in the neighborhood, whose father the register knew. They were refused, returned again in about two hours, were again refused, and came back two hours later. On being asked to swear to the girl's age, one of the men refused, saying that she had told him she was 18 years old, and that he thought she was about that age. It was then agreed that one of the men should go to the girl, and find a person who would swear to her age, and a man recommended by her was produced, who swore that she had told him she was 18, which was all he knew about it; whereupon the register issued the license. The girl was under 18. *Held*, that the register had not used reasonable diligence to ascertain the girl's age, within Code, § 1816, imposing a penalty on registers of deeds who, without making reasonable inquiry, issue a license for the marriage of persons against whose marriage there is a lawful impediment.

Appeal from superior court, Craven county; Norwood, Judge.

Action by Robert B. Agent against John B. Willis to recover a penalty for the wrongful issuance of a marriage license. There was a judgment for defendant, and plaintiff appeals. New trial.

Simmons, Pou & Ward and L. J. Moore, for appellant.

MONTGOMERY, J. This action was commenced in the court of a justice of the peace for the recovery of the penalty imposed by section 1816 of the Code for the issuing by defendant, as register of deeds of Craven county, of a license for the marriage of the plaintiff's daughter, who was under 18 years of age; the consent required by section 1814 of the Code not having been delivered to the defendant. On the trial in the superior court, the defendant offered no evidence, and admitted that that of the plaintiff was true. The substance of the evidence of the plaintiff was that he had lived in Newberne for 19 years, and that he and the defendant knew each other; that the plaintiff's daughter was under 18 years of age, and that he had not given his consent to the issuing of the license and was opposed to the marriage; that the defendant knew nothing of his own knowledge of the age of the girl; that about 2 o'clock, on the night of the 5th of September, 1898, one Prudie Harrison and one Parsons, who was probably the man afterwards married to the girl, went to the residence of the defendant for the license, and that he declined to issue it; that they returned two hours afterwards, and he still declined to issue the license, and told them to come to his office later; that about two hours later he saw Harrison and Parsons, and asked Harrison if he would swear to the girl's age, and that Harrison answered that he could not, but that the girl had told him three days be-

fore that she was 18 years old, but that he did not know how old she was; that defendant told them that they would have to get some one to swear to her age, and it was then and there agreed that Parsons should go to the girl, and find out what person to get to swear to her age; that the girl told him to get a man by name Tolor, and that Tolor came and swore that the girl had told him three days before that she was 18 years old, and that was all that he knew about it,—the oath being made and accompanied by a statement as to his means of information. Prudie Harrison testified that he told the defendant that he thought the girl was about 18 years old. His honor told the jury that upon the evidence the defendant had used reasonable diligence to ascertain the age of the plaintiff's daughter, and instructed them to answer the issue on that point in the affirmative.

The correctness of that instruction is the matter before us for decision. Did the defendant make reasonable inquiry about the age of the girl before he granted the license? To all persons who believe that the welfare of human society depends largely upon the family relation, and that the contract of marriage should be defended by careful and just laws, for the purpose of guarding against legal impediments, and to prevent the marriage of those under a certain age, when the parties are presumed not to be able to contract, the duties of the register of deeds, the officer in our state charged with the duty of issuing marriage licenses, seem most important and most solemn. That officer must exercise his duties carefully and conscientiously, and not as a mere matter of form. It was said by this court in *Williams v. Hodges*, 101 N. C. 300, 7 S. E. 736: "The license shall not be issued, as of course, to any person who shall apply for it. The register is charged to be cautious, and to scrutinize the application. It must appear probable to him, upon reasonable inquiry, when he has not personal knowledge of the parties, that the license may and ought to be issued." There was no dispute about the evidence in this case, and now, applying what we have said above to the facts, were probable reasons given to the defendant to authorize him to issue the license,—to believe that the girl was 18 years old? Did he make reasonable inquiry, according to the evidence, about that matter, before he acted? We are clearly of the opinion that he did not, and that the instruction of his honor to that effect was erroneous. The contracting parties—the father, the register of deeds, the persons who made the application—were all residents of Newberne. At a dead hour of the night the persons who made the application go to the residence of the defendant for that purpose, and, upon the application being refused, they return at 4 o'clock in the night, and again they are put off to a later hour. The license was issued two hours later, or about three-quarters of an hour after sunrise. The father of the child is at home, ignorant of

what is going on. Those were most suspicious circumstances, and should have put the defendant on his guard, at every point, as to his duties. Instead of requiring information from friends or connections of the family, who might reasonably be supposed to know the age of the girl, he took her word as to her age, and that message brought through persons who were not shown to be trustworthy. He knew nothing of her or of her age. Each person who was examined about the matter said that he got his information from the girl and from no one else. The defendant seemed to think that an oath on the part of anybody was all that was necessary to authorize him to issue the license, but the character of the witness and accuracy of information are the things that the register of deeds should look to when he issues a license for marriage, in cases where there is doubt about the age of the parties. The oath made by Tolor, at best, was only a statement of what the girl had told him as to her age, and he qualified his oath by stating the source of his information. We might say something on the moral aspect of this case, but we forbear. It is enough to say that there was error in the instruction of his honor, for which there must be a new trial. New trial.

BURRUS v. LIFE INS. CO. OF VIRGINIA.

(Supreme Court of North Carolina. Feb. 21, 1899.)

BILLS OF EXCHANGE—PRESENTMENT—ACCEPTANCE—INSURANCE—WRONGFUL CANCELLATION—MEASURE OF DAMAGES.

1. Where an unaccepted sight draft, indorsed: "Accepted. Payable at F. & M. Bank,"—is sought to be presented two days before maturity, the conclusive presumption is that the presentment was to be for acceptance, and not payment.

2. Where an insurer wrongfully cancels a policy, the measure of damage (insured electing to take back his money) is the amount of premiums theretofore paid, with interest, though the policy provides that it shall determine at the end of every five years unless insured elects to pay increased premiums.

Appeal from superior court, Craven county; Brown, Judge.

Action by Walter P. Burrus against the Life Insurance Company of Virginia. There was a judgment for plaintiff, and defendant appeals. Affirmed.

For a prior report, see 121 N. C. 62, 28 S. E. 62.

MacRae & Day, W. W. Clark, and O. H. Guion, for appellant. Simmons, Pou & Ward, for appellee.

MONTGOMERY, J. The plaintiff's husband's life was insured in the defendant company for the benefit of the feme plaintiff, and a premium became due on November 25, 1894. The same was not paid at that day, and the defendant refused to reinstate the plaintiff's policy, unless he would submit to

a re-examination and be found to be in good health, although he had sent the amount of the premium to the company on the 1st of December following. The plaintiff refused to be re-examined, and insisted that the company had unlawfully canceled the policy. The plaintiff alleged that the defendant, after the issuing of the policy, agreed with him that the company would draw on him sight drafts for the premiums necessary to keep the policy in force, and to have the drafts presented to him in Newbern, N. C., for payment, and that in pursuance of that agreement the defendant for years prior to November 25, 1894, did draw the drafts, and they were paid. That agreement was admitted by the defendant, but with the statement that it was made entirely for the plaintiff's convenience, and with a denial that the drafts were to be presented to the plaintiff in Newbern for payment. The defendant further said that the defendant was to draw through its bank in Richmond, Va., and that bank was to send the draft to Newbern for collection. For the payment which was to fall due on November 25, 1894, the defendant drew in Richmond, Va., a draft on the plaintiff payable at sight to the order of the Merchants' National Bank of Richmond, Va. The draft was sent by that bank to the Farmers' & Merchants' Bank, Newbern, N. C., for collection, and on the back of the draft there was written: "Accepted. Payable at the Farmers' & Merchants' Bank, Newbern, N. C." The collector of the last-mentioned bank went where he thought the plaintiff could be found on the 23d of November, but did not see him, nor any person authorized to act for him.

His honor instructed the jury fully on the law upon the evidence in respect to the agreement concerning the change of place of payment of premiums, the custom of the defendant in respect to the collection of premiums in Newbern through the bank there, and as to the effect in law of such collections. To these instructions there was no exception by the defendant. In reference to the right of the company to cancel the policy of the plaintiff, his honor charged the jury that: "If the Merchants' & Farmers' Bank used due diligence in presenting such draft, and complied with the law in that respect, then the insurance company, when the draft was returned unpaid, had a right to cancel the policy of insurance, and such cancellation would have been rightful and not wrongful; and, if you so find, you will answer the first issue, 'No.' If, on the contrary, you find that the Merchants' & Farmers' Bank was not diligent with the requirements of the law in presenting the premium draft, then the defendant had no right to cancel the policy, and it was the duty of the company to accept the premium afterwards from Burrus." There was no exception to this instruction.

His honor, on the question of the nature of

the draft, and the duty of the Newbern bank in reference to its presentation to the plaintiff, said to the jury: "The presentment of a bill of exchange or draft must be made to the drawee or acceptor, or to an authorized agent. A personal demand is not always necessary, and it is sufficient to make the demand at the residence or usual place of business of the drawee, where the presentment is for payment. This draft had not been accepted, and therefore the presentment first to be made by the bank was a presentment for acceptance. It was the duty of the bank collector to be careful, not only to present the draft at the usual place of business, but, if the plaintiff was not in, to assure himself that the person to whom he presented the draft for acceptance was the authorized agent of the plaintiff." The defendant excepted to this instruction. We find no error in it. By the terms of the policy of insurance, the premium was not due when the bank collector, with the draft, on the 23d, sought the plaintiff. It could not, therefore, have been a demand for payment which the collector intended to make on the plaintiff. If the collector had found the plaintiff on the 23d, he could not have made any legal demand for payment. He could only have requested that he sign the instrument: "Accepted. Payable at the Farmers' & Merchants' Bank, Newbern, N. C." The defendant, in carrying out the agreement to draw on the plaintiff at Newbern, through the Richmond bank, as the defendant contends, put the draft in the form of a sight draft. It was not due when the effort was made to present it to the plaintiff, and the paper was to every legal intent a draft for acceptance. The three days of grace were to be allowed after presentment and acceptance, and time of payment could not be known until acceptance. It is not only so in law, but on its back the intention of the drawer to make it a draft for acceptance was manifest. His honor was right in his instruction that the draft had not been accepted, and that the presentment first to be made was a presentment for acceptance. *Nimocks v. Woody*, 97 N. C. 1, 2 S. E. 249.

It was agreed that the court should answer the second issue, which was as to the damage the plaintiff had sustained by reason of the cancellation of his policy by the company. The court followed the rule laid down in *Braswell v. Insurance Co.*, 75 N. C. 8, and *Lovick v. Association*, 110 N. C. 93, 14 S. E. 506. In the first-mentioned case the court said: "If the defendant was in default by canceling the policy positively and peremptorily, the plaintiff has a right to recover back the amount paid as premium, and interest thereon, as 'money had and received for his use,' or upon a promise of the defendant to indemnify and save harmless, which the law implies from the wrongful act of the defendant in the cancellation of the

policy, in which case the measure of damage would be the amount necessary to enable the plaintiff to obtain another policy, if so minded, which, of course, would be much higher in respect to the premium, inasmuch as he is several years older than he was when he first obtained the policy; but the case need not be complicated by this consideration, as the plaintiff is content to take back his money with interest, and be quits of all further connection with the defendant." In the present case the plaintiff has adopted the same course, and we are not disposed to change the rule adopted in *Braswell's Case*. The defendant, however, contended that the policy in this case was different in kind from the policy in the other cases referred to, and that the same rule ought not to apply. The policy was of the following kind: "The policy of insurance is for a term of five years, the said term ending five years from the date of this policy, at noon, and all benefits arising under it to the insured or any other person or persons will then terminate; but the policy, with all its benefits, provisions, and requirements named therein, will be renewed by the company for the term of five years at the completion of the period above named, upon the payment to it of the premium therefor on or before the date of termination, and of the bi-monthly payment of the same sum every year for five years at the dates mentioned in this policy, which sum shall be at the present published rates of the company for the actual age; and all provisions, requirements, specifications, and benefits referred to in this policy, including the right of renewal for subsequent five-year periods, will be continued in force during the life of the insured as in the original contract, except, that when the renewal is at age of sixty or over, the premium thereafter paid shall be at the uniform rate as at age of such renewal." We are of the opinion that those features of the policy ought not to change the rule. To be sure, they provide that the benefits from the policy terminate at the end of periods of five years; but they permit continuous renewals for other periods of five years during the life of the insured, the only condition or limitation being the increased premiums at each successive period. No re-examination of the insured is required, and the defendant company has no option to cancel the policy, provided the insured shall pay the increased premiums at the beginning of each period of five years, as required under the terms of the policy. The only possible effect, as we see it, of the feature of the periods of five years provided for in the policy, upon the meaning and intent of the policy, is to increase the premiums at the several stages of five years, instead of having fixed them at a certain sum in the beginning, and therefore the measure of damages which the court applied in *Braswell's Case* is the proper rule. Affirmed.

RIDLEY v. SEABOARD & R. R. CO.
(Supreme Court of North Carolina. Feb. 21, 1899.)

NEGLECTED CONSTRUCTION OF RAILROAD — OVERFLOWING LANDS — DAMAGES — LIMITATION.

1. Where a railroad constructed its road over a stream so as to leave insufficient space for the passage of the water, thereby causing it to overflow adjacent lands, past damages to crops on such lands, and permanent damages to the land itself, may be recovered in one action.

2. The recovery may be by a single issue or by two separate issues.

3. An action for damages to crops by flooding the lands on which they grew may be brought within three years after the injury was sustained.

4. An action against a railroad company for permanent damages to lands by negligently constructing its road over a stream so as to flood the lands, by causing the stream to overflow, is barred only by 20 years' continuous maintenance of the road in such condition with the landowner's acquiescence.

5. Acts 1896, c. 224, limiting the recovery of damages for injury to real property to permanent damages only, and requiring an action therefor to be brought within five years, does not apply to an action for damages to real property and to crops thereon pending at the time of its adoption, or commenced within a reasonable time thereafter.

Appeal from superior court, Northampton county; Norwood, Judge.

Action by N. T. Ridley against the Seaboard & Roanoke Railroad Company for damages to real property. There was a judgment for plaintiff, and defendant appeals. Affirmed.

MacRae & Day, for appellant. Winborne & Lawrence and R. B. Peebles, for appellee.

CLARK, J. The court submitted issues both as to the damages to the crops for three years preceding the beginning of the action, and as to permanent damages; i. e. damages to the corpus. The recovery of these last will, of course, be a bar to future actions for injury to the crops. The defendant excepted to the submission of an issue as to past damages. The identical point was presented and decided in this same case on a former appeal (118 N. C. 996, 24 S. E. 730), where it is said (page 1009, 118 N. C., and page 735, 24 S. E.), "And either party * * * may demand that both present and prospective damage be assessed." This might be done by a single issue covering both, or by two separate issues, as in this case.

The defendant further excepted that the court did not sustain the plea of the statute of limitations. The court below properly admitted proof of damages to crops for three years prior to action brought, and the action as to permanent damages could only have been defeated by showing 20 years' continuous occupation, with acquiescence. *Parker v. Railroad Co.*, 119 N. C. 677, 25 S. E. 722.

Since Acts 1896, c. 224, in all actions brought in cases of this kind, only permanent damages (i. e. damages once for all) can be recovered, and such actions are bar-

red by the lapse of five years; but that statute cannot apply to an action like the present, which was brought before the ratification of the statute (*Nichols v. Railroad Co.*, 120 N. C. 495, 26 S. E. 643; *Harrell v. Railroad Co.*, 122 N. C. 822, 29 S. E. 56), or in a reasonable time thereafter (*Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294). No error.

WILLIAMS v. HUGHES.

(Supreme Court of North Carolina. Feb. 21, 1899.)

BOUNDARIES — PROCEEDINGS TO LOCATE — INSTRUCTIONS — TITLE.

1. In a proceeding under Acts 1893, c. 22, to locate boundary lines, an instruction that, upon all the evidence, the jury should say where the line was, is proper.

2. The judgment should leave out all reference to the title to the lands described in the petition, the statute making occupancy sufficient evidence of ownership to entitle one to relief thereunder.

Appeal from superior court, Camden county; Norwood, Judge.

Proceeding by L. P. Williams against J. G. Hughes. Judgment for plaintiff, and defendant appeals. Modified.

E. F. Aydlott, for appellant. G. W. Ward, for appellee.

FURCHES, J. This is a proceeding under chapter 22, Acts 1893, for the purpose of locating and establishing the boundary lines between plaintiff and defendant. The plaintiff filed his petition with the clerk of the superior court, in which he alleges that he is the owner of certain lands adjoining the lands of the defendant, names the lines in dispute, and locates the same as he claims them to be. The defendant answers, and denies the plaintiff's allegations, and specially denies that plaintiff is the owner of any lands adjoining his lands; and the trial seems to have proceeded upon the allegations of the plaintiff and the denials of the defendant.

This is a new statute, and has been before this court for consideration in but one case that we remember. In that case it is said that it was intended to take the place of chapter 48, vol. 1, of the Code, which it expressly repealed. And we do not think it was intended to try title to land under this statute, but to procession, locate, and establish the lines between adjacent landowners. It gives this right to the owners of land, and provides that the occupancy of land by the petitioner shall be sufficient evidence of ownership to entitle the petitioner to relief under this act. Therefore, where the petitioner is not occupying the land, or is not in possession of the same, as was said in *Basnight v. Meekins*, 121 N. C. 23, 27 S. E. 992, and the defendant denies the title of the petitioner, it becomes necessary for him to show title, not for the purpose of enabling him to recover the land, but to entitle him to have the dividing line between him and the defendant located and

established. Whether this title should be such as would entitle the petitioner to recover in an action of ejectment, or only such title as would entitle him to possession as against defendant, need not be decided in this case, because, if the plaintiff had any title, it seems to have been derived from defendant.

Under the pleadings, the court submitted two issues: (1) "Is plaintiff the owner of the land described in section 1 of his complaint?" (2) "Are the true boundary lines between plaintiff and defendant those set out in section 3 of the complaint?" Both of these issues were answered in the affirmative. It seems to us that it was not necessary to submit the first issue as a distinct proposition, as the title was only incidentally in question, but that it would have been sufficient if the court had charged the jury that if they found, from the evidence, that the petitioner was the owner of the land mentioned in his petition, or was in possession of the same, they would proceed to locate the boundary lines between the plaintiff and defendant; and for this purpose it seems to us that it would be better to broaden the second issue by allowing the jury to locate the boundary line, whether it was where the petitioner alleged it was, or not. But this seems to have been sufficient in this case, as it was not objected to, and as the jury found that the dividing line was where the petitioner alleged it to be. While we do not think it was necessary to submit the first issue, we do not say that it was erroneous in the court to have done so.

There are three exceptions taken by the defendant, neither one of which can be sustained. The first is: "The defendant asked the court to charge the jury that, if they believed all of the evidence, the land described in the allotment of the homestead covers the land described in the petition of plaintiff, and they should answer the first issue, 'No.'" This prayer was refused, and the defendant excepted. This prayer could not have been given, as the evidence was conflicting as to whether it did or not. The court, among other things, charged the jury "that it was only necessary to show possession, and, if they found that the plaintiff was in possession of the land described in the petition, they would answer the first issue 'Yes.'" To this the defendant excepted. It seems to us that this was, in effect, telling the jury that, if they found that the petitioner was in possession of the land described in the petition, that was sufficient evidence of ownership to entitle the plaintiff to have the dividing line located. This is within the express provisions of the statute. The court also charged the jury that, "upon all the evidence, they should say where the line was." To this the defendant excepted. This exception cannot be sustained.

While we find no error for which a new trial should be granted, we are of the opinion that, as title is not an issue in proceedings under this statute, the judgment should be so reformed as to leave out of it all reference

to the title to the lands described in the petition, and should only provide for locating the dividing line between plaintiff and defendant, as provided for by the statute. The judgment, thus reformed, will be affirmed. Modified and affirmed.

WILSON v. ALLEGHANY CO. et al.
(Supreme Court of North Carolina. Feb. 21, 1899.)

INJUNCTION—WHEN GRANTED.

To authorize an injunction in cases of special proceedings, the relief sought by injunction must be subsidiary to the relief asked in the proceedings; and therefore a proceeding to have lands processioned, under chapter 22, Acts 1893, which merely locates the dividing lines, cannot be aided by an injunction, subsequently asked for, restraining defendant from trespassing on the lands.

Appeal from superior court, Hyde county; Brown, Judge.

Action by Eliza T. Wilson against the Alleghany Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. F. Warren, for appellant. John H. Small and W. B. Rodman, for appellees.

FURCHES, J. In July, 1898, the plaintiff commenced a special proceeding, against the defendant Alleghany Company and others, to have her lands processioned and lines established, under chapter 22, Acts 1893. In August, 1898, and while the above-mentioned proceeding was still pending, the plaintiff applied to Judge Brown for an injunction, based upon affidavit made in said proceeding, in which she alleged that the defendant company was committing trespasses upon her lands, by cutting and carrying timber therefrom. This prayer for injunction was denied, and the plaintiff appealed.

We must sustain the action of the judge in refusing to grant the injunction prayed for, and for the reasons assigned by him. A judge, in some cases of special proceedings pending before the clerk, may grant injunctive relief, as is held in *Hunt v. Sneed*, 64 N. C. 176, cited and approved in *Sprinkle v. Hutchinson*, 66 N. C. 450. But, to authorize the judge to issue injunctions in cases of special proceedings, the relief sought by the injunction must be subsidiary to the relief asked in the special proceedings. *Hunt v. Sneed*, supra. That could not be so in this proceeding, which gives no substantive relief,—settles no rights or titles to property,—but only locates the dividing lines between the parties. *Williams v. Hughes* (at this term) 32 S. E. 325. So the injunction could not be in aid of any relief demanded or attainable in the special proceedings to locate the dividing line between the parties, under chapter 22, Acts 1893, and *Hunt v. Sneed* does not aid the plaintiff. The judgment of the court, refusing the injunction, is affirmed.

BARRICKMAN v. MARION OIL CO.

(Supreme Court of Appeals of West Virginia.
Dec. 14, 1896.)

**NEGLIGENCE—NATURAL GAS—DEGREE OF CARE—
DEFECTIVE APPLIANCES—EVIDENCE.**

1. A person or corporation engaged in furnishing natural gas to stoves, heaters, pipes, etc., for purposes of domestic light, heat, and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of the business, that injury to others may not be caused thereby; that is to say, if the delicacy, difficulty, and danger are extraordinarily great, extraordinary skill and diligence is required.

2. If the defendant, so furnishing such gas, negligently and carelessly suffer and permit a greater amount of pressure of said gas to be furnished than is reasonably proper for said purpose, by reason whereof the house or building being so furnished is consumed or injured by fire, resulting from such negligence, the defendant is liable in damages for such loss.

3. If such defendant suffer and permit its regulators or other appliances to be and remain for an unreasonable time in such condition that they do not control the amount and pressure of gas so furnished, so that more than a safe and proper amount of gas is so furnished, the defendant is guilty of negligence, and liable in damages for injuries proximately caused by such negligence.

4. If such injury is the natural consequence of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence must be regarded as the proximate or direct cause of the injury, in the absence of intervening negligence.

5. The mere fact that a building so furnished with gas was set on fire from the gas is not sufficient to justify the inference that an increased pressure of gas caused the fire.

6. In the trial of an action against a corporation so furnishing natural gas to a dwelling house, for damages for causing the destruction of such house by fire by negligently permitting too great a pressure of gas, it is not competent to prove by a witness the bare fact of what pressure the gauge of another gas company usually indicated.

(Syllabus by the Court.)

Error to circuit court, Monongalia county; J. M. Hagans, Judge.

Action by Franklin Barrickman against the Marion Oil Company. Verdict for plaintiff, and defendant brings error. Reversed.

A. B. Fleming and U. N. Arnett, for plaintiff in error. Cox & Baker, for defendant in error.

McWHORTER, J. Franklin Barrickman brought his action of trespass on the case in the circuit court of Monongalia county against the Marion Oil Company, claiming damages for the destruction of a dwelling house, owned by him, by fire, occasioned by the negligence of the defendant in furnishing natural gas at said house for domestic purposes. On the 18th of February, 1896, defendant appeared, and demurred to the declaration, and to each count, in which plaintiff joined, and of which the court took time to consider. On the 24th of the same month the court overruled the demurrer, and the de-

fendant pleaded to the general issue. Plaintiff filed an amended declaration, when defendant again demurred to plaintiff's whole declaration, and to each count, which demurrers were overruled by the court, and defendant entered its plea of not guilty to both the declaration and the amended declaration. A jury was duly impaneled, the case tried, and on the 20th of February, 1897, the jury rendered a verdict for plaintiff, and assessed his damages at \$1,000. Defendant moved the court to set aside the verdict, and grant it a new trial, because the verdict was contrary to the law and the evidence, for permitting improper evidence to go to the jury, for rejecting proper and material evidence offered by defendant, because the court gave several improper instructions on behalf of the plaintiff, and rejected and refused to give proper instructions offered by defendant, and in not giving instructions asked for by defendant in the form as prepared by defendant, and in modifying and making changes therein and additions thereto, and in giving them in such changed and modified form; which motion to set aside the verdict and grant a new trial was overruled and denied, and defendant excepted, and the court entered a judgment on said verdict against the defendant. Defendant took nine several bills of exception, which were severally signed, sealed, and made a part of the record. The defendant applied for and obtained a writ of error, assigning as error the overruling of the demurrers to the declaration, and the amended declaration, and to each count; the permitting of improper evidence on behalf of plaintiff to go to the jury, as set out in bills of exception 5, 6, 7, 8, and 9; in giving plaintiff's instructions, and each of them, and in refusing defendant's instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, and each of them; and in refusing to give defendant's instruction No. 8 in the form prepared and requested by defendant, and in amending the same by making addition thereto by the court, and in giving same to the jury in the form as shown by bill of exception No. 4. It is claimed that the demurrer to the declaration and to each count should have been sustained. There are three counts, two in the original and one in the amended declaration; and it is claimed by appellant that these counts are inconsistent (especially the one in the amended declaration) with those contained in the original declaration. In the latter (the original) it is averred that the dwelling house destroyed was the property of the plaintiff, and makes no mention of the fact that it was occupied, or in possession of a tenant or agent. In the amended declaration it is averred to be the property of and owned by plaintiff, while it is in the possession of one Milton Rinehart, as the lessee thereof, and from the plaintiff. It is no less the property of plaintiff, being in the possession of plaintiff by his tenant, than if the possession was held by him in person, and the third count, or amended de-

laration, is simply to show the manner of the possession of the owner of the property, and is an eminently proper count. It is insisted that because it is averred, in substance, in all the counts, that it was the duty of defendant to control and regulate the quantity and pressure of gas in such manner that only such quantity and pressure as was necessary for fuel and domestic heat for said dwelling house should be furnished, the demurrers should have been sustained that the degree of diligence set forth in each count is greater than is required by law. Appellant says that: "If it can be claimed that because natural gas is a very dangerous substance, etc., and that, under certain circumstances, more than ordinary care can be required of a person or company furnishing it, such a rule would not apply in this case, as it is shown the appellant only had what is known as a 'high-pressure line' for its own use, and that the appellee and a few other householders in a small village were allowed to connect therewith for their own accommodation by means of their own gas line, called a 'service line,' and which was as much a 'gas line' as was the appellant's main." This may all be well said in the course of the trial on the merits of the case, but not on demurrer. It nowhere appears in the declaration that defendant had only what is known as a "high-pressure line" for its own use, and a few householders connected with it for their own accommodation. The theory of the declaration is that defendant was in possession of certain wells producing natural gas, and was engaged in the business of furnishing gas through its pipe lines to consumers for fuel and domestic heating purposes for consideration, and it is averred that it was so furnishing such gas to the said dwelling house, the property of said plaintiff, under contract, for valuable consideration, and, being so engaged, it was the duty of defendant to properly control and regulate the quantity and pressure of the said natural gas so far as same was necessary for fuel and domestic heat, which should be so furnished by it to and for said dwelling house; and then it is averred that on the day, etc., and at the county of Monongalia, the defendant wrongfully, negligently, and unlawfully caused, suffered, and permitted the said natural gas to run, flow, and pass out of and from the said wells producing natural gas, and out of and from the said lines of pipe, machinery, and apparatus of which the defendant was possessed, in and into and through the said burners, heaters, stoves, grates, pipes, lines of pipe of plaintiff (which were averred to be in good repair, and fit for the purposes for which they were used), in so great and large quantities, and with so great a pressure, that the said burners, heaters, etc., of plaintiff were then and there forced open, broken, thrown apart, and burst, and by reason thereof the said great and large quantities of gas did escape and pass

out of said pipes, burners, etc., in and into the said dwelling house, and was ignited, burned, and exploded by the fires then and there lawfully kept, and being in the burners, heaters, etc., by which means the said house was burned and destroyed. "The object of the declaration is to set forth the facts which constitute the cause of action so that they may be understood by the party who is to answer them by the jury, who are to ascertain the truth of the allegations, and the court, who is to pronounce judgment." Hogg, Pl. & Prac. § 140; Berns v. Coal Co., 27 W. Va. 285; Snyder v. Electrical Co., 43 W. Va. 661, 28 S. E. 733. The declaration in the case at bar is sufficient, and the court did not err in overruling the demurrers.

The second assignment is that the court erred in permitting the evidence mentioned in appellant's bills of exception numbered 5, 6, 7, 8, and 9, and in each of them, to go to the jury. That contained in bill No. 5 relates to certain questions asked witness Mrs. Berry, who lived some 300 or 400 yards from the house that was destroyed, and that was furnished with gas from the same pipe line. Witness was asked what the gas pressure was that day, at her home, about the time of the fire, and shortly before. She stated that it was very high; that she burned it in the cooking stove in the kitchen. "How high was it, and what did you do at your house, Mrs. Berry?" Answer: "Well, when I went out, the stove was red hot, and the wall was burning behind the stove." She was asked to describe to the jury how the gas was acting in the kitchen stove, and what it was doing. Answer: "Why the gas— The stove was red hot, and it was burnt behind the stove when I went out." She also said: "I first threw water on the fire, I guess." Also certain testimony of E. O. Weldman, who was supplied with gas at his blacksmith shop, from the same line, and 200 or 250 yards from the Barrickman house that was burned, where he was asked: "How was the pressure at your house that day at the time, or shortly before, the fire?" Answer: "The gas, I think, was stronger than usual." Also the same bill sets forth certain questions asked of witness Mrs. Rosa Sutton, who lived about 100 yards from the Barrickman house, and was furnished gas from the same main, who was asked to state what the condition of the gas pressure was about the time, or shortly before, the house was burned. Answer: "It was very high. Was over the stove at work, and it was so high that it shook the stove lids, and I got out of the way of it. I turned it off, and then went to the other fires, and could not get it regulated, and I turned it off from the house. When I heard of the fire, I turned it off from the house." Plaintiff's counsel also propounded the four following questions to the same witness, and received the following answers, as set out in said bill No. 5: "Q. Where did you go from the dwelling? A. To the store. Q. How was it there?

A. Just the same as in the house. Q. What was the condition of the gaslights in the store? A. Well, so high they blew out. Q. When you went to the stove in the kitchen, how was the gas acting? A. I said that I was trying to regulate it in the stove, and went to the sitting room, and could not regulate it there, and came back to the stove, and turned it off from the grate." Also witness Charles Hall, minister of the Methodist Protestant Church, who lived about 100 yards from the house that burned,—two houses between them. Witness' house was supplied with natural gas from the same main which furnished the Barrickman house, and he was asked: "What was the condition of the gas, and where were you?" Answer: "I was sick that morning, lying on a cot in the room where one of my fires was. I kept two fires, one in the stove and sitting room. My brother was with me. He was reading by the fire. Noticed the fire come on. I thought he didn't notice it, as he was reading, and I spoke to him, and directed the fire to be turned lower. The pressure seemed higher than usual." Also, in the same bill, witness Jacob Barrickman, who lived 125 or 150 yards from the house that burned, and was supplied with gas from the same main line, and got home about half past 11 o'clock, day of fire, was asked: "Now, Mr. Barrickman, when you came home, what was the pressure in your house? A. Well, I guess, when I came home, it seemed to be higher than usual. Q. I will get you to state to the jury what the pressure and condition of the gas was about the time the fire broke out in the Barrickman house, and shortly before. A. Well, I guess about 11, or between 11 and 12 o'clock, it came on very strong, high pressure, stronger than it usually came on in the store building there." This testimony so excepted to refers to the condition of the gas as to the force and pressure at the time of the fire; no regulator on the main pipe intervening between the house burned and houses occupied or referred to by the witnesses. Appellant cites the case of *Emerson v. Gaslight Co.*, 3 Allen, 410, to sustain its position. That case is not applicable. It was for damages sustained by sickness introduced and suffered in a certain building by inhaling the gas that escaped into the house, but evidence that the inmates of another house were made sick in consequence of inhaling the gas that escaped into their house from the same defect in defendant's pipes was held inadmissible. "The evidence should be limited to the effect of the gas upon those who hold in common, and, under similar circumstances, inhaled it." *Hunt v. Gaslight Co.*, 8 Allen, 169. The condition and pressure of the gas in the neighboring houses at the time of the fire, there being no intervening regulator or hindrance to the force of the gas between the burned house and the other houses mentioned, would clearly indicate what it was at the house of plaintiff, and

I see no valid objection to the answering of the questions.

Bill of exceptions No. 6 relates to the testimony of plaintiff, which refers to what took place between plaintiff and Charles J. Meeks, an employé of defendant, who had been asked by plaintiff to go to the house, and see if the fixtures were safe; complaint having been made about a leak of gas. Witness was asked and answered questions as follows: "Q. What was done in reference to the leak? A. He called my attention to the leak, and says, 'It is not safe,'—the way Charlie spoke to me; and, says I, 'Charlie, if it is not safe, I want you to take the gas out of the house until you know it is safe.' I told him to shut the gas out of our house until he knowed it was safe. Q. State whether or not it was repaired after that. A. It was repaired after that. Q. State whether or not Meeks approved of it after it was repaired. A. He did." Appellant insists that it owed no duty to appellee in reference to service line and gas fittings in the house and about the store, and that anything that Meeks did towards repairing them was done for and as the employé of appellee, or for his accommodation, and neither his acts nor declarations would bind appellant. Meeks testified that he was not the agent of defendant; that he was an employé, a laborer. It is true, he did so much of skilled work for defendant as to connect the service pipes with the main line, which was his only duty connected therewith; but, as alleged in the declaration, plaintiff was the owner of and put in the pipes, burners, etc., in his house, by himself, or his tenant, and it was his duty to keep the same in good order and repair. Meeks was only the agent of defendant in the line of his duties in its employ, and could not be called to the service of another without the consent of defendant, and it was improper to admit as testimony before the jury what Meeks told plaintiff in relation to the condition and repairs of the fixtures of plaintiff in his house and on his premises.

Bill of exceptions No. 7 relates to the evidence of E. O. Weedman, who was asked what the gauge at the regulator showed the pressure to be at the time of the fire, the house still burning, but nearly burned down, answered, "The hand was on the other side of the pin," and witness was asked "whether that gauge registered more than 180 pounds, or whether that was all it could register." He answered, "There was only 180 pounds marked on it." Witness had stated that once in a while for probably six months back he had gone to the register, and generally looked at what it stood at, and the best that he could remember, outside of the one time he had mentioned, he had seen it as low as 15 pounds and as high as 40 or 50; and was asked and answered the following questions: "Q. From that time on up to the fire, when you examined the gauge, about what would the pressure stand at?

A. Well, I have saw it as low, I guess. Q. Usually about what, ordinarily? You have seen it as low as that, and as high as that. About what was it usually? A. I suppose midway between, I reckon." To which exceptions were taken. Also the following questions and answers propounded to and given by witness Reuben Laytan (included in same bill of exceptions): "Q. Whether or not you examined it on that day, and what it registered? A. I went over and looked at it, after the fire was all over. Q. How shortly afterwards? A. It might have been two hours. Q. Mr. Laytan, was part of the house still burning? A. Yes, sir; there was fire there yet when I went there. Q. Mr. Laytan, how did that gauge register? A. 80 pounds, when I went there." This examination of witnesses was on the matter of the flow of the gas, and referred to the register of defendant at its regulator; and, while it was a little after the fire,—an hour or two,—it was corroboration of witnesses who had testified to the fact of an extraordinary flow of gas at and immediately before the time of the fire; and I think the testimony was competent, as well as that tending to show what the flow had been for some time before.

Bill of exceptions No. 8 relates to testimony of witnesses J. M. Gregg and Samuel McGara. Gregg, an employé of the Union Improvement Company, engaged in furnishing natural gas for fuel, light, and heating in the vicinity of Morgantown, had been employed in the office about four years, and was asked, "I will get you to state to the jury what that pressure is customarily," and, by the court, "What pressure is usually contained in gas lines that furnish gas for domestic use?" Answer: "I can only speak from the gauge in one office. All the examinations there I made of that gauge show from a half to a pound; sometimes a little lower than a half a pound, in cold weather." Witness McGara was asked and answered the following questions, to which exceptions were taken, as shown in said bill No. 8: "Q. I will get you to state to the jury what pressure is used by you, or is necessary to operate an oil well,—what pressure without fire and without steam. A. Well, 30 pounds pressure is enough to pump a well. Q. Mr. McGara, from your experience in the gas business, I will get you to state whether or not, in your judgment, 30, or 40, or 50, or 60, or 80, or 180 pounds of gas on the service line to dwelling house—say $\frac{3}{4}$ to $\frac{3}{8}$ inch pipes—is dangerous. A. I would not let that go into a house." These two witnesses were examined as experts. Gregg had been employed as bookkeeper in a gas office, and, as stated by himself, could only speak from the gauge in this office. Said he was not an expert; did not claim to know what pressure would be dangerous. It is not competent to prove, in this case, the bare fact of

what the gauge of some other gas company might show, unless accompanied by scientific explanations or expert testimony showing its relevancy; hence the evidence of Gregg should not have been admitted. Witness Samuel McGara had large experience, and could be considered an expert in the use of gas, as well as the handling and controlling of it, and his testimony, excepted to, taken in connection with the rest of his testimony, is not exceptionable, and it was properly admitted.

The ninth bill of exceptions relates to the introduction by plaintiff of a receipted gas bill made by defendant against E. O. Weedman, dated January 1, 1896, for "the use of gas as per contract to February 1st, 1896, \$3." This, I presume, was introduced to prove the fact that defendant was furnishing gas for consideration. This bill was made quite nine months after the injury complained of, and I fail to see the relevancy of it, even if it were a transaction between defendant and plaintiff, instead of a stranger. Its admission was an error; yet, I think, harmless.

At the request of appellee, the court gave to the jury the following instructions, numbered 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, and 14: "(1) The jury is instructed that a corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, to be used for the purpose of domestic heat and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be occasioned to others; that is to say, if the danger, delicacy, and difficulty is extraordinarily great, extraordinary skill and diligence is required. (2) The jury is instructed that it was the duty of the defendant, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying a community with natural gas for private habitation, to be used as fuel and domestic heating, to exercise such care, diligence, and skill in the conduct of its business as is proportioned to the danger or risk to the property of others. (3) The jury is instructed that if they believe from the evidence that at the time of the alleged injury and burning of the plaintiff's dwelling, mentioned in the declaration, the defendant, for a valuable consideration, was furnishing natural gas to the stoves, grates, burners, heaters, pipes, lines of pipe, machinery, or apparatus used for the purpose of fuel and domestic heat in and about said dwelling, and that the defendant negligently and carelessly suffered and permitted a greater amount of pressure of said gas to be furnished than is proper for said purpose, and that by reason thereof the plaintiff's said dwelling house

was consumed by fire, then the jury must find for the plaintiff, and assess his damages occasioned by such burning. (4) The jury is instructed that if they believe from the evidence that natural gas is a very dangerous, volatile, and explosive substance, then the person or corporation who furnishes it for valuable consideration to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, for the purpose of fuel for domestic heat, must use such care, skill, attention, and diligence in order that no greater amount or pressure thereof shall be so furnished than is proper to be furnished, and in order to prevent injury to the person or property of others, as is proportioned to the danger of such substance." "(6) If the jury believe from the evidence that natural gas is an extremely dangerous substance, and that the defendant, at the time of the burning alleged in the declaration, was furnishing, for a valuable consideration, such gas to the heaters, burners, stoves, grates, pipes, lines of pipe, machinery, or apparatus of the plaintiff, for the purpose of using such gas as fuel for domestic heat in and about the dwelling house mentioned in the declaration at the time of such burning, then it was the duty of the defendant under the law to use such care, diligence, and skill, both in providing proper machinery, regulators, and apparatus, work, labor, and attention, in order to control such gas, and the amount of pressure furnished to such dwelling house, as is in due proportion to the nature of the substance used. (7) If the jury believe from the evidence that the defendant, at the time of the alleged burning of the dwelling house of the plaintiff, mentioned in the declaration, was, for a valuable consideration, furnishing natural gas to said dwelling house or to the machinery and apparatus used in and about said dwelling house, for the purpose of burning natural gas for domestic heat and fuel, as mentioned in the declaration, and that the said defendant at the time of such burning negligently failed to provide all such appliances, regulators, and machinery as were reasonably necessary to control the amount and pressure of the gas so furnished, then such failure is negligence on the part of the defendant, and it is liable for such damage to the property of another as was the direct result of such negligence. (8) The jury is instructed that if it believes from the evidence that at the time of the burning of the dwelling house of the plaintiff, alleged in the declaration, the defendant, for a valuable consideration, was furnishing to and for the machinery and apparatus in and about said dwelling house, for the purpose of domestic heat and fuel, a substance known as 'natural gas,' and that at the time of such burning the defendant permitted and suffered its regulator or regulators to be in such condition that it or they did not control the amount and pressure of the gas so furnished, and that it had permitted and suffered its regulators to remain in such con-

dition for at least three or four months prior to the time of said burning, and that more than a safe and proper amount of gas was so furnished, then the defendant is guilty of negligence, and it is liable to the plaintiff for any damages occasioned to him directly caused by such negligence." "(10) The jury is instructed that if they believe from the evidence that the defendant was guilty of the negligence or carelessness charged in the declaration, and that the injury complained of was the natural consequence of such negligence or carelessness, and such as might have been foreseen and reasonably anticipated as the result of such negligence or carelessness, then such carelessness or negligence should be regarded by the jury as the proximate or direct cause of the injury. (11) The jury is instructed that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence. (12) The jury is instructed that remote negligence on the part of the plaintiff or those occupying the house in the declaration mentioned at the time of the alleged burning will not prevent the plaintiff from recovering for an injury for the destruction of his property immediately caused by the negligence of the defendant. (13) The jury is instructed that the negligence on the part of the plaintiff, in order to defeat of itself his recovery, must be a proximate cause of the injury. (14) The jury is instructed that the negligence of the plaintiff, Barrickman, or his tenant, Rinehart, in this case, which preclude a recovery, is where, in the presence of a seen danger, he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is not seen, but merely anticipated, or dependent upon future events, such as the future continuance of the defendant's negligence, plaintiff is not bound to guard against it by refraining from his usual course, being otherwise a prudent one, in the management of his property and business." To which appellant excepted by bill of exceptions No. 2. The argument against the giving of most of these instructions is the same as that used on the demurrer. Appellant insists that under the averments of the declaration, as well as the instructions, too high a degree of care and diligence is required of appellant in the handling of the gas; that there is a proper rule for each case as it arises; and it is insisted that in this case it is that of ordinary care and diligence.

In *Berns v. Coal Co.*, 27 W. Va. 285 (Syl. point 7), it is held that: "'Negligence' and 'ordinary care' are correlative terms. What constitutes ordinary care depends on the circumstances of each particular case. It is such care as a person of ordinary prudence would exercise under the circumstances." What are the circumstances of this partic-

ular case? Appellant was engaged in the business of transporting and furnishing to consumers an article of trade and traffic of the most delicate, explosive, and inflammable nature, and very dangerous, and the care and diligence of appellant must be commensurate with the danger incident to the handling of the commodity. Appellant cites *Bartlett v. Gaslight Co.*, 122 Mass. 209, to show that appellee's instructions 12, 13, and 14 especially were bad, where it was said: "The jury, in the main part of the charge, had been told that the burden of proof was on the plaintiff to show affirmatively that the injury was occasioned by the negligence of the servants of the defendant company, and that in no material degree did the negligence of the tenant of the plaintiff contribute to that injury. * * * The question is, was either of these parties negligent or not? If either, which? * * * The plaintiff must satisfy you upon the whole evidence, by a fair preponderance of evidence, that he was in the exercise of such care as a prudent man might reasonably be expected to exercise under the circumstances, and that the explosion was caused by the negligence of the defendant." The company is liable in damages "if the plaintiff's tenant was in the exercise of due care." Instruction 12 was not proper to be given, because it was not applicable. In the very nature of the case at bar, as disclosed by the record, plaintiff's negligence, if guilty of any, was not remote, but proximate; and the instruction was misleading. No. 13 is the law in that case, as laid down by this court in *Snyder v. Railroad Co.*, 11 W. Va. 14 (Syl. point 7), discussed by the court on page 37. The nature of that case differs very materially in many respects from the case at bar, and I can scarcely see how it can be made to apply here, unless there should be added to it, "unless the danger was such as no prudent man ought to risk." With these qualifying words it might have been given. Appellee's instructions Nos. 3, 7, and 8 should not have been given, because "they present a certain hypothesis [the negligence of defendant], and make the case turn wholly on it, disregarding another hypothesis [contributory negligence] fairly arising on the evidence." *Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255 (Syl. point 9); *McKelvey v. Railway Co.*, 35 W. Va. 500, 14 S. E. 261 (Syl. point 3). Instruction No. 10 is subject to very much the same criticism, and should not have been given without adding to it, "in the absence of intervening negligence," or something to the same effect. The other instructions of appellee were properly given.

Appellant asked the instructions Nos. 1 to 13, inclusive, which (leaving out No. 8) are referred to in bill of exceptions No. 3, and are as follows: "(1) The plaintiff, in order to recover in this suit, must satisfy the jury by a preponderance of testimony that the defendant was guilty of negligence, and that such negligence caused the injury. (2) The

mere fact that the house of the plaintiff was set on fire is not sufficient to justify the inference that an increased pressure of gas caused the fire. (3) If the jury believe from the evidence that the plaintiff and his tenant, Milton Rinehart, or either of them, had knowledge some time prior to the burning of the plaintiff's house that the pressure of gas in the defendant's lines was uneven and variable,—greater at some times than at others.—and if, by reason of such uneven and variable pressure, it was dangerous to use the gas from said line for lighting and heating the dwelling house owned by the plaintiff and occupied by Milton Rinehart, then the plaintiff was guilty of negligence in permitting the same to be used therein; and if the jury believe that the fire which destroyed said house was caused by an uneven and variable pressure of gas, he cannot recover damages against the defendant for the injuries sustained. (4) If the jury believe from the evidence that the plaintiff and his tenant, Milton Rinehart, or either of them, had knowledge, prior to the burning of said house, that the pressure of gas in defendant's lines was variable and uneven, and that the tenant left the gas burning in said house during his absence and the absence of his family therefrom, on the day and at the time of the so leaving of the gas burning during his and his family's absence from the house, this was negligence on the part of the tenant, which negligence of the tenant is to be imputed to the plaintiff, and the plaintiff cannot recover in this action. (5) If the jury believe from the evidence that at the time of the fire which destroyed plaintiff's house there was an unusual pressure of gas, as described in the declaration, and that said gas, with unusual force, came into the pipe and appliances and to the burners, valves, and fittings on the plaintiff's premises, and thus increased the quantity of gas where the same was to be consumed, yet the plaintiff cannot recover if the jury further believe from the evidence that the pipe, valves, fittings, and appliances placed on the plaintiff's premises for the purpose of conducting said gas from the defendant's line to said house were not in good order and repair, and were at the time of the fire unsafe for the use and consumption of said gas, and that by reason thereof the said gas escaped, or the quantity thereof being burned was increased, and caused the destruction of said house. (6) If the jury believe from the evidence that the plaintiff's tenant, Milton Rinehart, was guilty of negligence in the placing or maintaining on said leased premises the pipe, valves, fittings, and appliances which made the connection to conduct said gas from defendant's main into the house on said leased premises in an unsafe condition, and in not keeping and maintaining said pipe, valves, fittings, and appliances in good order and repair, and in proper and safe condition for the use and consumption of the gas, and that by reason

of which unsafe condition of said pipe, valves, fittings, and appliances said house was set on fire, and destroyed, by means of an explosion of said gas, or by means of increased heat or the escape of gas, occasioned, in whole or in part, by such unsafe and defective pipe, valves, fittings, and appliances, the negligence of the tenant, Milton Rinehart, should prevent the plaintiff from recovering in this action, and the jury should find for the defendant. (7) If the jury believes from the evidence that, at the time of the fire which destroyed the plaintiff's house, Milton Rinehart, the plaintiff's tenant, was guilty of negligence in not keeping and maintaining pipes, valves, fixtures, and appliances placed on the premises of the said plaintiff for the purpose of conducting the said gas from the defendant's main into the said dwelling house on said premises in good order and repair, and if the said negligence of the said tenant, in whole or in part, caused or occasioned the injury complained of and described in the declaration in this cause, the plaintiff cannot recover, and the jury should find for the defendant." "(9) If the jury believe from the evidence that the house of the plaintiff, described in the declaration, was by the defendant furnished and supplied with gas on the application of Milton Rinehart, the plaintiff's tenant, and that such gas was conducted from the defendant's main or gas line to said house by means of pipe, valves, fittings, and appliances laid and furnished by said tenant, with the consent of the plaintiff, and that pursuant to a promise made by said tenant that he, said tenant, would keep and maintain said pipe, valves, fittings, and appliances necessary and proper for the safe use and consumption of said gas in good order and repair, and that the fire which consumed the plaintiff's house was caused by an explosion of the gas in said house, or by any other means resulting from the escape or leakage of said gas, or the negligent manner of taking care of or using the same after leaving the defendant's main, the plaintiff cannot recover, and the jury should find for the defendant. (10) If the jury believes from the evidence that the injury complained of by the plaintiff in his declaration resulted from a cause which neither the plaintiff nor defendant knew of, and of which the defendant could not, by the exercise of ordinary care and prudence, have foreseen or known, the injury would be the result of accident, and for which the defendant would not be responsible, and the jury should find for the defendant. (11) Only ordinary care and prudence was required of the defendant in the conduct of its business and in the management of the gas line described in the declaration, and, if the jury believes from the evidence that the defendant exercised ordinary care and prudence in the delivering of its gas through the pipe line into the service line of the plaintiff or his tenant leading to the house which was destroyed, then the

plaintiff cannot recover for the injury complained of. (12) If the jury believes from the evidence that the defendant had upon its gas line from which it delivered gas to the plaintiff for use in his house, gas regulators in good order and sufficient to control the pressure and quantity of gas, and that the plaintiff used ordinary care in having its gas line and said regulators inspected and kept in good working order and safe condition, and that said regulators were so inspected within an hour or less of the time of the accident complained of in the declaration, and found to be in good order, and working properly, and the gas properly regulated and controlled thereby, and that from some unknown cause said regulators, or one of them, after said inspection, and before said fire, became temporarily and suddenly obstructed in some unknown way, which caused them, or either of them, to cease to work, or regulate said gas, and by reason of which the quantity and pressure of gas was enormously and suddenly increased to a high pressure, which occasioned the injury complained of in the declaration, the defendant is not responsible for such accident, and the plaintiff cannot recover in this action. (13) The jury is instructed that in this case negligence is the ground of the plaintiff's action, and that it therefore rests upon the plaintiff to trace the fault of his injury to the defendant, by proving negligence upon the part of the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if from these circumstances so proven by the plaintiff, and from all the evidence, including the evidence of the defendant, it appears that the fault of the injury was mutual, or, in other words, that the negligence is fairly imputable to the plaintiff or his tenant, the plaintiff cannot recover."

Appellant's instructions Nos. 1 and 2 were given. As to Nos. 3 and 4, in my view of the case, they are too sweeping. It is a fact known to all who have any knowledge of natural gas that the pressure is uneven and variable, greater at some times than at others, which facts are also abundantly shown in the evidence in this case; and by reason of such variable pressure it is more or less dangerous to use it; and, if instruction No. 3 is proper to be given, contributory negligence would have to be presumed in every case of this character. I think it simply tends to confuse and mislead the jury; and, if No. 4 is proper, then in no instance could a consumer leave his house with the gas turned on to any extent without being guilty of contributory negligence in case of destruction of his property from the gas. However, a majority of the court holds No. 3 to be good, and that the same should have been given, and that No. 4 was properly rejected. As to instructions Nos. 5, 6, 7, and 9, there was evidence tending to prove that the fixtures of plaintiff, especially those connecting the gas with the stove where the fire originated, were not well put

in, as shown by the evidence of Robert and Charles Barrickman, who did the work; that it was probably not a good job, or well done, and that Dr. Rhinehart, the tenant, had notice thereof; and also tending to show that such fixtures were not in good order and repair, and were not safe. In view of the evidence in the case, said last-named instructions were improperly rejected. Appellant's instructions 10, 11, and 12 are drawn upon appellant's theory of "ordinary care" only being incumbent upon it, and were properly rejected as presented, and should not have been given unless "ordinary care" was so qualified in said instructions to be "such care as is required by the dangerous character of natural gas." Instruction No. 13 is the law as laid down by Cooley on Torts (page 803, side page 673). He says: "The plaintiff must show the circumstances under which the injury occurred, and if, from these circumstances, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover;" and adds: "There is a legal presumption against negligence, upon which he is at liberty to rely, thus casting the burden of showing contributory negligence upon the defendant." The instruction is in consonance with plaintiff's instruction No. 11 "that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence"; and should have been given. *Gerity's Adm'x v. Haley*, 29 W. Va. 98, 11 S. E. 901, and *Carrico v. Railway Co.*, 39 W. Va. 86, 19 S. E. 571 (Syl. point 7).

Instruction No. 8, which is made the subject of bill of exceptions No. 4, is as follows: "(8) If the jury believe from the evidence that the house of the plaintiff described in the declaration was by the defendant furnished and supplied with gas upon the application of the plaintiff's tenant, Milton Rhinehart, and that such gas was conducted from the defendant's main or gas line to the said house by means of pipe, valves, fittings, and appliances laid and furnished by the said tenant with the consent of the plaintiff, and that such gas was furnished upon the promise of the said tenant that he would keep and maintain said pipe, valves, fittings, and appliances in good order and repair, the jury is instructed that it was the duty of the plaintiff, or his tenant, Milton Rhinehart, to see that the pipe, valves, fittings, and appliances and fixtures on the premises of the plaintiff described in the declaration, and which conducted the gas from the defendant's gas line to the premises of the plaintiff, were kept in good order and repair, and in proper and safe condition for the use and consumption of gas on the premises and in the house of the plaintiff; and if the jury believes from the evidence that such pipes, valves, fittings, and appliances which made the connections necessary to conduct

said gas from the defendant's gas line to said premises were not, at the time of the burning of the plaintiff's house, in good order and repair and safe condition for the consumption of such gas, and that the fire which destroyed the plaintiff's house was caused from gas, and that such fire was caused by escape or leakage of such gas, or the negligent manner of taking care of or using the same after leaving the defendant's main or gas line, the plaintiff cannot recover, even if the defendant was negligent as claimed by the plaintiff in his declaration." For the same reasons given above for granting instructions 5, 6, 7, and 9, this No. 8 should have been given as presented, and without the modification by the court as given.

For the reasons herein given, there is error in the judgment complained of, and the same is reversed and annulled, the verdict of the jury set aside, and the case remanded to the circuit court for a new trial to be had therein.

WOODWARD LUMBER CO. v. TRIPOD PAINT CO.

(Supreme Court of Georgia. Feb. 3, 1899.)

APPEAL—REVIEW—NEW TRIAL.

There was some evidence authorizing the verdict; and, the case having been fairly submitted to the jury, the discretion of the trial judge in overruling the motion for a new trial will not be controlled.

(Syllabus by the Court.)

Error from city court of Atlanta; J. D. Berry, Judge.

Action between the Woodward Lumber Company and the Tripod Paint Company. From the judgment the lumber company brings error. Affirmed.

Hamilton Douglas, for plaintiff in error. W. D. Ellis, Jr., for defendant in error.

PER CURIAM. Judgment affirmed.

BROWN v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

CRIMINAL LAW—APPEAL.

The verdict was amply sustained by the evidence, and the rulings complained of were not of such a character as to require the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Talbot county: W. B. Butt, Judge.

W. S. Brown was convicted of crime, and brings error. Affirmed.

J. J. Bull, C. J. Thornton, and J. H. Worrell, for plaintiff in error. S. P. Gilbert, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

LITTLE, J., absent on account of sickness

TEASLEY v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

CRIMINAL LAW—INSTRUCTIONS—EVIDENCE OF ACCUSED.

1. Under previous rulings of this court, it is not error on the part of the presiding judge, after having properly charged the jury in reference to the prisoner's statement, and after instructing the jury that they may believe that statement, in whole or in part, to the exclusion of the sworn testimony, to add, "remembering it is not under oath, and does not subject him to the penalty incident to a sworn witness." *Poppell v. State*, 71 Ga. 276; *Klug v. State*, 77 Ga. 734.

2. An examination of the record does not disclose that the judge erred in charging the jury, or in ruling on the admissibility of evidence, of which complaint is made in the motion for new trial; and, as the verdict is amply supported by the evidence, the judgment is affirmed.

(Syllabus by the Court.)

Error from superior court, Elbert county; Seaborn Reese, Judge.

Ed Teasley was convicted of crime, and brings error. Affirmed.

J. N. Worley, for plaintiff in error. R. H. Lewis, Sol. Gen., and Harrison & Bryan, for the State.

PER CURIAM. Judgment affirmed.

FORD v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

CRIMINAL LAW—APPEAL.

The evidence authorized the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

J. W. Ford was convicted of crime, and brings error. Affirmed.

J. W. Preston and M. H. Ayer, for plaintiff in error. Robt. Hodges, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

Decided by the First division, temporarily composed of LITTLE, FISH, and LEWIS, JJ.; the remaining justices, because of sickness, not participating in the decision.

LESTER v. STATE.

(Supreme Court of Georgia. Feb. 1, 1899.)

BURGLARY—EVIDENCE—POSSESSION OF STOLEN GOODS.

On the trial of an indictment for burglary, the possession by the defendant of goods taken from the house at the time of the burglarious entry may be shown, and will have more or less weight according to the recency of the possession and the explanation given of such possession. Such possession cannot, however, in any case, be sufficient to support a verdict of guilty, unless the breaking and entering be clearly shown.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; Seaborn Reese, Judge.

Edward Lester was convicted of burglary, and brings error. Reversed.

Sam L. Olive, for plaintiff in error. R. H. Lewis, Sol. Gen., and Harrison & Bryan, for the State.

LITTLE, J. We reverse the judgment of the court below because the record in the case does not show sufficient evidence to support the finding of the jury. To maintain a conviction for the offense of burglary, it is absolutely essential that proof of the breaking and entering be made. It is not at all necessary for the character of evidence which establishes the corpus delicti to be positive and direct; but it is necessary that the corpus delicti be shown by evidence which is legal, admissible, and which establishes the fact beyond a reasonable doubt. If one be found in the recent possession of goods shown to have been stolen from the house at the time of the breaking and entering, such possession is sufficient to connect the person in possession with the perpetration of the offense. But it is not, of itself, conclusive. *Jones v. State* (Ga.) 31 S. E. 574. In this case there were no external or internal evidences that the house was broken. The theory of the state was that it was entered by the unlocking of the door by some person unauthorized, but there was no proof, direct or circumstantial, that such was the case, other than from the fact that the property was stolen from the house, and apparently no other entry could have been made than by the means of unlocking the door. The loss of the property seems to have been relied on as a proof of the entry, and the possession of the defendant to be taken as a fact sufficient to authorize his conviction of the breaking and entering. This is not sufficient. As it is necessary, when the recent possession of goods stolen from the house at the time of a burglarious entry is relied on, to connect the defendant with such entry, the breaking and entering must be clearly shown before the circumstance of possession can in any way connect the defendant with the offense charged. Judgment reversed. All the justices concurring.

LANIER v. STATE.

(Supreme Court of Georgia. Feb. 1, 1899.)

ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.

On the trial of one charged with the offense of an assault with intent to murder, it is error for the court to charge the jury, "If the defendant cut his wife with a weapon likely to produce death, with malice, under such circumstances as would have made him guilty of murder, had death ensued, then I charge you that he would be guilty of the offense of an assault with intent to murder." And while this error is not entirely cured by further instructions of the court to the effect that the use of the deadly weapon would not of itself authorize the inference of malice, and that the jury would de-

termine the existence of malice, or not, from the character of the assault and the intent with which it was made, yet when it clearly appears from the undisputed testimony that the guilt of the accused was thoroughly established, and where there is nothing either in the testimony or in the prisoner's statement which could possibly authorize any inference that there was not an intent to kill under circumstances that make it an aggravated case of an assault with intent to murder, this court will not reverse the judgment of the court below in overruling the motion for a new trial because of error in the charge above quoted.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

Andrew Lanier was convicted of an assault with intent to murder, and brings error. Affirmed.

John R. Cooper and Oscar Brown, for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

LEWIS, J. Andrew Lanier was tried in Gwinnett superior court under an indictment charging him with the crime of an assault with intent to murder, was convicted, and excepts to the judgment of the court overruling his motion for a new trial. Briefly stated, the uncontradicted evidence, as shown by the record, is as follows: The person alleged to have been assaulted was the wife of the accused. The accused seems to have become angered on account of her talking with another man at or near a church in the county where the crime was alleged to have been committed. He made an assault upon her with a razor, cutting her three times; one of the wounds inflicted being in the neck, and came very nearly resulting in her death,—lacking, according to the physicians who examined the wound, only the thickness of paper in severing an artery, which, if cut, would necessarily have resulted in death. The wounds were large and deep, extending several inches. There was further testimony that the defendant had been drinking some that day, but was not drunk at the time of the assault. Just prior to the assault the accused threatened the life of his wife, by stating that he intended "to cut her damned head off." The following is the defendant's statement: "At the time I was said to do this, I did not intend to do anything of the kind. I didn't intend to hurt her, though I did hurt her in some way."

The only ground in the motion for a new trial that merits any consideration whatever is exception to the following charge: "Gentlemen of the jury, if the defendant cut his wife with a weapon likely to produce death, with malice, under such circumstances as would have made him guilty of murder, had death ensued, then I charge you that he would be guilty of the offense of assault with intent to murder." In the certificate of this ground of the motion, the court gave the following explanation with reference to the charge just quoted: "The court

charged that the mere use of a deadly weapon would not of itself authorize the inference of malice, and that the jury would determine the existence of malice, or not, from the character of the assault, and the intent with which it was made."

The charge of the court first above quoted is clearly error. It is based upon the idea that when an assault is made upon one, with malice, with a weapon likely to produce death, under such circumstances as would have made it murder, had death ensued, then the jury, as a matter of law, were compelled to find that the assault was made with an intent to kill. Such a presumption of an intent to kill does follow when a homicide has been committed, because the purpose of the law is to hold the slayer responsible for the consequences of his act,—not the consequences which might have ensued, but those which actually do ensue. But, when death does not ensue from an assault made with a deadly weapon, there is no foundation for such a presumption, the main ground of which is the killing itself. An intent to kill is a necessary element to constitute the offense of an assault with intent to murder. An assault may be made with a deadly weapon, and with malice, yet at the same time not made with an intent to kill. Whether there existed such an intent, or not, is a question of fact for the jury. In order for the law to infer an intent, there must have been a killing. This principle has been so thoroughly established in the following cases decided by this court, that any further discussion on the subject is entirely unnecessary: *Gilbert v. State*, 90 Ga. 691, 16 S. E. 652; *Gallery v. State*, 92 Ga. 463, 17 S. E. 863, and authorities cited in both cases. Nor can we say that the explanation given by the court entirely relieves the charge excepted to of error. The judge states that he further instructed the jury that the use of a deadly weapon would not of itself authorize the inference of malice, and that the jury would determine the existence of malice, or not, from the character of the assault, and the intent with which it was made. But the question is whether or not the use of a deadly weapon under circumstances likely to produce death would necessarily require, as a matter of law, that the jury should infer an intent to kill. While we think the charge complained of was error, yet we do not think this error of law is of such a nature as to require the grant of a new trial, in the light of the record before us. The testimony in behalf of the state leaves no room whatever for doubt that the accused made an assault upon his wife with an intent to kill her, and under circumstances that would have made it a most aggravated case of murder, had death ensued. From the brief statement that he made in his own behalf, there is no effort whatever to excuse or justify the deed, but merely to state, in explanation of the crime, that he was drinking at the

time, and did not intend to hurt her. The grant of a new trial could not, legally or rightly, result in any other verdict than that found by the jury. There being no room, therefore, to doubt the guilt of the defendant, we cannot say that the charge complained of operated with prejudice or injury against the prisoner. It would seem a mere farce in judicial procedure to grant a new trial in such a case, when the only legal and proper effect of such a course would be the same verdict by another jury. This court has in several cases committed itself to the doctrine that it does not necessarily follow, even in a criminal case, that a new trial will be granted, notwithstanding there may be palpable errors, either in the charge of the court to the jury, or in the admission or rejection of testimony. *Pascal v. State*, 77 Ga. 596, 3 S. E. 2; *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *Luby v. State*, 102 Ga. 633, 29 S. E. 494. Judgment affirmed. All the justices concurring.

ELDER v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

CRIMINAL LAW—APPEAL.

The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Jones county; John C. Hart, Judge.

Dave Elder was convicted of crime, and brings error. Affirmed.

W. T. Davidson, for plaintiff in error. H. G. Lewis, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

Decided by the First division, temporarily composed of LITTLE, FISH, and LEWIS, JJ.; the remaining justices, because of sickness, not participating in the decision.

BANIGAN v. NELMS, Sheriff.

(Supreme Court of Georgia. Feb. 4, 1899.)

APPEAL FROM CITY COURT—REVIEW.

This court has no power to review a decision made by the judge of the city court of Atlanta, unless the same was rendered in a "civil cause" or a "criminal proceeding" pending in his court or before him as judge thereof.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action between John J. Banigan and Austell and others. Judgment for plaintiff, and on an execution sale by J. W. Nelms, sheriff, and purchase by plaintiff, he excepted from a rule requiring him to furnish revenue stamps for the deed, and brings error. Writ of error dismissed.

J. H. Gilbert, for plaintiff in error. Goodwin, Westmoreland & Hallman, for defendant in error.

COBB, J. Banigan recovered judgment against Austell and others, and an execution issued upon this judgment was levied upon an improved city lot as the property of the defendants. The lot having been sold, and the sheriff being about to execute a deed to the purchaser, who was the plaintiff in *fi. fa.*, the question arose as to who should bear the expense of furnishing the revenue stamps to be affixed to the deed; it being conceded by the parties that under the provisions of the act of congress which went into effect July 1, 1898, the deed should be stamped. It was agreed between the sheriff and Banigan, the purchaser, that this question should be submitted to Hon. H. M. Reid, judge of the city court of Atlanta, from which court the execution had issued. The record does not show that the defendants in execution were parties to this agreement. It appears that on July 11, 1898, at chambers, the question was submitted to Judge Reid, who decided that the expense of furnishing the stamps should be borne by the purchaser. To this decision Banigan, the purchaser, excepted, and the case is here upon a writ of error based on his bill of exceptions.

In the argument here the question was raised as to whether this court had jurisdiction to review the decision of Judge Reid in this matter. The jurisdiction of this court to review the decision of the judge of the city court of Atlanta is determined by the same rules which give it jurisdiction to review the decisions of the judges of the superior courts. The statute declaring the jurisdiction of this court in reference to decisions made by judges of the superior courts provides that "either party in any civil cause, and the defendant in any criminal proceeding, in the superior courts of this state, may except to any sentence, judgment or decision, or decree of such court, or of the judge thereof, in any matter heard at chambers." Civ. Code, § 5527. It will be seen at a glance that in other than a "criminal proceeding" the power of this court is limited to the right to pass upon judgments, decisions, or decrees rendered in civil causes, either by the superior court, or the judge thereof, in a matter heard at chambers. It is absolutely essential that the decision complained of should have been rendered in a "civil cause" which was properly before the court or the judge at chambers. It is also necessary that such decision should have been rendered by him in the capacity as judge. This court has no authority to review a decision of the individual who happens to be judge when he is acting simply as an arbitrator or referee selected by persons who may be involved in a controversy other than a cause pending in his court. There being no cause pending before Judge Reid in which the question was raised as to

who should furnish the stamps necessary to be affixed to the deed, and the agreement between the parties being, in effect, simply to allow him to decide the question as referee or arbitrator, his decision in the matter was not such a "decision, judgment, or decree" as would be reviewable in this court. *Stanton v. Speer*, 69 Ga. 771; *Ashburn v. State*, 15 Ga. 248; *Harrington v. Harrington*, 15 Ga. 561; *Waters v. McNabb*, 30 Ga. 672. See, also, *Smith v. Head*, 75 Ga. 755. The case of *McGuire v. Johnson*, 25 Ga. 604, which was relied upon by the plaintiff in error as authority to sustain the jurisdiction of this court, is clearly distinguishable from the case now under consideration. It appears from the record in that case that there was a motion in term time to suspend the execution and retax the costs. The plaintiffs in execution, as well as the defendants in execution, were parties to the motion. The sheriff, who, at most, in such matters, is only a nominal party, was not a party to the writ of error. This was a "civil cause," within the meaning of the statute giving this court jurisdiction. The facts of the present record fail to disclose anything which would make the matter submitted to Judge Reid in any sense a "civil cause." The sheriff had had a sale. The deed by which it was to be consummated was about to be executed, and the question arose as to who should pay the expense of the stamps. The sheriff executed the deed and affixed the stamps, under an agreement with the purchaser that Judge Reid should decide who should pay for them. Judge Reid decided that the purchaser should pay, and in so doing he was only an arbitrator. There is no law providing for an appeal from his decision, and the parties must abide by the ruling of their arbitrator. Writ of error dismissed. All the justices concurring.

FLEMING v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

1. On the trial of one indicted for the illegal sale of whisky, it is error for the court to charge the jury, in effect, that if the accused had agreed to sell and deliver to another a certain quantity of such liquor at a stated price, and while the accused was in the act of separating this quantity from a bulk of the same article in a barrel he was prevented from carrying out his intention by an officer of the law, and for this reason did not complete a delivery of the liquor, then the jury might infer a delivery of the goods agreed to be sold.

2. The verdict of guilty in this case is contrary to the evidence, the testimony failing to show any sale of whisky as charged in the indictment.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

Peter Fleming was convicted of selling intoxicating liquors, and brings error. Reversed.

O. C. Brown and A. G. McCurry, for plaintiff in error. R. H. Lewis, Sol. Gen., for the State.

LEWIS, J. Peter Fleming was tried in the superior court of Hart county under an indictment charging him with the unlawful sale of spirituous and intoxicating liquors, to wit, whisky. To this indictment he pleaded not guilty. The evidence in behalf of the state was substantially as follows: On the 11th of August, 1897, the accused was, in Hart county, detected in drawing whisky from a barrel into a gallop pot. The barrel was located in a wagon. There were several bystanders present while the accused was engaged in this act of measuring whisky, and one of them had some change in his hand. A marshal of the town came up while the accused was engaged in this act of drawing whisky, when the bystander put his money in his pocket, and the accused ceased drawing the liquor, and emptied back into the barrel what he had drawn therefrom. The state's witnesses saw no whisky sold, and saw no money pass to the accused. The testimony for the accused tended to establish the fact that neither the wagon nor the whisky belonged to him, but to another party, who was in the crowd around the wagon at the time the marshal came up; that the accused had nothing to do with the liquor, and had no authority from its owner to sell the same. The accused himself stated that he never undertook to sell any liquor, that he had no right to do so, and that he simply went down to the wagon to purchase some for himself. He was found guilty, and excepts to the judgment overruling his motion for a new trial.

1, 2. One of the grounds in the motion for a new trial was alleged error in the following charge of the court: "In this case I charge you that if you believe the defendant at the time or on or about the time alleged in this indictment had liquor for sale, or whisky for sale; that he and anybody agreed upon a price to be paid for a certain quantity of that whisky, and the price was agreed to by both parties to it, and the parties consented thereto; and that the whisky, which in this case was in a bulk condition, and it was necessary, to complete the sale of the quantity sold, to separate that quantity from the bulk, and the defendant was in the act of separating the quantity of whisky agreed to be sold, for which a certain price was agreed to be paid, his intention and purpose at the time being to deliver that quantity of whisky so agreed to be sold at a price agreed upon, and while in the act of separating for that purpose he was interrupted from carrying out his intention and purpose by an officer of the law, and that was the reason why he did not complete the delivery,—then I charge you that you may infer that there was a delivery of the goods agreed to be sold at an agreed price, if any proof shows that, and the consent of the parties was had thereto." There

was also exception taken to a refusal by the trial judge to give in charge a written request of counsel for accused substantially to the effect that the above facts would not constitute a sale. The accused also moved for a new trial on the general grounds that the verdict was contrary to law and evidence. As a general rule of law, delivery of goods is essential to the perfection of a sale. Civ. Code, § 3545. It is true that the question of delivery is one largely of intention of the parties to the contract, and actual delivery may be dispensed with by agreement of the parties. A variety of instances might be cited which the law will construe into a constructive delivery of property, and a complete sale thereof might be had without any actual manual possession of the goods by the vendee; but there should be some evidence showing such a constructive delivery. The one thing perhaps essential in all cases to a complete sale of personalty is that the goods must by the vendor be put in a deliverable condition, especially in the absence of any agreement to the contrary. Where the article, for instance, as in this case, was in bulk, and particularly where it is liquid, stored in a vessel containing a larger quantity than that bargained for, it is absolutely necessary to separate the quantity purchased from the bulk, in order to make either a constructive or actual delivery of what was sold. Before this separation is complete, there can be no complete sale. Bish. Cont. § 1809. Another element essential to a complete sale of personalty is a relinquishment by the vendor to the vendee of dominion and control of the property sold. The vendor must do all the contract requires of him touching a delivery of the goods, before the sale thereof is complete. Unquestionably in this case no title to the whisky which the accused was charged with having sold had passed from him to anybody. Neither dominion nor custody of the liquor had passed from him. Had, by any casualty, the whisky bargained for been destroyed before there had been a complete separation of it from its bulky condition, undoubtedly the loss would have fallen upon the vendor, in this case, and not upon the vendee. Even if the evidence authorized the conclusion that there had been a contract of sale, the circumstances manifestly indicated that the parties contemplated a cash transaction, and that actual delivery should be had before the sale was complete. There was nothing whatever in the testimony authorizing the inference that there could possibly have been any other intention of the parties to the contract. The testimony simply makes out a case, if any at all, of an attempt by the accused to unlawfully sell whisky, and of his being intercepted while engaged in preparing the article for delivery, and before he had committed the crime with which he is charged. Even if there is such an offense known to our law as an attempt to illegally sell intoxicating liquors, the accused was neither char-

ged with nor convicted of such an offense. For the above reasons, we think there was error in the charge complained of, and that the verdict was without evidence to sustain it. Judgment reversed. All the justices concurring.

SIMMONS v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

GAMING—EVIDENCE—FORMER JEOPARDY.

1. The evidence not being sufficient to show that the plaintiff in error was guilty of the offense of playing and betting for money or other valuable thing, the conviction cannot be sustained.

2. Where an accusation under which one is tried and found not guilty is void, because it did not charge him with the commission of any offense, the accused was not in jeopardy; and on a subsequent trial, under an accusation which did legally charge him with the same offense, it was not error to instruct the jury that the former accusation was a nullity, and that they should not consider the same.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Lucius Simmons was convicted of gaming, and brings error. Reversed.

Thos. W. Thurmond, for plaintiff in error. J. D. Boyd, Sol. City Court, and O. H. B. Bloodworth, Sol. Gen., for the State.

LITTLE, J. On the 12th of September, 1898, the plaintiff in error was tried in the city court of Griffin for the offense of gaming. The jury returned a verdict of guilty. He made a motion for a new trial, which was refused by the court; and to that refusal he excepted, and assigns error on several grounds set out in the motion. These grounds, when considered together, really present but two questions: (1) Is the verdict contrary to law and the evidence in the case? (2) Did the court err in ruling that the plaintiff in error was not put in jeopardy on a trial for the same offense under an accusation previously preferred?

It appears in the record that on the 23d of July, 1897, an accusation was preferred against the plaintiff in error in the following words: "R. S. Ison, in the name and behalf of the citizens of Georgia, upon his oath, as appears by the above and foregoing affidavit, charges and accused Bob Jordan and Lucius Simmons, of the county and state aforesaid, with the offense of misdemeanor. For that the said Bob Jordan on the 18th day of July, in the year 1897, in the county aforesaid, did then and there unlawfully play and bet at a game played with cards, for money and other things of value, contrary to the laws of said state, the good order, peace, and dignity thereof." It appears that there was a trial of the plaintiff in error under this accusation, and that the jury returned a verdict of not guilty. On the trial under the present accusation, he filed a plea of former

acquittal, and introduced the first accusation, and the affidavit on which it was founded, as evidence of such former acquittal. In his charge, the judge instructed the jury that the trial under said first accusation, and the verdict as set out in the plea of former acquittal, was a nullity, and that the jury should not consider the same. The evidence upon which the plaintiff in error was found guilty was to the following effect: On Sunday evening a crowd of negroes was assembled at a room in Griffin. When discovered, they were sitting around a table where there were some playing cards and some pasteboard cards or chips. None of the witnesses saw any playing or money. One of the crowd told the policemen that they were playing for milk shakes. This was said in the presence of the defendant, and possibly he said so. Another witness testified that the crowd had chipped in and made up about 80 cents, and paid it to George Hunter for some milk shakes; that Hunter put the money in his pocket, and the crowd was playing for the milk shakes; the plaintiff in error chipped in with the others. The owner of the room testified that, when the police came, plaintiff in error had paid him for the milk shake for himself, and he was either just making it or had made it when the officer came in and arrested the crowd; that he had the money for the milk shakes, that was made up by the crowd, in his pocket; that the crowd were playing for this money, with the understanding that the man winning would take it, and set up the crowd to milk shakes. This concluded the evidence for the state, besides an admission that both cases were for the same transaction. We do not think this evidence warranted a verdict of guilty. It does not show directly that the accused was engaged in playing cards on that occasion, and it is difficult for us to say, from the very meager report of the evidence, that, even if he had been, he would have been guilty of playing cards for money or other valuable thing. The strongest evidence for the state is to the effect that, of the crowd which was playing, each contributed a sufficient amount of money to pay for the number of milk shakes (whatever they may be) necessary to furnish each with one of the beverages, and that, at the time they were playing, this money had been collected and paid over to the owner of the house, with the understanding that the man winning would take it and set up the crowd to the milk shakes. If this be true, then each one of the crowd was paying for his own milk shake, and nobody was winner and nobody loser. It is hardly probable that this version of the game that was played was true, but it is the testimony found in the record, without contradiction, and, of course, we are to be governed strictly by the case as it is made in the record; and we cannot say that such a game constitutes playing and betting for money or other valuable thing. The evidence is not, in our

opinion, sufficient to sustain the verdict of guilty.

2. It is apparent that the accusation upon which the plaintiff in error was first tried did not charge him with any offense. It is true that the prosecutor, in the name and behalf of the people of Georgia, charged and accused Bob Jordan and Lucius Simmons with the "offense of misdemeanor." This of itself would not have been a sufficient charge to have put either of the persons named on trial, because these words, without more, do not charge either of them with any violation of the laws of this state. After thus alleging the misdemeanor, the accusation proceeds, "For that the said Bob Jordan on 18th day of July, in the county aforesaid, did unlawfully play and bet," etc. So that the accusation, both in law and in fact, charged only Bob Jordan with the offense of playing and betting; and the jury trying Lucius Simmons properly returned a verdict of not guilty, as no evidence could have legally been admitted against him under this accusation. The constitution of this state (article 1, § 1, par. 8) provides that no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his motion, etc. It is a well-settled principle, in affording protection to defendants under this provision of the constitution, that, if the indictment is so defective as to be a good cause for arresting the judgment, there is no jeopardy. *Jones v. State*, 55 Ga. 625; *Reynolds v. State*, 3 Ga. 53; 1 Bish. Cr. Law, § 1021. We are referred to two cases as ruling that such an accusation was sufficient to put the defendant in jeopardy. The first is that of *Jordan v. State*, 60 Ga. 656. It appears in that case that the indictment was in the usual form, and charged Jordan alone with an offense, in the formal part, and it concluded thus: "For that the said —, in the county aforesaid, on the 10th day of July, 1877, did," etc. (giving the details of the charge). So there was but one person indicted. He was charged with a specific offense. In giving the details of that charge, his name was not repeated, but he was referred to as the "said —." The court ruled that an indictment which names the defendant, but afterwards, in charging the offense, leaves a blank, instead of renaming him, is not good in arrest. The other case is that of *Price v. State*, 67 Ga. 723. There the court made the same ruling as was made in the case of *Jordan v. State*, supra. These cases are clearly distinguishable from the one at bar. Here the formal part of the accusation set out that two persons were guilty of a misdemeanor, and, following that, it only charged one of them with doing acts which constitute a violation of the criminal laws of this state, and made no reference to the other in any way. If both names had been subsequently left blank, the cases cited would perhaps have been applicable; but, having charged two persons, the accusation proceeds

to set up that acts which constituted the offense were done only by one of them. The principle ruled in the two cases referred to has been carried to its utmost limit, and should not be extended. But they do not control the present case. In our judgment, the first accusation was void, and any judgment rendered against the defendant thereon should have been arrested. This being true, the plaintiff in error was never in jeopardy under that accusation, and his plea of former acquittal was not sustained by an inspection of the record, nor by the facts of the case. Not having been in jeopardy, he was properly put on trial under the present accusation, and the verdict of guilty, if founded on sufficient evidence, would have been sustained. Judgment reversed. All the justices concurring.

GIVENS v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

CRIMINAL LAW—EVIDENCE—TIME OF OFFENSE.

Where upon the trial in October, 1898, under a presentment found in September, 1897, of one charged with carrying a concealed weapon, it did not appear when the offense was committed, otherwise than "on the night of the 9th of August," a verdict of guilty was contrary to law and the evidence, and a refusal to grant a new trial was erroneous.

(Syllabus by the Court.)

Error from city court of Gwinnett; Sam J. Winn, Judge.

Jim Givens was convicted of carrying a concealed weapon, and brings error. Reversed.

R. W. Peeples, for plaintiff in error. F. F. Juhan, for the State.

PER CURIAM. Judgment reversed.

Decided by the First division, temporarily composed of LITTLE, FISH, and LEWIS, JJ.; the remaining justices, because of sickness, not participating in the decision.

SHEPHERD v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

CRIMINAL LAW—APPEAL.

The evidence fully sustains the verdict rendered, and there was no error in the charges or rulings by the court of which complaint is made. (Syllabus by the Court.)

Error from superior court, Stewart county; Z. A. Littlejohn, Judge.

George Shepherd was convicted of crime, and brings error. Affirmed.

B. F. Harrell & Son, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

Decided by the First division, temporarily composed of LITTLE, FISH, and LEWIS, JJ.; the remaining justices, because of sickness, not participating in the decision.

BRANDENSTEIN et al v. DOUGLAS et al.

(Supreme Court of Georgia. Feb. 3, 1899.)

CONTRACT OF AGENT—UNAUTHORIZED ACTS.

This being an action for damages alleged to have been sustained by the breach of a contract entered into between the plaintiffs and an agent of the defendants, in which it was stipulated that the defendants would deliver to the plaintiffs certain goods, which was not done, and the uncontradicted evidence in the case showing that the authority of the agent was limited to receiving proposals, his principals reserving the right to reject the same, and that the contract was not approved by such principals, a verdict in favor of the plaintiffs was contrary to law, and should have been set aside.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Douglas & Davison against Brandenstein & Co. Judgment for plaintiffs. Defendants bring error. Reversed.

Brandon & Arkwright, for plaintiffs in error. Lumpkin & Colquitt, for defendants in error.

PER CURIAM. Judgment reversed.

ANDREWS v. STATE.

(Supreme Court of Georgia. Feb. 2, 1899.)

BURGLARY—OWNERSHIP OF PROPERTY—NEW TRIAL.

The verdict not being without evidence to support it, and no error of law being complained of, this court will not interfere with the discretion of the trial judge in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; Seaborn Reese, Judge.

Garnett Andrews was convicted of burglary, and brings error. Affirmed.

Horace M. Holden, for plaintiff in error. R. H. Lewis, Sol. Gen., by Harrison & Bryan, for the State.

LEWIS, J. Andrews was indicted by the grand jury of Taliaferro county for the offense of burglary; there being two counts in the indictment, one charging him with breaking and entering a certain dwelling house, with intent to steal therefrom, and the other charging him, after having entered said house, with taking and carrying therefrom a certain watch and chain, "of the personal goods of Joe Calloway," with intent to steal the same. The accused was convicted of larceny from the house, and excepts to the judgment of the court overruling his motion for a new trial.

All the grounds in the motion for a new trial are covered by the general ones, that the verdict is contrary to law and the evidence. The only point insisted upon here in behalf of plaintiff in error is that the verdict is illegal because the evidence shows that

the property mentioned in the indictment at the time of the larceny belonged, not to Joe Calloway, but to his wife. The only witness on this point was Joe Calloway himself. On the direct examination he testified that the property in question belonged to him. On the cross-examination he swore that a week previous to the larceny he had given it to his wife. On the redirect and recross examinations he testified that the property had not been out of his custody or control; that, while he had promised to give it to his wife, he had never delivered it to her, and had never surrendered dominion and control over it; that it was stolen from the house at a place where he himself had placed it. From all the facts testified to by him, we cannot say the jury were not authorized to infer even absolute ownership of the property by Joe Calloway, and that the gift to his wife had never been perfected either by a constructive or actual delivery. Judgment affirmed. All the justices concurring.

LEWIS v. STATE.

(Supreme Court of Georgia. Jan. 31, 1899.)

HOMICIDE—EVIDENCE—NEW TRIAL.

1. The evidence sustained the verdict of guilty.
2. There was no error in overruling the motion for a new trial upon the ground of newly-discovered evidence relating to the insanity of the accused, when the only testimony in support of such ground was the affidavits of witnesses that they had known the accused for a number of years, and had been for a long time, and are now, of the opinion that he has been, is now, and was at the time of the killing, of unsound mind; it not appearing that any of the affiants were experts on the subject testified about, and no facts being related by them upon which their opinions were based.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

Robert Lewis was convicted of homicide, and brings error. Affirmed.

Arminius Wright, for plaintiff in error. C. D. Hill, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LEWIS, J. Robert Lewis was tried in Fulton superior court on an issue formed by a plea of not guilty to an indictment charging him with the murder of Charlie Haynes. It appears that the accused was an employé engaged in work on a building in the city of Atlanta under the immediate supervision of Charlie Haynes, another employé under the contractor having charge of the work. Haynes made a complaint to the contractor that Lewis was not doing his work properly, whereupon Haynes was directed to pay him off and discharge him, which was done. In a day or two afterwards the accused made his appearance upon the streets at or near the building, and as soon as Haynes came from the building the accused shot him without notice or warning, the wound resulting in al-

most instant death. The accused introduced no testimony, but made a statement to the effect that Haynes had no cause for discharging him; that he told Haynes at the time that he had a wife and two children, and they were dependent on him for support, and asked that he might continue his work. Haynes replied in a bolsterous manner, cursed him, and alluded to his wife as the "scarlet wife" the accused was keeping. The accused protested against the language of Haynes, and stated that his wife was as innocent a woman as there was in the world. and Haynes replied that, if he compared that "scarlet" with his wife, he would kill him, and the accused went off and got prepared; that he went back to the building that evening to get some money, with the view of returning to his home in the mountains, and met with Haynes, and, not knowing but what Haynes was ready for him, he concluded it was the best time then for him to kill him. The jury returned a verdict of guilty. A motion for a new trial was made upon the general grounds that the verdict was contrary to law and the evidence, and on the further ground of newly-discovered evidence, as shown by the joint affidavit of several affiants, attached to and made a part of the motion. The motion was overruled, and the accused excepted.

1. The testimony in this case not only authorized, but absolutely required, a verdict of guilty. Even in the light of the statement made by the accused, the killing was a deliberate assassination, with scarcely a mitigating circumstance attending the deed.

2. The main ground relied on by plaintiff in error is the one relating to the newly-discovered evidence upon the subject of insanity. The joint affidavit in support of this ground, signed by seven witnesses, recites as follows: "That they [affiants] know and are well acquainted with Robert Lewis, defendant in the above-stated case, that they have known him for a number of years, and that they have been for a long time, and are now, of the opinion that the said Lewis has been and now is of unsound mind, and that he was of unsound mind at the time he killed Foreman Haynes, of the Prudential Building, for which killing he is now under sentence of death. Deponents further say that they have good and sufficient reason for their belief in the insanity of the said Lewis, they frequently having seen evidences of it in their associations with the said Lewis for a long time before and up to the time of the homicide." There also appears in the record an affidavit executed by counsel for the accused, to the effect that, after his appointment by the court to defend the accused, the latter refused to talk about the case until a very short while before he was placed on trial, and that the attorney had no knowledge of, or means of discovering, the evidence shown to exist by the affidavit attached to the motion, and that affiant believes the newly-discovered evidence

shown to the court to be material, and that the verdict of the jury would have been different, had it been submitted to them. The conclusive reply to this ground in the motion is that, had the evidence as contained in the affidavit been offered, it would not have been admissible, for the reason that it does not appear the witnesses were experts, and they do not relate a single fact upon which their opinion of the insanity of the accused was based. Besides this, the affidavit does not indicate what opinion the witnesses had as to the extent of the unsoundness of mind with which they think the accused was afflicted,—whether or not it was of such a nature as to render him irresponsible for the commission of a crime. This case is controlled by the decision of this court in *Graham v. State*, 102 Ga. 650, 29 S. E. 582, and *Battle v. State* (decided at present term) 32 S. E. 160. Judgment affirmed.

Decided by the First division, temporarily composed of LITTLE, FISH, and COBB, JJ.; the remaining justices, because of sickness, not participating in the decision.

RIPLEY v. EADY et al.

(Supreme Court of Georgia. Feb. 3, 1899.)

BREACH OF BOND—DAMAGES—PLEADING—AMENDMENT.

1. The breach of an ordinary bond, conditioned for the performance of a specified act, does not give to the obligee an absolute right to recover the amount named in the face of the instrument. When such a breach occurs, he should sue for, and is entitled to recover, only the damages actually sustained.

2. A trial judge before whom a demurrer to a petition has been argued, and who reserves his decision thereon, is not bound, before rendering a judgment upon the demurrer, to give the plaintiff an opportunity to amend his petition.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by T. J. Ripley, receiver of the State Savings Bank, against Eady & Mayfield. Demurrer to petition sustained, and plaintiff brings error. Affirmed.

Anderson, Felder & Davis, for plaintiff in error. P. F. Smith, for defendants in error.

LUMPKIN, P. J. 1. The bill of exceptions in the present case alleges error in sustaining a demurrer to the plaintiff's petition. The action was brought by Ripley, as receiver of the State Savings Bank. He alleged that Eady & Mayfield, a partnership, had made and delivered to the bank a bond in the sum of \$1,000, the condition of which was that if Eady & Mayfield failed and refused, on demand, to purchase from the bank certain shares of stock in a land company, at the stipulated price of \$1,000, then the

makers of the bond were to be liable thereon. The petition alleged that the receiver had duly made upon the defendants a demand to purchase this stock, which was tendered to them by him, and that they "refused to accept said stock or to pay said sum, whereby said Eady & Mayfield became indebted to petitioner in the sum of \$1,000, besides interest at 7 per cent., * * * for which petitioner prays judgment against both of said defendants." It will thus be seen that the action was not one for damages because of an alleged breach of the contract set forth in the bond, but was an action of assumpsit, whereby the plaintiff sought to recover the face of the bond, with interest, just as if it had been a promissory note. It is manifest that the action was improperly brought. See *Dart v. Association*, 99 Ga. 794, 27 S. E. 171. Upon the facts alleged, the measure of damages which the plaintiff could recover was the difference between the contract price of the stock in question and its market value, in case it was really worth less than \$1,000. The action should have been brought accordingly, and the necessary fact alleged. The demurrer presented the proper objection to the plaintiff's petition. The court sustained the demurrer on the ground that the plaintiff failed to allege that the bank had itself made a demand upon Eady & Mayfield to purchase the stock. The right conclusion was reached, though the reason given for the same by the judge was not a good one, as not infrequently happens. *Lee v. Porter*, 63 Ga. 346. When the assets of the bank went into the hands of the receiver, he had the same right to make a demand upon Eady & Mayfield as the bank had previously enjoyed. The judgment rendered was, however, demanded, and will not be set aside merely because it was founded upon the wrong reason.

2. Another point in the case arose as follows: After hearing argument on the demurrer, the trial judge reserved his decision for a few days, and then entered an order sustaining the demurrer and dismissing the petition. Counsel for the plaintiff in error complain that the judge should have given them notice of his intention to enter this order, so that they might have an opportunity to amend. We do not understand that the judge was bound to do this. The question at issue had been presented and argued, and nothing was left but for the judge to decide it and frame an order accordingly. Even if the petition was amendable, no offer to amend was presented in due time. The duty of diligently looking after and protecting the plaintiff's interests devolved upon counsel, not upon the judge, who, so far as appears, was not asked at the hearing to grant an opportunity to amend before rendering his decision, in the event he should determine the demurrer was well taken. Judgment affirmed. All the justices concurring.

STEPHENS v. STATE.

(Supreme Court of Georgia. Feb. 2, 1899.)

CRIMINAL LAW—SECOND APPEAL—LAW OF THE CASE.

After a thorough and conscientious investigation of the evidence which was submitted in a former trial of this case, on a writ of error sued out to the refusal of the court below to grant a new trial, upon a conviction of murder, this court adjudicated that the evidence was not sufficient to authorize a conviction of that offense. Another trial of the case having been had, and a verdict of guilty of murder having been again rendered by the jury, and the court below having refused to grant a new trial, and it appearing that practically the same evidence as to the details of the homicide was adduced on the second trial as on the first, it follows, in view of the judgment of this court first rendered, that the conviction cannot lawfully stand. It was therefore error in the court below to refuse to set aside the last verdict, and its judgment is accordingly reversed.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

John Stephens was convicted of murder, and brings error. Reversed.

For opinion on former appeal, see 31 S. E. 400.

John R. Cooper, for plaintiff in error. Robt. Hodges, Sol. Gen., J. M. Terrell, Atty. Gen., and Anderson, Anderson & Grace, for the State.

PER CURIAM. Judgment reversed.

BLUTHENTHAL et al. v. MOORE.

(Supreme Court of Georgia. Feb. 3, 1899.)

CONTRACT—CONSIDERATION—GUARANTY—ACTION ON—PLEADING.

1. There is sufficient consideration to support an agreement to answer for the debt of another, when the creditor is thereby induced by the promisor to relinquish a valuable lien which he had acquired upon property to secure the original debt.

2. A complaint which clearly sets forth such an undertaking to answer for or guaranty the payment of the debt of a third person is good, though it does not allege the promise to be in writing, it not appearing from the plaintiff's petition that the agreement was merely verbal.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Suit by Bluthenthal & Bickhart against S. S. Moore. Demurrer to the petition sustained, and plaintiffs bring error. Reversed.

Glenn, Slaton & Phillips, for plaintiffs in error. R. J. Jordan, for defendant in error.

LEWIS, J. Bluthenthal & Bickart brought suit against S. S. Moore in the city court of Atlanta, presenting in their petition substantially the following case: J. B. Watkins was formerly engaged in the liquor business in the city of Atlanta, and in January, 1897, sold his stock of liquors to one A. J. Harp. At the time of this sale, Watkins was indebted

to petitioners; and, upon Harp taking possession of the property so sold, said Harp executed to petitioners a mortgage covering the indebtedness due petitioners by Watkins, which indebtedness Harp had assumed. Shortly thereafter Harp, being unable to secure from the city authorities a license authorizing him to run a barroom, delivered the stock of liquors back to Watkins. In the meantime petitioners had foreclosed their mortgage on said property, and Watkins was unable to open the barroom. In order to give Watkins an opportunity to sell liquors, S. S. Moore, the father-in-law of Watkins, agreed with petitioners that if they would accept from said Watkins certain promissory notes in lieu of the mortgage which had been given them by Harp on said property, and which was a superior lien thereon, and would release the foreclosure, and allow Watkins to get possession of the property and dispose of the same free from the incumbrance of the mortgage, he (S. S. Moore) would guaranty that the notes to be given by said Watkins would be promptly paid at maturity. Acting upon this promise of Moore, and his guaranty that the notes to be given by Watkins would be paid promptly at maturity, petitioners accepted from Watkins 10 promissory notes, each dated January 18, 1897, and each being for the sum of \$10, with interest from date at 8 per cent. per annum, due respectively in 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 months after date, also a note dated January 18, 1897, for \$6, due 11 months after date; and they allowed Watkins to go in possession of the property, and relieved the property from the foreclosure of their mortgage. Copies of the notes were attached to the petition. Petitioners further alleged that all the notes were due; that Watkins was not in the state, and they were unable to reach him by legal process, nor did they know his whereabouts. Judgment was prayed against Moore and Watkins on said indebtedness. To this petition the defendant, Moore, filed the following demurrer: "(1) Because there is no cause of action set out against this defendant; (2) because the declaration fails to show any consideration to the defendant, Moore; (3) because the guaranty set out in said petition is not alleged to be in writing, and the same, not being an original undertaking, is therefore void." The court sustained the demurrer, and plaintiffs excepted.

1. Section 3657 of the Civil Code declares that "a consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise." It follows from this that, in order for the consideration of a contract to be valid, it is not essential that any profit or benefit should accrue to the promisor, but the contract is equally as valid if any injury accrue to the promisee. It is true that, even if a promise to answer for the debt of another be in writing, it does not necessarily preclude inquiry

as to whether a consideration for the promise in fact exists. In *Davis v. Tift*, 70 Ga. 52, 53, it was decided: "A promise in writing to answer for the debt of another need not state the consideration therefor, but the fact of the undertaking being in writing does not preclude inquiry as to whether a consideration for the promise in fact exists; and a promise to pay the pre-existing debt of another, without any detriment or inconvenience to the creditor, or any benefit secured to the debtor in consequence of the undertaking, is a mere nudum pactum." That, however, is not this case. The detriment to the creditors arose out of the fact that, by virtue of the promise and undertaking sued on, they relinquished a valuable lien upon the property of their original debtor at a time when they had commenced to enforce the same, and thus lost the opportunity of making their money out of the principal obligor. Manifestly, then, there was sufficient consideration to support the contract, and the petition was not demurrable on that ground.

2. It is insisted, however, that the undertaking which is made the basis of this action was a guaranty to pay the debt of another, and, being a promise to answer for the default of another, it was not an original undertaking, and, under the statute of frauds, should have been in writing. Conceding that there are no facts set forth in the petition which would take this case out of the statute of frauds, we do not think that this ground of the demurrer is well taken. It nowhere appears in the petition that the promise made by the defendant in error was not in writing. That being the case, the court will not presume, when the contract was made, that there was any violation by the parties of the statute on the subject. The principle announced in the second headnote is fully covered by the decision of this court in *Draper v. Dry-Goods Co.*, 30 S. E. 566, where it was held that, "in a suit for damages growing out of a breach of contract, required by the statute to be in writing, the petition is not demurrable upon the ground that it does not set forth whether or not the contract was in writing." It is true, in that case the contract sued upon was not a promise to answer for the debt of another, but it was a contract involving the purchase of goods for a sum exceeding \$50. The principle decided, however, necessarily governs this case. It will be seen from the opinion and the authorities cited in the case above mentioned that the decision rests upon the rule that, where a statute in derogation of the common law requires certain contracts to be executed in a prescribed manner in order to be binding upon the parties, the law will not presume, in the absence of proof, that either party has violated the statute. From one of the authorities cited in that opinion is this quotation, which is directly applicable to the case now under considera-

tion: "Thus, a complaint upon an undertaking to answer for the debt of a third person is good, though it does not allege that either the promise or the consideration was in writing." 1 *Estee*. Pl. & Prac. § 320. Judgment reversed. All the justices concurring.

CARTER v. STATE.

(Supreme Court of Georgia. Feb. 2, 1899.)

ARSON—INDICTMENT—"HOUSE"—INSTRUCTIONS—
EVIDENCE—ACCOMPLICE—JURY—
QUALIFICATIONS.

1. It is not essential that an indictment for arson, charging the burning of an "outhouse," should allege whether or not the same was located in a city, town, or village.

2. A freight-car body, which has been detached from the wheels, and placed upon permanent posts near a railway track at a station, and to which a platform has been attached, thus constituting a structure to be used as "a freight warehouse," and which is used for this purpose only, is a "house," within the meaning of section 136 of the Penal Code.

3. Such a house, located elsewhere than in a city, town, or village, may be characterized as an "outhouse," though not appurtenant to any other building.

4. When the principle embraced in a request to charge is so fully covered by the general instructions given to the jury that they could not possibly be mistaken as to the true law of the point in question, refusing to give such a request is not cause for a new trial.

5. According to the rule laid down by this court in *Byrd v. State*, 68 Ga. 661, the acts and declarations of one accomplice, done and made during the pendency of a common purpose and effort to conceal a crime already perpetrated, are admissible against another accomplice.

6. A new trial will not be granted because of a refusal by the court to inquire whether or not any of the panel of jurors were disqualified by relationship, when it is not shown that in point of fact a juror thus disqualified was placed upon the panel.

7. The discretion of the trial judge in determining, upon conflicting evidence, whether or not a juror was impartial, will not, unless abused, be interfered with by this court.

(Syllabus by the Court.)

Error from superior court, Wayne county; J. L. Sweat, Judge.

H. B. Carter was convicted of arson and brings error. Affirmed.

Thos. E. Watson, Brantley & Bennet, and E. D. Graham, for plaintiff in error. John W. Bennett, Sol. Gen., Goodyear & Kay, and D. M. Clark, for the State.

LUMPKIN, P. J. Upon an indictment against H. B. Carter, D. H. Moody, F. Herrington, and Jim Moody, charging them with the crime of arson, Carter was separately tried and convicted. His bill of exceptions alleges error in overruling a demurrer to the indictment, and in refusing to sustain a motion for a new trial. We will undertake a brief discussion of the material questions thus presented.

1. The indictment charged the willful and malicious burning of "a certain freight warehouse," the property of the Southern Railway

Company, "the same being then and there an outhouse." The point made by the demurrer was that the indictment failed to allege whether or not the house alleged to have been burned was in a city, town, or village. The decision of this court in *Smith v. State*, 64 Ga. 605, practically settles this question. It was there held that: "Whether the outhouse burnt be in a city, town, or village, or not, does not affect the legal character of the offense. It affects the punishment only." Accordingly, a ruling of the trial court refusing to exclude testimony on the ground that the indictment failed to allege that the outhouse was not in a city, town, or village was sustained.

2. The next question for determination is whether or not the structure burned was a "house," within the meaning of section 136 of the Penal Code, defining the offense of arson. The evidence shows that the body of a freight car had been taken off the wheels, and placed near the railway track at a station, that it was supported upon permanent posts, and that a platform, to be used in transferring freights to and from the car body, had been attached to the same. It further appeared that the structure thus located was used as "a freight warehouse" by the railway company, in precisely the same manner as if it had been an ordinary warehouse built for this identical purpose. In view of these facts, we have no difficulty in holding that the structure in question was a "house," and accordingly we approve the instruction to this effect given by the trial judge to the jury. That the structure with which we are now dealing was not in shape like an ordinary house, or that a portion of the same had been formerly used as a movable car, does not prevent it from being, within legal contemplation, a house. It was certainly no longer a car; and having all the elements of permanency, and being adapted to the uses for which a warehouse is suitable, we see no reason why it should not be treated as a structure coming within the protection of the statute above cited. See, in this connection, *Williams v. State* (this term) 32 S. E. 129.

3. As will have been observed, the indictment alleged that this structure was an "outhouse." There was no evidence showing that the Southern Railway Company had or owned any other building at this station; and counsel for the accused thereupon insisted that the house in question could not, in legal contemplation, be an "outhouse," and, accordingly, that there was a fatal variance between the allegations of the indictment and the proof. It is true that the word "outhouse" primarily means a building adjacent to a dwelling house, and subservient thereto, but distinct from the mansion itself. See 2 Bouv. Law Dict. 341; Black, Law Dict. 859; And. Law Dict. 515. After careful consideration, however, we have reached the conclusion that the word "outhouse," as used in

sections 136, 141, and 142 of our Penal Code, as applied to a structure not located within a city, town, or village, is intended to embrace a house of any description which is not a dwelling house. In *Watt v. State*, 61 Ga. 66, this court held that the willful and malicious burning of a country church was indictable under section 4379 of the then existing Code, which is the same as section 141 of the present Penal Code. The status of a railway warehouse, located elsewhere than in a city, town, or village, cannot be legally different from that of a country church similarly situated. That all houses other than dwelling houses, thus located, were intended to be regarded as "outhouses," seems manifest from the provisions of section 142 of the Penal Code, which declares that "setting fire to an out-house of another, as described in the preceding section, shall be punished," etc.; for, unless this meaning be given to the word "outhouse" as used in section 142, we would have no penalty whatever for the offense of setting fire to a house of the kind described in the present indictment. The truth is, the prefix "out" was totally unnecessary in this connection, except for the exclusive purpose of distinguishing dwelling houses from other houses; but the use thereof should not, we think, be given the effect of defeating the legislative will, which clearly was to include buildings other than those which would ordinarily be understood as falling within the class designated by the word "outhouse."

4. All of the persons named in the indictment were accused as principals. The court was requested to charge that if Carter, who was then on trial, was guilty either as an accessory before the fact or as an accessory after the fact, he could not lawfully be convicted under this indictment. The court refused to instruct the jury in the precise language of the requests presented, but did charge the jury repeatedly, distinctly, and unequivocally, that the accused could not be convicted unless they were satisfied beyond a reasonable doubt that he was present at the time the arson was committed, and actually participated in its perpetration. A mind of even ordinary comprehension could not have failed to understand, from the plain and explicit language used by the judge, that no verdict of guilty could properly be returned against the accused unless the evidence showed his guilt as a principal. The jury must have known, from the instructions given them, that no matter how intimate a connection with the crime Carter may have had, either before or after its commission, he could not be lawfully convicted of the charge brought against him unless he was present and actually participated in the burning of the house. This being so, and the evidence tending to show his guilt as a principal being very strong, we do not feel constrained to order a new trial because of the court's refusal to give the requests above mentioned, although we do not hesitate to

say it would have been the better practice so to do.

5. The court admitted, over objection of the accused, evidence of certain acts on the part of D. H. Moody, and declarations immediately accompanying the same, and also a letter written by him to Herrington, all tending to show a guilty connection on Moody's part with the crime charged in the indictment, and also to some extent implicating Carter as a participant therein. These acts were done and these declarations were made some time after the arson had been committed, and the letter was written at a still later period; but there was, independently of the conduct and sayings of Moody with which we are now dealing, and of anything contained in his letter to Herrington, much evidence tending to show there was a conspiracy to steal goods from the warehouse and burn the building, and also to establish the state's contention that Carter was actively concerned, not only in the theft and arson, but also in a common intent and purpose on the part of the conspirators to effectuate a concealment of these crimes, and shield each other from detection and punishment. In other words, there was, outside of the evidence objected to, proof authorizing the conclusion that the alleged conspiracy embraced a "criminal enterprise," the scope of which included larceny, arson, and concealment. There was also some evidence warranting the inference that this enterprise was still pending on the occasions to which the evidence complained of as illegal related. It seems, therefore, under the decision of this court in *Byrd v. State*, 68 Ga. 661, that this evidence was admissible against Carter. In that case it was distinctly ruled that the acts and conduct of one accomplice during the pendency of the wrongful act, not alone in its actual perpetration, but also in its subsequent concealment, were admissible against another accomplice. This holding was doubtless based upon the idea that the criminal enterprise was still pending while the conspirators continued to be active in taking measures to prevent the discovery of the crime, or the identity of those connected with its perpetration.

6. One ground of the motion for a new trial complains that the judge erred in refusing to inquire whether or not any of the panel of jurors put upon the accused were stockholders in the Southern Railway Company, or were related to such stockholders. As it was not made to appear that any juror having such a disqualification was in fact upon the panel, this ground is obviously without merit.

7. The only remaining ground of the motion for a new trial which need be noticed is one alleging partiality on the part of a juror. This ground was supported by evidence going to show that prior to the trial the juror in question had used expressions indicating prejudice against the accused. By way of

counter showing, however, the juror made an affidavit positively denying the use of the language imputed to him, and was in this respect corroborated by other evidence. It therefore simply appears that, upon a conflict of testimony which would have warranted a finding either way, the judge held that the juror was not incompetent to try the accused, and certainly there was no abuse of discretion in so doing. Judgment affirmed. All the justices concurring.

CHARLON v. STATE.

(Supreme Court of Georgia. Feb. 3, 1899.)

HOMICIDE—COUNSEL—APPOINTMENT TO DEFEND—CONTINUANCE—DISCRETION—REVIEW—INSTRUCTIONS—VERDICT.

1. Under the attendant circumstances, it was not error for the court, before an indictment was found against the prisoner, to appoint counsel for his defense, and at the same time to set a day for his trial.

2. The time to be allowed counsel to prepare for trial is in the sound discretion of the trial judge, which discretion will not be interfered with by this court unless abused.

(a) No unusual or intricate matters of law or fact appearing, and nothing being shown as to public excitement, there was no abuse of discretion in overruling the motion for a continuance upon the grounds of want of time to prepare for trial and of public excitement.

3. Where, on a trial for murder, it appeared that the accused shot at K., but killed M., and the court charged sections 64 and 65 of the Penal Code, defining voluntary manslaughter, such charge was not misleading, as having the effect of instructing the jury that, to reduce the homicide from murder to manslaughter, they must find that M. actually assaulted or attempted to commit a serious personal injury on the accused; especially where the judge further charged "that if the defendant did not intend to kill [M.], but [K.], if it would not have been murder had he killed [K.], then his killing [M.] would not have been murder," and there was a verdict finding the accused guilty of murder.

4. The evidence, if not the statement of the accused, demanded the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; *R. Falligant*, Judge.

John Charlton was convicted of murder, and brings error. Affirmed.

Gordon Saussy and W. T. Johnson, for plaintiff in error. W. W. Osborne, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

FISH, J. The first and second grounds of the motion for a new trial were the general grounds that the verdict was contrary to the law and the evidence. These will be considered in disposing of the other grounds.

1. The third and fourth grounds complain that it was error for the court, before an indictment was found against the plaintiff in error, to appoint counsel for him, and to assign the case for trial. In certifying to these grounds, the trial judge says that counsel were appointed after inquiring of the plain-

tiff in error, and on his message that he had no counsel, and wished counsel assigned him; that, when counsel were appointed, the court immediately placed at their command everything to obtain witnesses, if any were required. Under these circumstances, we can see nothing harmful to the rights of the plaintiff in error in the action of the court. The appointment of counsel seems to have been at the instance of the accused, and he will not be heard to except to the granting of his own request. The day set for the trial was subsequent to the finding of the indictment, and there was nothing in assigning the case for trial which would prevent plaintiff in error from having it continued when called, if there should then exist any valid reason why the trial should not then proceed. In fact, counsel seem to have so understood, as they filed a motion at that time for a continuance.

2. The fifth ground of the motion for a new trial was that the court erred in overruling the motion for a continuance made by the plaintiff in error, upon the grounds that he and his counsel had not had sufficient time since the appointment of counsel and the finding of the bill to prepare for trial, and because public feeling was so excited against him at the time that he could not obtain a fair trial. In refusing the continuance, the court stated to counsel for the accused "that, if the defendant would point out or name any one or more witnesses whom he desired, they should be subpoenaed at once." Counsel had Saturday, and until the case was called, on Tuesday, to consult with plaintiff in error and prepare for his defense; and, if there had been anything unusual about the case requiring more time for its preparation, it should have been shown when the motion for continuance was made. See *Stevens v. State*, 93 Ga. 307, 20 S. E. 331 (Syl. point 2). The accused had no absent witnesses; there was nothing peculiar about the facts of the case; and no theory of defense was suggested requiring special preparation. It must be left to the sound discretion of the trial judge to determine what time should be allowed counsel to prepare for trial, and such discretion will not be interfered with by this court unless abused. In *Walton's Case*, 79 Ga. 446, 5 S. E. 203, the homicide occurred Friday night. On Monday following, the presiding judge, in anticipation of the indictment, appointed counsel to represent the defendant. An indictment for murder was found on Tuesday, and the case was then set for trial on Wednesday morning. When it was called, the accused moved for a continuance, on the ground that he was not ready for trial, because his counsel had not had an opportunity, since their appointment and the finding of the indictment, to look into the case and make due preparation. The motion for continuance was overruled, and upon a writ of error to this court the decision of the trial judge was affirmed; *Blandford, J.*, delivering the opinion, and distinguishing *Blackman's Case*, 76 Ga.

288, also citing *Moody's Case*, 54 Ga. 660. See *Eberhart's Case*, 47 Ga. 598.

No facts were shown in support of the motion for continuance on the ground of public excitement and prejudice, and there was nothing to take the case out of the general rule, so frequently laid down, that public excitement and prejudice alone are not sufficient cause for continuance. See cases cited under section 961 of the Penal Code. Even if the ruling of the court on the motion for continuance had been erroneous, in view of the evidence subsequently submitted and also the statement of the accused, such error was not cause for a new trial.

3. We do not think that the judge's charge on the subject of voluntary manslaughter was misleading because, in effect, instructing the jury that, to reduce the homicide from murder to manslaughter, they must find that McLeod actually assaulted or attempted to commit a serious personal injury on the defendant. In charging on the subject of voluntary manslaughter, the court read all of sections 64 and 65 of the Penal Code, defining that offense. In our opinion, the effect of so doing was not as contended for by counsel for plaintiff in error. We do not think that it can be reasonably presumed that any sensible jury, by hearing the law of such sections read, would be misled into believing that as the accused shot at Kracken, and unintentionally killed McLeod, to reduce the homicide from murder to voluntary manslaughter it must appear that McLeod assaulted or attempted to commit a serious personal injury on the accused. The court further charged the jury as follows: "I charge you that if the defendant did not intend to kill McLeod, but Kracken, if it would not have been murder had he killed Kracken, then his killing McLeod would not have been murder." The jury must have understood the converse to be true,—that, if it would have been murder had the accused killed Kracken, then his killing McLeod would be murder. They evidently believed, from the law and the facts before them, that, if Kracken had been killed by the shot which killed McLeod, it would have been murder, and that, therefore, the killing of the latter was equally murder.

4. The evidence, if not the statement of the accused, conclusively showed that he was guilty of murder, and there was no error in overruling the motion for a new trial. Judgment affirmed. All the justices concurring; *LITTLE, J.*, specially.

HUFF v. STATE.

(Supreme Court of Georgia. Feb. 4, 1899.)

RAPE—EVIDENCE.

1. On the trial of one indicted for the crime of rape, it is error for the court to refuse to allow counsel for the accused, on cross-examination of the party alleged to have been raped, to undertake to show by her that, after the alleged criminal act, she desired all the time to settle the

case, and stop the prosecution. Such an error will require a new trial in a close case, especially where the guilt of the accused is entirely dependent upon the credibility of such a witness.

2. Other than as above indicated, there was no material error committed at the trial.

(Syllabus by the Court.)

Error from superior court, Elbert county; Seaborn Reese, Judge.

Ran Huff was convicted of crime, and brings error. Reversed.

Sam L. Olive, for plaintiff in error. R. H. Lewis, Sol. Gen., and Harrison & Bryan, for the State.

LEWIS, J. The accused was indicted and convicted for the offense of rape, with a recommendation to mercy. A sentence of 12 years in the penitentiary was imposed upon him by the court. He made a motion for a new trial, which was overruled, and he excepted.

1. It appears from the record that the party alleged to have been raped was introduced as a witness in behalf of the state. On her cross-examination by counsel for the accused, she was asked the following question: "Isn't it a fact that you have wanted to settle this thing, and stop it, all the way along?" The court refused to permit the witness to answer this question, which ruling was excepted to, and is made one of the grounds in the motion for a new trial. We are inclined to think that, as a general rule, where one is on trial for a crime involving a great personal wrong or injury to another, any conduct of the alleged injured party that might properly be considered by the jury as inconsistent with the theory that such person was injured as alleged, would be admissible in evidence in behalf of the accused. When the alleged victim of the wrong is upon the stand as a witness against the accused, the question as to whether or not counsel for the accused has a right, upon cross-examination, to inquire into the conduct, acts, or sayings of such a witness, after the alleged crime, with the view of showing that such conduct is inconsistent either with the guilt of the accused or with the testimony given by the witness, is free from doubt. The right of a thorough and sifting cross-examination of a witness in all matters material to the issue is one recognized and emphasized by the law, and courts should be cautious in abridging such right. It, of course, does not necessarily follow that an effort by the prosecutor to settle a criminal case would tend to show either the innocence of the accused or the want of good faith in the prosecution. This would depend upon the facts and circumstances of each particular case; for instance, upon the nature and gravity of the offense charged, the relation of the parties, and their intelligence and condition in life. As to what weight such testimony would or should have is not a question of law, but one alone for determination by the jury. In *Gaines v.*

State, 99 Ga. 704, 26 S. E. 760, it was decided that "evidence that the father of one accused of crime endeavored to effect a settlement of the prosecution may, in some instances, be competent, as affecting the father's credibility as a witness." Justice Lumpkin, in delivering the opinion in that case, on page 705, 99 Ga., and page 760, 26 S. E., says: "As the father of the girl testified as a witness for the state, evidence that he undertook to compromise with the father of the accused was unquestionably relevant, as affecting the credibility of the witness." It follows, therefore, that the court erred in refusing to allow the witness in this case to answer questions by which it was sought, by counsel for the accused, to show that she desired or had made efforts to compromise or settle the case, and stop the prosecution. Under the facts of this case, we think the error requires a new trial. We do not deem it proper to express or intimate any opinion as to whether or not the testimony was sufficient to authorize the verdict. But we only consider the testimony, with the view of determining the materiality of this erroneous ruling of the court. The guilt of accused, so far as shown by this record, depends entirely upon the credibility of this one witness, who swears to an outrageous and unnatural crime against her own father, an old man, and the head of a family, consisting of his wife and 18 children. We think the error of the court in restricting the cross-examination of this witness, as above indicated, might, under the facts and circumstances disclosed by the record in this case, have operated injuriously to the accused, and for this reason a new trial is granted.

2. There were other grounds in the motion for a new trial, complaining of other rulings and charges of the court, but we do not deem them of sufficient merit to require any special attention. Other than as above indicated, there was no material error of law committed upon the trial. Judgment reversed. All the justices concurring.

MAYER et al. v. MOREHEAD.

(Supreme Court of Georgia. Feb. 4, 1899.)

LEASE OF FARM LANDS—CONSTRUCTION—LOSS BY FIRE.

Where farming lands were rented for a term of years, and the tenants agreed "to keep up all repairs at their own expense, fire and providential causes excepted," the whole rent could be recovered, notwithstanding the total destruction, by accidental fire, of a gin house situated on the rented premises.

(Syllabus by the Court.)

Error from superior court, Dougherty county; A. H. Hansell, Judge.

Action by Mrs. L. L. Morehead against Mayer & Crine. Judgment for plaintiff. Defendants bring error. Affirmed.

D. H. Pope & Son, for plaintiffs in error. Jones & Bacon, for defendant in error.

FISH, J. Mrs. L. L. Morehead, as executrix, sued out a distress warrant against Mayer & Crine for \$700 rent, claimed to be due for the year 1897 for certain farming lands in Dougherty county. Defendants filed a counter affidavit, and, on the trial, put in evidence a lease from plaintiff to them, the material parts of which were that plaintiff leased to defendants the Mud Creek and Walker places, or farms, from 1893 to 1898, at a rental of \$700 a year, and the lessees agreed "to keep up all repairs at their own expense, fire and providential causes excepted," which lease was signed by plaintiff and defendants. The bill of exceptions states that the "defendants then swore Daniel Mayer, one of the defendants, and Charles Bledsoe, and proposed to prove by them that the gin house on the said place was destroyed by fire prior to the fall of 1896; that plaintiff was notified of it, and declined to rebuild or replace it; that defendants raised 200 or 300 bales of cotton on the land rented; that they had to haul it to be ginned on another place, several miles off; that it cost \$2 a bale to have it ginned in this way; that it could have been ginned on the place, by the hands employed, without extra expense to the defendants, and that defendants could have made, without extra expense to themselves, \$200 or \$300 a year by ginning their neighbors' cotton; that they paid the rent of 1896 under protest, and gave notice of their right to a reduction thereon, on account of the burning of said gin house, at and before paying the same; that said farms were large, and had all necessary buildings, tenant houses, and the like for running the same, except the burned gin house." Plaintiff's counsel objected to the introduction of this testimony, and the court sustained the objection. Defendants offering no other evidence, a verdict for \$700 was rendered for the plaintiff, and defendants excepted.

The question for our decision, therefore, is whether the learned trial judge committed error in rejecting the testimony proffered by the defendants. Where an estate for years is created, our Civil Code (section 3113), following the common law, makes the tenant bound for all repairs or other expense necessary for the preservation and protection of the property; but where simply the relation of landlord and tenant exists, the tenant in such case having no estate, but only a usufruct in the rented premises, the civil law is adopted, and the landlord must keep the premises in repair (section 3123); and if, on notice, he fails to do so, the tenant has a right of action, or he may recoup against the rent (*Lewis v. Chisholm*, 68 Ga. 40). Instead, however, of applying to the relation of landlord and tenant the rule of the civil law, that where the rented premises are "destroyed by an inundation, an earthquake, or other event, the lessor, who was bound to give the property, cannot demand the rent, and will be bound to return so much of it as he has received," Civ. Code, § 3135, again following the common law, pro-

vides that "the destruction of a tenement by fire, or the loss of possession by any casualty, not caused by the landlord, or from defect of his title, shall not abate the rent contracted to be paid." So, if a rented dwelling be unroofed by a storm, the landlord, upon notice, is bound to repair it, or the tenant will have a right of action, or may recoup against the rent; but, if the storm completely destroys the dwelling, the landlord is not required to replace it, nor does the rent abate. This may not be consistency, nor the perfection of human reason, but it seems to be the law of this state. In the present case, if the gin house had been the only property rented, and it had been merely damaged by fire, the landlord, unless otherwise stipulated, would have been bound to repair it; but, if it had been totally destroyed by fire, the landlord would not have been bound to replace it, nor would the rent have abated. What did occur in this case was that farming lands, together with all the necessary buildings, including a gin house, were rented for a term of years, the tenants expressly agreeing to keep up all repairs, except such as might be made necessary by fire or providential cause; and the gin house was accidentally destroyed by fire during the term. It is clear that the tenants, under their contract, were not required to rebuild it. Nor did any implied covenant to rebuild on the part of the landlord arise from the mere exception of repairs on account of fire and providential cause in the tenants' covenant to "keep up all repairs at their own expense."

Was the landlord bound to rebuild the gin house under the law? That depends upon whether its rebuilding was necessary to keep the rented premises in repair. The words "keep * * * in repair," as used in section 3123 of the Civil Code, are not technical words, but are used in their ordinary sense. The usual meaning of "to repair" is "to mend; to restore to a sound state what has been partially destroyed; to make good an existing thing;" not to make a new thing, such as erecting a new building to take the place of one destroyed. If the landlord was bound to replace the burned gin house, then she would have been equally bound to have replaced the dwelling, the tenant houses, the stables, the barns, all necessary buildings on the farms, had they been burned, and to have replaced them as often as they might have been destroyed during the term. We do not think the law requiring the landlord to keep the rented premises in repair means that he shall rebuild buildings wholly destroyed by casualty not caused by him. According to the evidence offered by the defendants, the gin house constituted a very substantial part of the rented premises, and was of much benefit to defendants; but, if true, such facts could not be sufficient reasons, under our law, for requiring the landlord to rebuild it after it was destroyed, when, under section 3135 of the Civil Code, the destruction or loss of rented property by casualty shall not abate the rent con-

tracted to be paid. The enforcement of this rule seems a hardship; but it is the law, and tenants, if they are unwilling to take the risks, may protect themselves by stipulating, in their rent contracts, against liability for future rent in the event of the destruction of the premises. Under our view of the law, we are constrained to hold that there was no error in rejecting the evidence offered by the defendants. Judgment affirmed. All the justices concurring.

HOBBS v. HAMLET.

(Supreme Court of Georgia. Feb. 3, 1890.)

TAX SALE—EXCESSIVE LEVY.

The levy of a tax execution for \$16.20, upon an undivided one-half interest in 1,225 acres of land worth \$5 or \$6 per acre, was so grossly excessive as to render a sale thereunder void, notwithstanding separate offers were made of an undivided one-half interest, first in a half lot containing 100 acres, then in additional whole lots containing 200 acres each, with no bid until an undivided one-half interest in the whole tract was offered.

(Syllabus by the Court.)

Error from superior court, Lee county; Z. A. Littlejohn, Judge.

Action by A. E. Hamlet against R. Hobbs. Judgment for plaintiff. Defendant brings error. Affirmed.

Jesse W. Walters, for plaintiff in error. D. H. Pope & Son and E. A. Hawkins, for defendant in error.

FISH, J. In the trial below counsel for both parties agreed that the question involved was one of law, and that the presiding judge should direct a verdict after hearing the facts and argument. A verdict was directed finding the property subject to the mortgage *fi. fa.*, upon the ground that the levy of the tax *fi. fa.* was grossly excessive, and that the sale thereunder was void. Such ruling was in accordance with the former adjudications of this court. In *Brinson v. Lassiter*, 81 Ga. 40, 6 S. E. 468, it was held that "the levy of a tax execution for \$3.60 on one hundred acres of land, worth \$1,200, is such a fraud on the law as to render the sale void, at the option of the landowner; and a deed made in pursuance of such levy and sale is void on its face, if it show the fact of such excessive levy." A later case strongly in point is *Williamson v. White*, 101 Ga. 276, 28 S. E. 846. There a tax execution for \$13.77, and 50 cents costs, was levied upon 555 acres of land, embracing three lots, viz. Nos. 167, 168, and 193. The sheriff exposed the land for sale in separate parcels. No. 167 sold for \$8, No. 168 was next sold for \$5.50, and No. 193 was then sold for \$20. Two of the lots contained 200 acres each, and the third 152½ acres. The land was worth at least \$2 per acre. It was held that such a levy was palpably and grossly excessive, and rendered a sale thereunder void. Justice Cobb, in rendering the deci-

sion, said: "The fact that the sheriff sold the three lots levied on separately does not alter the case. The levy of a \$14 execution upon 152½ acres of land, which was the smallest lot, and of the value, according to the evidence, of at least \$2 an acre, would have been so grossly excessive as to have avoided the sale if no other lots had been included in the levy. An excessive seizure by the sheriff of a defendant's property is what constitutes the fraud upon his rights, and a sale by parcels will not cure it, when it appears that a seizure of any one of the parcels would have been in itself an excessive levy. Purchasers are deterred, and wisely so, from buying property offered in parcels, where the levy as a whole is so grossly excessive as to render the same voidable for fraud." In the case now under consideration, a tax *fi. fa.* for \$16.20 was levied upon an undivided one-half interest in 1,225 acres of land worth \$5 or \$6 per acre. Such a levy was so grossly excessive as to be deemed fraudulent. While the land was offered in parcels, the smallest interest offered was an undivided half interest in a half lot containing 100 acres, such interest being worth \$250 or \$300. A levy upon this interest alone would have been excessive and void. As suggested by Justice Cobb in *Williamson v. White*, supra, the very fact that a levy as a whole is so grossly excessive as to be void is sufficient reason to deter persons from purchasing the property when offered in parcels. Nobody cares to buy at a void sale. As bearing on main point, see *Doane v. Chittenden*, 25 Ga. 103; *Parker v. Glenn*, 72 Ga. 637; *Mixon v. Stanley*, 100 Ga. 372, 28 S. E. 440; *Forbes v. Hall*, 102 Ga. 47, 28 S. E. 915. Judgment affirmed. All the justices concurring.

KERCHNER et al. v. FRAZIER et al.

(Supreme Court of Georgia. Feb. 4, 1899.)

DECREE—ADMISSIBILITY IN EVIDENCE.

A decree in chancery, when offered in evidence to prove collaterally that such decree was made, is admissible, although not accompanied with the record in the case. But when offered to establish any particular state of facts, or as an adjudication upon the subject-matter, such decree is only admissible in evidence when accompanied with a complete and duly authenticated copy of the proceedings in which such decree was rendered.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. O. Kibbee, Judge pro hac.

Trial of the right to property between Kerchner & Calder Bros. and W. H. Frazier & Bro. Judgment for claimants, and plaintiffs bring error. Reversed.

De Lacy & Bishop, for plaintiffs in error. J. H. Martin, for defendants in error.

LITTLE, J. An execution issued in favor of the plaintiffs in error on a judgment rendered May 6, 1884, against J. J. Frazier and

Hines, and on the 30th day of May, 1885, was levied upon lot No. 46, and 33 acres in the southwest corner of lot 144, in the Nineteenth district of Dodge county, as the property of J. J. Frazier. A claim was interposed by W. H. Frazier & Bro. At the trial, plaintiffs in execution made out a prima facie case by the introduction of the execution and evidence that the defendant in *fi. fa.* was in possession at the time of the levy. Claimants introduced evidence to the effect that, at the time of the rendition of the judgment, they were in possession of the lands in dispute, and J. J. Frazier was not in possession, either then or subsequently. Claimants also offered in evidence a certified copy of a verdict and decree rendered in Pulaski superior court, purporting to reform a certain deed dated December 14, 1883, wherein J. J. Frazier was grantor, and W. H. Frazier & Bro. grantees, conveying lot of land No. 45 in the Nineteenth district of Dodge county, subject to certain mortgages made by J. J. Frazier to W. C. Jackson,* so as to properly describe the land conveyed as lot No. 46, instead of lot No. 45, and as 33 acres in the southwest corner of lot 134 in the Nineteenth district of Dodge county. The admissibility of the copy verdict and decree were objected to; the objection was overruled; and the certified copies admitted as evidence. Claimants then introduced the afore-described deed, and closed; and, there being no further testimony, the court directed a verdict for the claimant. Error is assigned upon the ruling of the court admitting the evidence, and the direction of the verdict.

1. The only question which it is necessary to consider is whether the verdict and decree were properly admitted in evidence. As, in our opinion, the evidence was inadmissible, it, of course, becomes unnecessary to further refer to the error assigned to the action of the court in directing the verdict.

The objections made at the trial to the introduction of the evidence offered were that they were not binding upon the plaintiffs in *fi. fa.*, because neither J. J. Frazier, defendant in *fi. fa.*, nor the plaintiffs in *fi. fa.*, were made parties; and, further, because plaintiffs' judgment was obtained in 1884, and the land was levied upon in 1885; and also because the pleadings and the record upon which the decree was found do not accompany the verdict and decree, and if they did, such record would show that neither the plaintiffs in *fi. fa.* nor the defendant in *fi. fa.* were parties to the decree. We have no difficulty in disposing of any of the questions so raised, except the last; that is, that the verdict and decree were admitted in evidence without being accompanied with the record in the case. The deed to the claimant, made by J. J. Frazier, described the land conveyed as lot No. 45 in the Nineteenth district of Dodge county. If, in fact, an error was made in the description of the lot con-

veyed, and it was the intention of the grantor to convey, and of the grantee to have, under his deed, lot No. 46, then it was perfectly competent for a court of equity having jurisdiction to reform the deed so as to make it speak the truth; and, after such reformation, the deed would take effect from its date as conveying the proper lot, and it was not necessary that any other parties should have been made to the proceedings instituted to reform such deed than the parties thereto. A court of equity, upon proper proofs, can and will reform a deed, and make it speak what the parties really intended, not only as between the parties, but against everybody else but bona fide purchasers without notice; and a judgment creditor is not such a purchaser. *Lowe v. Allen*, 68 Ga. 227, citing *Trout v. Goodman*, 7 Ga. 383; *Wall v. Arrington*, 13 Ga. 88; *Burke v. Anderson*, 40 Ga. 535; *English v. McElroy*, 62 Ga. 413. In the case of *Phillips v. Roquemore*, 96 Ga. 719, 23 S. E. 855, it was held that equity will correct a mistake in a mortgage where property intended to be included was inadvertently omitted, even after the mortgage has been foreclosed, and the property described in it has been levied upon and sold under the mortgage *fi. fa.* After such correction, the lien of the mortgage on the omitted property will be superior in dignity to that of a judgment obtained after the mortgage was originally executed, and before its reformation. The court ruled in that case that there was no protection to judgment creditors, nor to any others than bona fide purchasers for value without notice.

It seems to us, therefore, that these objections to the admissibility of the verdict and decree were not sound. The further objection is made, however, that the verdict and decree were not accompanied with the record in the case. In his treatise on the Law of Evidence, Judge Taylor lays down the rule to be that, "if a decree in chancery is offered merely to prove that it was in fact made, here, as in the case of verdicts, no proof of any other proceeding is required; but if a party intends to avail himself of a decree, as an adjudication upon the subject-matter, he must generally prove, not only the decree, but also the pleadings upon which it was founded; since, without such proof, it may be impossible either to understand the decree itself, or to ascertain with certainty what disputed questions it decided." 3 Tayl. Ev. § 1574a. Mr. Greenleaf, in his treatise on Evidence (volume 1, § 511), treating this subject, says: "The general rule is that where a party intends to avail himself of a decree as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must show the proceedings upon which the decree was founded. 'The whole record,' says Chief Baron Comyns, 'which concerns the matter in question, ought to be produced,'"—citing

Com. Dig. tit. "Evidence"; 2 Phil. Ev. pp. 138, 139. To the same effect are the decisions of our own court. In the case of *Mitchell v. Mitchell*, 40 Ga. 11, this court ruled that a copy of the verdict in an equity cause, unaccompanied by the bill and answer and other parts of the record, is not evidence. In the case of *Gibson v. Robinson*, 90 Ga. 756, 16 S. E. 969, Justice Lumpkin, delivering the opinion of the court, clearly expresses the rule on this subject in the following language: "It is well recognized as a general rule that where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it was the judicial result, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the same was rendered. But, where the only direct object to be subserved is to show the existence and contents of such judgment, this rule does not apply, and a certified copy of the judgment entry of a court of record possessing general original jurisdiction is admissible, by itself, to prove rendition and contents." It is true that in this last case the court ruled that the judgment without the record was admissible; and that ruling was right, as it was offered and admitted only to show the rendition and contents of the judgment. Under these rules, it would seem that the decree was not admissible of itself. It was offered to show that the superior court of Pulaski county, exercising chancery jurisdiction, with proper parties before it, decreed the reformation of a deed, the effect of which was to vest in the claimants title to property which was not in terms conveyed by the deed. The object of the claimants was to avail themselves of this decree as an adjudication that the grantor in his deed intended thereby to convey different land than was therein described; and, in order for the decree to have such effect, it was necessary that proper parties should have been made to such proceeding, and the decree be founded upon proper pleading, with all the necessary allegations. It was not for the purpose of merely proving that the decree was made. That would have been a collateral matter. But it was for the purpose of showing, as a matter of title (which was the direct issue involved), that, by adjudication, it had been determined that the deed relied on by the claimants to show their title in fact conveyed to them a different lot than that set out and described. For it to have had this effect, it was necessary that the whole record should have been introduced, so as to definitely show, not only the decree of the court, but that, from the joinder of parties and the necessary allegations, the court was authorized to make the decree. Inasmuch as, in our judgment, the decree, standing alone, was not admissible for the purposes offered, the court erred in allowing it to go to the jury; and the judgment is reversed. All the justices concurring.

32 S.E.—23

KELLAR v. PAGAN.

(Supreme Court of South Carolina. Feb. 25, 1899.)

LANDLORD AND TENANT—EXPIRATION OF TERM—EJECTMENT—MAGISTRATES—JURISDICTION—PLEADING—APPEAL—EXCEPTIONS.

1. Rev. St. 1893, § 1937, vests in two magistrates jurisdiction to eject a tenant holding over under a lease of "lands and tenements," on application of the landlord, without previous demand for possession; and section 1939 vests a single magistrate with jurisdiction where the lease is of "houses and tenements," and the landlord has demanded and been refused possession. *Held*, that a single magistrate may eject a tenant of "lands."

2. Rev. St. 1893, § 1939, provides that, if a tenant holds over under a lease, the landlord may enter and claim possession, and, in case of refusal or resistance, may apply to a magistrate for relief. *Held*, that where a landlord seeking before a magistrate to eject his tenant alleges a demand for possession and refusal by the tenant, and the allegation is not denied, a judgment ejecting the tenant is proper, though the testimony does not show that the landlord entered and demanded possession, nor that the tenant refused a demand.

3. On appeal from a judgment ejecting a tenant, under Rev. St. 1893, § 1939, the failure of the evidence to show that the landlord entered to demand possession, or that the tenant refused a demand, cannot be considered, where the only exception to the judgment is that the "evidence failed to show that any demand for possession had been made."

Appeal from common pleas circuit court of Fairfield county; D. A. Townsend, Judge.

Action before a single magistrate by S. Fannie Kellar against I. F. Pagan to eject the latter from leased premises. From a judgment in favor of plaintiff, defendant appealed to the circuit court; and, from a judgment sustaining the appeal and dismissing the proceeding, plaintiff appeals. Reversed.

Ragsdale & Ragsdale, for appellant. J. E. McDonald, for respondent.

McIVER, C. J. This was a proceeding instituted before a magistrate to eject defendant from certain premises alleged to have been leased by plaintiff to defendant for the year 1897, upon the ground that defendant held over unlawfully after the expiration of his lease. A formal summons or notice to show cause, bearing date 10th of March, 1898, was issued by the magistrate, and duly served upon the defendant, on the 11th of March, 1898, requiring him to show cause, on the 14th of March, 1898, why he should not be dispossessed of said premises. To this summons or notice was annexed a formal complaint, duly verified by plaintiff, in which it was alleged that the plaintiff had leased to defendant, for the year 1897, a certain tract of land, particularly described in the complaint; that said lease expired on the 31st of December, 1897; that said defendant has since been, and now is, in unlawful possession of the said premises; and "that the plaintiff has demanded possession of the said premises, which has been refused by the said I. F. Pagan." The "case" does not

show that the defendant made any answer, either orally or in writing, to this complaint, but it does show that, on the day appointed, the defendant appeared, and was examined as a witness in his own behalf. In his testimony he does not deny that plaintiff had demanded possession, nor does he deny that he refused to comply with such demand. His defense seemed to be a claim that he had rented the premises in question from the son and agent of the plaintiff, for the year 1898; but this was denied by the plaintiff and her son in their testimony. The magistrate rendered judgment as follows: "That the defendant is wrongfully holding possession of plaintiff's premises described in her complaint, after the expiration of his lease, and judgment is accordingly given in favor of the plaintiff for the possession of said premises." From this judgment, defendant appealed, upon the several grounds set out in the "case"; and this appeal was heard by his honor, Judge Townsend, who rendered judgment sustaining the appeal, and dismissing the proceeding. From this judgment, plaintiff appeals, upon the several grounds set out in the record, which we do not deem it necessary to set forth here specifically. The circuit judge bases his judgment upon two grounds: (1) Because "it does not appear from the testimony that the plaintiff ever went upon the premises, and demanded possession from the defendant; nor does it appear from the testimony that the defendant refused or resisted such demand for possession; and, these being prerequisites to the right to invoke the summary and stringent provisions of the statute, the appeal would have to be sustained upon that ground." (2) Because a single magistrate has no jurisdiction, under the statute, to eject a tenant holding over after the expiration of his lease of "lands and tenements," as jurisdiction in such a case is, by section 1937 of the Revised Statutes of 1893, vested in two magistrates, and a single magistrate is, by section 1939, only invested with jurisdiction to eject a tenant of "houses and tenements" holding over after the expiration of his lease; and, "as plaintiff has elected to treat the defendant as a tenant in possession of lands and tenements, I hold that the magistrate did not have jurisdiction in this proceeding."

We will first consider the question of jurisdiction. It will be observed that the view taken by the circuit judge as to the matter of jurisdiction is based upon the different phraseology used in the two sections of the Revised Statutes of 1893, above referred to,—the one (1937) investing two magistrates with jurisdiction to eject a tenant of "lands and tenements," while the other (1939) invests a single magistrate with jurisdiction only in a case of a tenant of "houses and tenements." But an examination of the statutes from which the Revised Statutes of 1893 were compiled shows no such difference of phraseology as that relied upon. Section 1937 of the Revised Stat-

utes purports to be taken from section 1817 of the General Statutes of 1882, and follows the phraseology of the section from which it was taken; but section 1939 of the Revised Statutes of 1893, which purports to be taken from section 1819 of the General Statutes of 1882, does not follow the language of the section from which it is taken. In section 1819 of the General Statutes the language is: "In all cases where tenants hold over after the expiration of their leases or contracts for rent, whether the same be in writing or by parol, or shall fail to pay the rent when it shall become due, the landlord is hereby authorized and empowered, either in person or by agent, to enter upon the premises and claim possession; and in case of refusal or resistance, it shall be lawful for the person so letting said premises, houses or tenements, his agent, or attorney, to apply to a trial justice, whose duty it shall be to have a notice served upon the person or persons so refusing to be dispossessed to show cause before him, if any he can, within three days from the date of said personal service of such notice, why he should not be dispossessed; and if he fails to show sufficient cause, it shall be the duty of the trial justice forthwith to issue his warrant, directed to the sheriff of the county, or any constable thereof, requiring him, without delay, to dispossess said person or persons from the premises so let, and authorizing him to use such force as may be necessary." But in section 1939 of the Revised Statutes the language is: "In all cases where any tenant of *houses and tenements* holds over after the expiration of his lease, or contract for rent, whether the same be in writing or by parol," etc., proceeding substantially in the same language as is copied above from section 1819 of the General Statutes. It will thus be seen that the words which we have italicized in the quotation immediately preceding—the very words upon which the circuit judge bases his conclusion—are not found in the section of the General Statutes from which section 1939 of the Revised Statutes purports to be taken; nor are they to be found in the original act of 1878 (16 St. at Large, p. 635), which was carried into the General Statutes of 1882 as section 1819, but seem to have been injected into section 1939 of the Revised Statutes of 1893 without authority, so far as we can perceive. It is true that, both in section 1819 of the General Statutes and the original act of 1878, the words "houses and tenements" are found lower down in the section, where we find the following language: "It shall be lawful for the person so letting said premises, houses or tenements, his agent or attorney, to apply to a trial justice," etc., which shows that the person who may be thus ejected need not necessarily be a tenant "of houses and tenements," but may be a tenant of any other premises. The point is that the words "houses and tenements" are not to be found either in that portion of the original act of 1878 or in that portion of section 1819 of the

General Statutes intended to designate the class of tenants who may be thus ejected. In section 1939 of the Revised Statutes the unauthorized injection of the words "of houses and tenements" would seem to imply that the remedy therein provided could only be applied where the person sought to be ejected was a tenant "of houses and tenements," whereas, both by the original act of 1878 and by section 1819 of the General Statutes, the remedy may be applied in the case of a tenant of "any" premises, holding over after the expiration of his lease; for the language there found is: "In all cases where tenants hold over after the expiration of their leases," etc.,—not tenants of any particular kind of property, but tenants of any premises that may be leased.

Now, when it is remembered that the Revised Statutes of 1893 cannot be regarded as having the force of law, by reason of the fact that they were not passed in the mode prescribed by the constitution (*Armstrong v. Brant*, 44 S. C., at page 181, 21 S. E. 634), it is very obvious that there is no foundation for the distinction which the circuit judge draws between the two sections of the Revised Statutes (1937 and 1939), and upon which he bases his conclusion that a single magistrate could not take jurisdiction of this case; for in this respect there is no such difference in the phraseology of the two sections of the General Statutes of 1882 (1817 and 1819) which do have the force of law as that upon which the circuit judge relies. Indeed, it is always safer, when the court is called upon to construe any statutory legislation, to look to the language used in the statute, which does have the force of law, rather than the language used by the compiler in his revision.

But, besides the view just presented, even if it should be assumed that the statute must be construed as if it contained the words relied upon by the circuit judge,—“houses and tenements,”—we do not think the view taken by him could be sustained; for the word “tenements” is a well-known technical term, the signification of which is well defined. As said by Blackstone in his Commentaries (volume 2, p. 17): “In its original, proper, and legal sense, it signifies everything that may be holden, provided it be of a permanent nature.” Its significance is broader than the term “lands,” as it includes not only lands, but everything else of a permanent nature that may be holden; and if a single magistrate, under the section as it reads in the Revised Statutes, would have jurisdiction to eject a tenant of a house after the expiration of his lease, who refuses to surrender possession, we see no reason why, under the word “tenements,” he would not have jurisdiction to eject a tenant from lands; otherwise, this anomalous result would follow: If a landowner leases a farm, upon which there is a dwelling house, in which the tenant resides (as the testimony shows was the fact in this very case), if such tenant holds over after the

expiration of his lease, while a single magistrate would have jurisdiction to eject him from the house, he would not have jurisdiction to eject him from the land. A construction leading to such an anomalous result cannot be adopted, especially where the language is broad enough to warrant another and more reasonable construction.

It is argued by counsel for appellant that inasmuch as the two sections of the Revised Statutes (1937 and 1939) are so very much alike, except that, in the one, jurisdiction is given to two magistrates, while, in the other, jurisdiction is conferred upon a single magistrate, the reasonable conclusion is that the remedies provided for in the respective sections were intended to be applied to different classes of cases. But, in the first place, there are, at least, two other radical differences in the two sections. In the one (section 1937), no previous demand for possession is required, while, in the other (section 1939), the landlord must first, “either in person or by agent, * * * enter upon the premises and claim possession,” and it is only “in case of refusal or resistance” that the landlord may apply to a single magistrate for relief. Again, in section 1937 provision is made for a trial by jury, while in section 1939 no such provision is made. But, be that as it may, we find both of these acts upon the statute book; and we do not see by what authority the court can deny the landlord relief under either, provided he makes a case sufficient to authorize the relief demanded. The history of the legislation upon this subject shows that there has been a continual advance in the law upon this subject, always in the direction of affording the landlord more prompt and summary relief. At common law the only legal remedy which a landlord had in case his tenant held over after the expiration of his lease was by an action of ejectment, which was so cumbrous, expensive, and tardy that it became necessary to provide other more summary remedies. Accordingly, we find that several statutes have been enacted in this state for the purpose indicated, the last being the act of 1878 (16 St. at Large, p. 635), which was re-enacted in the General Statutes of 1882 as section 1819. The fact that a landlord may, without demanding possession, apply to two magistrates to have his tenant, who holds over after the expiration of his lease, ejected under the provisions of section 1817 of the General Statutes of 1882 (now incorporated in the Revised Statutes as section 1937), does not forbid the idea that a landlord may, after demand and refusal of possession by the tenant, apply to a single magistrate for a warrant to eject his tenant, who holds over after the expiration of his lease, under the provisions of section 1819 of the General Statutes of 1882 (now incorporated in the Revised Statutes of 1893 as section 1939). We are of opinion, therefore, that there was error in holding that the magistrate had no jurisdiction in this case.

The only remaining inquiry is whether the first ground, as above stated, upon which the circuit judge held that the appeal should be dismissed, can be sustained. While it is true that both section 1819 of the General Statutes, and section 1939 of the Revised Statutes, do provide that, in case a tenant holds over after the expiration of his lease, "the landlord, either in person or by agent, may enter upon the premises and claim possession; and in case of refusal or resistance, the landlord, his agent, or attorney, may apply to a magistrate" for the relief provided for in that section; and while it is likewise true that there is no allegation in the complaint filed by plaintiff in this case, and no testimony, that she, either in person or by her agent, entered upon the leased premises, and claimed possession, nor was there any allegation of any resistance on the part of the defendant,—yet it is also true that the plaintiff, in her complaint, does allege that she had demanded possession of the said premises, and that her demand was refused by the defendant; and this allegation is not denied by the defendant by any answer, either written or oral, and must therefore be regarded as admitted. Besides, the defendant, in his own testimony, makes no such denial, but, on the contrary, rests his defense upon a fact found against him by the magistrate, which finding was not reversed by the circuit judge, to wit, that he had leased the premises in question for the year 1898. But, in addition to this, there was no exception to the judgment of the magistrate, based upon the ground that the plaintiff had failed either to allege or prove that she had entered upon the leased premises, and claimed possession, or that the defendant had made any resistance to such claim; for the only exception as to this matter was that "the evidence failed to show that any demand for possession had been made," when, as we have seen, this was admitted by the failure to deny the allegation in the complaint that such demand had been made and refused. This question, therefore, was not properly before the circuit judge. But, aside from this, while it may be true that where, as in the case of *State v. Marshall*, 24 S. C. 507, the tenant appeared in response to the summons or notice served upon him, and showed, for cause why he should not be ejected, that the landlord had never entered upon the leased premises and claimed possession, it would be necessary to show that such entry had been made and possession there claimed, and that proof of a demand for possession elsewhere made would not be sufficient to entitle the landlord to the remedy provided in the section; though the point was not decided in the case just cited, for reasons there stated, nor has it been decided in any other case, so far as we are informed. While we do not deem it necessary to decide the point here, inasmuch as it was not properly before the circuit court, we may

say, in passing, that such a construction of the statute seems to us, as at present advised, rather too technical; for it is difficult to conceive any reason why a landlord should be required to enter upon the leased premises, and there claim possession, and why a demand for possession, without such entry, elsewhere made, should not be sufficient. Such seems to be the view of the legislature, for, by the act of 1898 (22 St. at Large, p. 791), section 1819 of the General Statutes of 1882, incorporated in the Revised Statutes of 1893 as section 1939, has been amended by striking out the words to "enter upon the premises and claim possession," and substituting the words "demand possession thereof from the tenant or person in possession thereof"; so that, as the law now reads, the landlord is only required "to demand possession," and there is no requirement that entry be made on the premises. But as this act was approved on the 21st of February, 1898, it could not take effect or have the force of law until the twentieth day after its approval by the governor, there being no other day specifically mentioned in the statute when it should take effect. Gen. St. 1882, § 33. This act, therefore, did not take effect until the 13th of March, 1898; and as the proceeding in this case was commenced on the 10th of March, 1898, its provisions cannot be applied to the question we have been considering, though it may apply to another question which shall be presently stated. The only purpose in referring to it now is to indicate that the legislature was also of opinion that the requirements were as indicated by counsel for appellant, who has contended that the absence of allegation and proof that the landlord had entered on the leased premises and claimed possession raises a jurisdictional question, which may be raised at any time by either party, or by the court of its own motion. We cannot accept that view. On the contrary, the question is as to the sufficiency of the allegations and proof, and not as to the jurisdiction of the magistrate; for if, as we have seen, a single magistrate is invested with jurisdiction of a proceeding to eject a tenant who holds over after the expiration of his lease, deficiencies in the allegations or proof necessary to maintain such a proceeding do not present questions of jurisdiction.

There is another question which might have been raised in this case. Originally there was no right of appeal from the judgment of a trial justice (now magistrate) in a case of this kind; and hence, when error of law was imputed in his action, the remedy was by writ of certiorari, as in the case of *State v. Marshall*, supra. But by the act of January 5, 1895 (21 St. at Large, p. 822), section 1819 of the General Statutes of 1882, now incorporated in the Revised Statutes of 1893 as section 1939, was amended by adding a proviso at the end of the section conferring upon either party to a proceeding under said

section the right of appeal. But by the act of 1898, above referred to, said section was again amended in two particulars—First, by striking out the words hereinbefore referred to, and substituting other words there mentioned; second, by substituting the word “magistrate” for the words “trial justice,” and proceeding in the following language: “So that said section when amended shall read as follows, to wit.” Then follows the whole section, with the two amendments inserted at the proper places, but omitting the proviso added to the original section by the act of January 5, 1895, above referred to. If, then, the section must be read as the legislature has declared by the act of 1898 it shall read, then it would seem that there is now no right of appeal in a case of this kind, as the proviso conferring that right is not now contained in the section; for while it is true, as stated above, that the act of 1898 had not gone into effect and did not have the force of law when this proceeding was commenced, yet such act had gone into effect and did have the force of law when the judgment was rendered, and, of course, before the appeal was taken, as the judgment of the magistrate was rendered on the 14th of March, 1898, and the act took effect on the 13th of March, 1898. So that, if the omission of the proviso to the section conferring the right of appeal, from the act of 1898, declaring how that section shall read, took the right of appeal, then there was no law authorizing an appeal when the appeal from the judgment of the magistrate was taken. This question, so far as we are informed, has never been determined by this court. It was somewhat considered in *State v. Black*, 34 S. C. 194, 13 S. E. 361, but was not decided, for the reasons stated in that case; nor do we propose to decide it now, as it has not been raised and has not been argued; and, besides, under the view which we take of the case, it is not necessary to this decision. It is only referred to now to avoid committing the court, even by implication, upon a question which was not raised in the court below, nor in this court, by a motion to dismiss the appeal upon the ground that the matter is not appealable, and which has not been argued. The judgment of this court is that the judgment of the circuit court be reversed, and the judgment of the magistrate be affirmed; and the case is remanded to the magistrate, with instructions that he proceed to enforce his judgment according to law.

STATE v. MASON.

(Supreme Court of South Carolina. Feb. 23, 1899.)

INDICTMENT—FORM—MOTION TO QUASH—APPEAL—MURDER—MALICE—INSTRUCTIONS.

1. An indictment should not be quashed when it concludes with the words “against the peace and dignity of the same state aforesaid,” in-

stead of the words “against the peace and dignity of the state,” as required by Const. art. 5, § 31, as the additional words may be regarded as surplusage.

2. An order overruling a motion to quash an indictment is not appealable.

3. A charge in a trial for murder that malice is implied from an intentional killing without justification or excuse is not subject to exception.

4. An exception to a portion of the charge alleged to be erroneous should point out wherein it is erroneous.

5. A charge, on a trial for murder, that if the jury have a reasonable doubt as between the fact of defendant's acting under strong provocation, exciting sudden passion, and the deliberateness which would show malice, they should give defendant the benefit of the doubt, and find the lesser rather than the greater crime, was not objectionable as precluding the jury from rendering any verdict except one for murder or manslaughter, it appearing that it was followed by an instruction that, if a doubt arose as between any crime at all and defendant's innocence, they should find him not guilty.

Appeal from general sessions circuit court of Laurens county; J. C. Klugh, Judge.

Charlie Mason was convicted of murder, and appeals. Affirmed.

W. R. Richey, for appellant. T. S. Lease, for the State.

JONES, J. Appellant, having been convicted of murder, and sentenced, seeks to reverse the judgment on the grounds now considered.

1. It is excepted that the circuit court erred in refusing to quash the indictment on the ground that it concluded with the words “against the peace and dignity of the same state aforesaid,” instead of with the words “against the peace and dignity of the state,” as required in section 31 of article 5 of the constitution. The motion to quash was properly overruled. All the words required by the constitution are in the indictment, and the additional words “same” and “aforesaid” may be regarded as surplusage. *State v. Robinson*, 27 S. C. 618, 4 S. E. 570.

2. After the motion to quash was refused, appellant gave notice of intention to appeal, and then objected to proceeding with the trial until the appeal was disposed of. He was ordered to trial. In the second and third exceptions this ruling is complained of on the ground that the notice of appeal from the order refusing to quash the indictment operated as a stay of the proceedings. The appellant, on the argument, very properly did not press these exceptions. An order overruling a motion to quash an indictment is not appealable. *State v. Burbage*, 51 S. C. 234, 28 S. E. 937.

3. It is excepted that the circuit judge erred in charging the jury as follows: “So, where an act of that kind is done, where a person is killed, and nothing appears but the fact of the killing, the law presumes that that is a killing with malice, and that is what is meant by implied malice.” The exception is general, and points out no specific error in the language quoted. Immediately preceding the language objected to, which is necessary to

explain it, the circuit judge charged these words: "Malice implied is the same thing as any other kind of malice. The word 'implied' refers to the manner in which the malice is shown or proven, and in general the law implies or presumes malice from the intentional and voluntary doing of an act that is wrongful, where there is no justification or excuse for the act." Then follows the language complained of. The charge amounted to nothing more than saying that malice is implied from an intentional killing without justification or excuse. This exception is overruled.

4. The remaining exception alleges error in charging the jury these words: "If you have a reasonable doubt as between the fact of his acting under a strong provocation exciting sudden heat and passion and the deliberateness which would show malice, give the defendant the benefit of the doubt, and find the lesser, rather than the greater." The exception is faulty in not pointing out wherein there was error. In the argument appellant contends that by this charge the jury was precluded from rendering any verdict except one for murder or one for manslaughter. But we cannot so hold. The charge correctly informed the jury as to their duty in case they had a reasonable doubt as between murder or manslaughter, and this charge was immediately followed with an instruction that, "If a doubt arises as between any crime at all and his innocence, you are bound to give him the benefit of that doubt, and find him not guilty." The judgment of the circuit court is affirmed, and the case is remanded in order that a new day may be assigned for the execution of the sentence imposed.

BALTZEGHER v. CAROLINA MIDLAND RY. CO.

(Supreme Court of South Carolina. Feb. 23, 1899.)

SURFACE WATERS — OBSTRUCTION — NUISANCE — WHAT CONSTITUTES—SPECIAL DAMAGES.

1. A landowner may repel surface water by an obstruction without incurring liability for damage to an adjoining proprietor, unless a nuisance per se is created by the accumulation of the water.

2. Allegations in a complaint against a landowner, that the latter has obstructed the flow of surface water, and caused it to accumulate for a considerable while after each rain and flood, so that it becomes stagnant, and emits nauseous odors and gases, which poison and pollute the air around plaintiff's dwelling, and render it unhealthy and dangerous to live in, do not show that such accumulation is a nuisance per se.

3. A complaint against a landowner for creating a nuisance by obstructing the flow of surface water, and causing an accumulation of water near plaintiff's dwelling, sufficiently shows that the nuisance is a public one, where it alleges that plaintiff's lot is in the corporate limits of a town, and there is nothing in the complaint showing that the inhabitants of the town are not as susceptible to the injurious effects as plaintiff.

4. A complaint against a landowner who created a public nuisance by obstructing the flow

of surface water, and causing an accumulation thereof, which alleges merely that such nuisance rendered plaintiff's dwelling unhealthy and dangerous to live in, and caused sickness and suffering to his family, does not show that plaintiff sustained damages peculiar to himself, and differing in kind from those that might be sustained by the public generally.

Appeal from common pleas circuit court of Aiken county; R. O. Watts, Judge.

Action by G. Jones Baltzeger against the Carolina Midland Railway Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

G. W. Croft & Son and R. L. Gunter, for appellant. Henderson Bros. and Robt. Aldrich, for respondent.

GARY, A. J. The appeal herein is from an order sustaining a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint is as follows: (1) The first paragraph merely alleges the corporate existence of the defendant. (2) "That the plaintiff is the owner of the following described real estate, to wit: 'All that lot of land, with the improvements thereon, containing three acres, more or less, situate within the corporate limits of the town of Wagener, * * * which said premises lie west of the railway track of the defendant in the said town of Wagener, and within a hundred feet from the defendant's line of railway.' That the dwelling house of the plaintiff is upon said premises, and the same is now, and has been for several years past, occupied and used by the plaintiff and his family." (3) "That near to the plaintiff's residence, and running by the same, and across the line of the defendant's railway track, is a hollow or depression in the land, in and through and down which the surface water, in times of rains and floods, has been accustomed, by nature, from time immemorial, to pass and flow through, and thereby affording a complete passage and drainage for all surface waters which were collected and entered into said hollow." (4) "That about the year 1886 or 1887 the Blackville, Alston and Newberry Railroad Company, a corporation under the laws of this state, constructed the line of railway now owned and operated by the defendant, and, in building the line of said railway across the said hollow, caused a high embankment to be created, and also dug deep ditches on the upper and lower sides of said embankment, which said embankment completely stopped the flow and passage of the surface water down said hollow, as it was accustomed by nature to flow, and, in time of rains and floods, caused the said water to accumulate in a pond on the upper side of said railway track, and also caused a considerable quantity of water to accumulate and gather in the said ditch on the lower side of said railroad track; and the said water so collected remains in said ditches and in the pond formed on the upper side of said embank-

ment for a considerable while after each rain and flood, and it becomes stagnant, and emits nauseous odors and gases, which poison and pollute the air in and around the plaintiff's said dwelling house, and render the same unhealthy and dangerous to live in, and has within the last three years caused annoyance, sickness, pains, and suffering to the plaintiff, and also to the members of his family, and has within that period caused the death of one of plaintiff's children, who was made sick by the offensive and nauseous gases emitted from said stagnant waters. And the plaintiff alleges that the collection and ponding of such waters as aforesaid is a nuisance to him, dangerous to the health of himself and family, and the same ought to be abated." (5) "The plaintiff further alleges that the Blackville, Alston & Newberry Railroad Company, some five or six years ago, changed its name to the Carolina Midland Railroad Company; and, under said last name, the defendant owns and maintains said embankment and ditches across said hollow, and still maintains and continues said nuisance. And the plaintiff further alleges that the said railroad company, when building said road, or at any time since, could have, without much expense, put a culvert under and across said embankment, which would carry off the surface water, and remove said nuisance; but that the said railroad company carelessly and negligently built said embankment so as to cause said nuisance; and that the defendant, although requested to so abate the same, has, unmindful of its duty, and in wanton disregard of the plaintiff's rights and health, failed to do so, and negligently and carelessly still maintains said nuisance, to the damage of this plaintiff in the sum of two thousand dollars."

The first question which will be considered is whether damages caused by the accumulation of surface water are actionable. In 24 Am. & Eng. Enc. Law, 907, it is said: "A great divergence has arisen in the rules adopted in the various states as to the right of the lower proprietor to obstruct the flow of surface water, and to repel it from his premises, by means of an embankment or other obstruction. Some states have adopted what is known as the 'civil-law rule,' which subjects the lower estate to the easement or servitude of receiving the flow of the surface water from the upper estate. Other states, again, have adopted what is known as the 'common-law rule,' by virtue of which the lower proprietor may do as he pleases with his land, and may receive, repel, or divert surface water flowing thereon, at his pleasure. In one or two states, again, a modified rule has been adopted, under which each case is to be governed by its circumstances, and the right to obstruct or repel the flow of surface water is to be determined by the reasonableness of the use of the lower estate." The rule of the common law as to surface water is perhaps nowhere more clearly stated

than in 24 Am. & Eng. Enc. Law, 917: "Under this rule it is held that the right of the owner of land to occupy and improve it in such a manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface, or flowing on it from the surface of adjoining lots, either to stand in unusual quantities on the adjacent lands, or to pass onto and over it in greater quantities and in other directions than they were accustomed to flow. 'Cujus est solum ejus est usque ad cœlum,' is regarded as a general rule applicable to the use and enjoyment of real property; and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any consideration of injury to the other land, which may be occasioned by the flow of mere surface water, in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water, by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil." In a note to the case of Gray v. McWilliams (Cal.) 21 Lawy. Rep. Ann., on page 593 (s. c. 32 Pac. 976), the rule of the common law is thus stated: "The gist of the so-called 'common-law rule' is that one may do as he pleases with his property, regardless of the effect upon surface water. This rule recognizes the right of each proprietor to fight surface water (Jones v. Hannovan, 55 Mo. 462); and the result is that, if carried to its ultimate conclusion, it simply means that the courts will recognize no wrong in any action undertaken for the purpose of getting rid of surface water. In other words, no legal right of any kind can be claimed *jure naturæ* in the flow of surface water; so that neither its detention, diversion, nor repulsion is an actionable injury, even though damage ensue. Bowlsby v. Speer, 31 N. J. Law, 351." The only exception to the rule that surface water being a common enemy, every landowner has the right to deal with it in any such manner as he may see fit, is that it is subject to the general law in regard to nuisances, if its accumulation has become a nuisance *per se*.

as, for example, whenever it has become dangerous, at all times and under all circumstances, to life, health, or property. If this were not the law, a person could accumulate the surface water upon his premises in a populous town or city, and, although the nauseous gases and vapors escaping from it might be deadly to the public generally, it could not be abated even by the public authorities. The allegations of the complaint are not sufficient to show that the alleged accumulation of the surface water was a nuisance per se.

It might seem without explanation that the case of *Edwards v. Railroad Co.*, 39 S. C. 472, 18 S. E. 58, is in conflict with the foregoing authorities. In that case the court said: "The circuit judge, in effect, charged the jury that the first question for them to determine was whether the obstruction of the sand bank was necessary for the protection of defendant's roadbed and right of way, and, if so, then the defendant was not liable. * * * But, in view of the express declaration of the lawmaking power, as embodied in section 2738 of the General Statutes, we feel bound to declare, in the absence of any constitutional provision, statute, or even authoritative decision to the contrary, that the common-law rule must still be recognized as controlling here; for that section expressly declares that 'every part of the common law of England not altered by this act, nor inconsistent with the constitution of this state and the customs and laws thereof, is hereby continued in full force and virtue within this state, in the same manner as before the passage of this act.' Under the common-law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if, in doing so, he throws it back upon a coterminous proprietor, to his damage, which the law regards as a case of *damnum absque injuria*, and affording no cause of action." From the foregoing language used in that case it appears (1) that the common-law rule was distinctly recognized as controlling in this state; and (2) that, as the plaintiff lost the case, there was no error of which she could complain, as the charge was really too favorable to her. Under the charge of the presiding judge, she received the benefit of the intermediate or modified rule hereinbefore mentioned. If the defendant had lost the case, and had appealed from the charge of the presiding judge, the court would have been compelled, following the rule of the common law, to grant a new trial. It will thus be seen that the case of *Edwards v. Railroad Co.* is not in conflict with the common-law rule.

But, even if the alleged accumulation of the surface water was such as to create a nuisance not *malum in se*, the next question which will be considered is whether it was public or private in its character. In 16 Am.

& Eng. Enc. Law, 926, it is said: "Public or common nuisances affect the community at large, or some considerable portion of it, as the inhabitants of a town. * * * A private nuisance affects only one person or a determinate number of persons." In the note on that page the following quotation from *Wood, Nuis. § 71*, is made, to wit: "It is not so much a question whether a large number of persons happen to be annoyed by the act, as whether the act itself was such and in such a place as that the natural effect thereof would be to annoy or offend all who came within its sphere." In the same note the case of *Soltan v. De Held*, 2 Sim. (N. S.) 133, is cited, in which the vice chancellor says: "To constitute a public nuisance, the thing must be such as, in its nature or its consequence, is a nuisance, an injury, or a damage to all persons who come within the sphere of its operations, though it may be so in a greater degree to some than it is to others." On the next page of the same volume it is said: "A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence; for, if the act or use of property be in a remote and unfrequented locality, it will not, unless *malum in se*, be a public nuisance." On page 931 of the same volume it is said: "In order to constitute a public nuisance, the act or use of property must be an annoyance common to the public generally. The test is not the number of persons annoyed, but the possibility of annoyance to the public by invasion of its rights." And in a note on same page the case of *Soltan v. De Held* is again cited as holding that "the test is not the number of persons annoyed, but the fact that it is in a public place, and annoying to all who come within its sphere."

The complaint alleges that the plaintiff's lot upon which is his dwelling is in the corporate limits of the town of Wagener, and within 100 feet of defendant's line of railroad, and there is nothing in the complaint showing that the other inhabitants of the town of Wagener are not as susceptible to the injurious effects of the alleged nuisance as the plaintiff. Under these circumstances, and tested by the foregoing authorities, the alleged nuisance could only be regarded as public in its nature; and, having reached this conclusion, the next question that will be determined is whether the allegations of the complaint show that the plaintiff sustained damages peculiar to himself. The rule upon this subject is stated in *South Carolina Steamboat Co. v. South Carolina Ry. Co.*, 30 S. C. 539, 9 S. E. 650 (affirmed in *Same v. Wilmington, C. & A. R. Co.*, 46 S. C. 327, 24 S. E. 337), as follows: "That the injury must be particular,—as some of the cases express it, special or peculiar; must result directly from the obstruction, and not as a secondary consequence thereof; and must differ in kind, and not merely in extent or degree, from that which the general public sustains."

The plaintiff relies upon the allegations contained in the fourth paragraph of his complaint to show that his injury was special or peculiar. One of the requirements of the rule is that the damages must differ in kind as well as degree from those which, it may reasonably be expected, will be sustained by the public generally. The allegations of the complaint show that the causes which led to the plaintiff's injury might reasonably be expected to affect others in the neighborhood, and therefore his injury was not special.

The appellant's attorneys cited sections 1264 and 1272 of the Revised Statutes, which are as follows:

"Sec. 1264. No person shall be permitted or allowed to make or keep up any dams or banks to stop the course of any waters, so as to overflow the lands of another person, without the consent of such person first had and obtained; nor shall any person be permitted or allowed to let off any reserved water to injure the crops upon the grounds of other persons."

"Sec. 1272. Nothing contained therein shall be construed to authorize any person or persons to keep water at any time on lands other than his, her, or their own."

There are no allegations in the complaint showing that these sections have any application to this case.

The respondent's attorneys gave notice of additional grounds upon which they would ask that the judgment of the circuit court be sustained, but the conclusions hereinbefore stated render the consideration of the additional grounds unnecessary. It is the judgment of this court that the judgment of the circuit court be affirmed.

STATE v. TUCKER et al.

(Supreme Court of South Carolina. Feb. 24, 1899.)

CLEANING OF RUNNING STREAMS—DUTY OF RIPARIAN OWNERS—CRIMINAL PROSECUTIONS—COMPLAINT BY PRIVATE CITIZEN—STATUTES—REPEAL.

1. Const. 1895, art. 3, § 34, subd. 11, prohibiting the enacting of special laws where a general law is applicable, is not retroactive, and hence does not make void Gen. St. 1882, §§ 1178, 1179, 1181, requiring landowners in certain counties to clean out running streams on their lands during certain periods of the year.

2. The provisions of Gen. St. 1882, §§ 1178, 1179, 1181, being valid when adopted, are not repealed by Const. 1895, art. 17, § 11, subd. 3, providing that laws in force at the time of its adoption, not inconsistent therewith, shall remain in full force, since said provision repeals laws inconsistent with its self-executing provisions only.

3. Gen. St. 1882, § 1181, makes it the duty of the county commissioners to enforce the provisions of sections 1178–1180. The county government act of January 4, 1894, devolves the duties of the county commissioners on the county supervisor and the county board of road commissioners. Act Dec. 24, 1894, abolishes the county board of road commissioners, and creates the county board of commissioners, to which it delegates the duties of the former.

Held, that the county government acts of January 4, 1894, and December 24, 1894, did not, by abolishing the county board of road commissioners, repeal Gen. St. 1882, § 1181.

4. The duty prescribed by Gen. St. 1882, § 1181, devolved on the county board of commissioners.

5. A private citizen may institute a prosecution for violating said provisions, the remedy given by Gen. St. 1882, § 1181, for enforcing said provisions, being cumulative merely, and not exclusive.

Appeal from common pleas circuit court of Anderson county; J. C. Klugh, Judge.

W. H. Tucker and another were convicted of neglecting to clean out a running stream on their lands, and they appeal. Affirmed.

Bonham & Watkins, for appellants. J. E. Brezeale and Tribble & Prince, for the State.

JONES, J. Defendants were arrested under a warrant sworn out by a private citizen, charging them with neglecting to clean out a running stream in the county of Anderson during the month of May, 1898, in violation of sections 1178 and 1179 of the General Statutes of 1882 and amendatory acts, now incorporated in the Revised Statutes of 1893 as sections 1273 and 1274.

The first question presented by this appeal is whether the legislation in question is in conflict with subdivision 11, § 34, art. 3, of the constitution, as special legislation. Sections 1178 and 1179 of the General Statutes of 1882, as amended and incorporated in the Revised Statutes of 1893, as sections 1273 and 1274, are as follows:

"Sec. 1273. All landowners of the counties of Anderson, Beaufort, Chester, Greenville, Oconee, Union, Fairfield, Laurens, Newberry and Abbeville shall remove from the running streams of water upon their lands all trash, trees, rafts and timber during the months of May and August in each year, and in the counties of Pickens, Spartanburg and York in the month of August in each year.

"Sec. 1274. Any person convicted of violating the foregoing section shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five nor more than fifty dollars, or be imprisoned not less than ten nor more than thirty days, in the discretion of the court before which the case may be tried."

By section 34, art. 3, of the constitution, the general assembly is forbidden to enact local or special laws on certain enumerated subjects, but these subjects do not embrace the matter of cleaning out running streams. In subdivision 11 of this section it is provided: "In all other cases, where a general law can be made applicable, no special law shall be enacted." The contention, therefore, is that a general law can be made applicable to this subject, and, since the acts in question are local or special, they are in conflict with subdivision 11 aforesaid. But if we should hold that a general law could be made applicable to this subject, and that the legislation in question is local

or special, it does not render the said legislation void, as in conflict with the constitution, because the legislation was had long before the adoption of the constitution, and the provisions of the constitution under consideration are not retroactive. In the case of *State v. Higgins*, 51 S. C. 51, 28 S. E. 15, the act declared to be in conflict with subdivision 11, § 34, art. 3, because a general law could have been made applicable, was adopted after the constitution of 1895 went into operation. It is contended, however, that, under subdivision 3, § 11, art. 17, the legislation in question was, in effect, repealed upon the adoption of the constitution. This section simply repeals the provisions of all laws inconsistent with the self-executing provisions of the constitution. The prohibition against the enactment of local or special laws on certain specified subjects, and in all cases where a general law can be made applicable, being prospective only, it follows that such local or special legislation as was in existence at the adoption of the constitution, and valid when enacted, cannot be held inconsistent with the provisions of the constitution relating to prospective legislation of that character. We concur with the circuit court overruling the magistrate on this point.

The next question presented is whether the acts in question were repealed by the acts of 1894 and 1896, providing a new system of county government for all the counties of the state. The argument is that the provisions appearing as sections 1273 and 1274, above quoted, can only be enforced in the manner provided in the law appearing as section 1276, Rev. St., as follows: "It shall be the duty of the county board of road commissioners of the counties above named to see that the provisions of the three preceding sections are complied with; and in case of neglect or refusal on the part of any landowner to comply with their requirements the said commissioners shall, upon complaint being made to them by any land owner or rentee interested in the enforcement of the provisions of said sections, notify such landowner to proceed within fifteen days to comply therewith, and upon failure to do so, the said commissioners shall indict, or cause to be indicted, under the provisions of said sections; and should the commissioners neglect or refuse to perform the duties required of them by this section they shall be severally guilty of a misdemeanor," etc. The contention is that the county board of road commissioners no longer exists, and that no person or body of persons is now charged with the enforcement of said sections 1273 and 1274. We fail to see merit in this contention. Section 1181 of the General Statutes of 1882 made it the duty of the county commissioners of the counties named to see that the provisions of sections 1178, 1179, and 1180, which now appear as sections 1273,

1274, and 1275 of the Revised Statutes, were enforced. The new county government act of January 4, 1894, devolved the duties of county commissioners upon the county supervisor and county board of road commissioners; and by the act approved December 24, 1894, "county boards of road commissioners" are called "county boards of commissioners." Thus, whatever duty in the premises belonged formerly to the county commissioners, and afterwards to the county board of road commissioners, now belongs to the county board of commissioners. But, even if the new county government acts were deemed in any way inconsistent with the provisions of section 1276, quoted above, and could possibly be construed as repealing said section, it would not by any means follow that the provisions of sections 1273 and 1274 may not stand, independently of section 1276. This brings us to the last question raised.

It is contended that no prosecution can be instituted, under sections 1273 and 1274, by a private citizen; that the landowner or renter interested in the enforcement of the provisions of these sections must first complain to the county board of commissioners, who shall notify such landowner to comply with said sections within 15 days; and the said commissioners shall indict, or cause to be indicted, the landowners neglecting or refusing compliance. We do not so hold. The method of procedure mentioned in section 1276 is not exclusive. This section seeks to secure enforcement of the provisions of section 1273 et seq. by making it incumbent on certain officers, under penalty, to see after their enforcement, and is cumulative, not exclusive. This section itself recognizes that the prosecution or indictment is "under the provisions of said sections"; meaning sections 1273, 1274, and 1275, and not under section 1276. The neglect or refusal of the landowner to clean out the running streams after notice from the commissioners requiring the same is important in determining what is the further duty of the commissioners in the premises, but is of no bearing on the offense which is made a misdemeanor in section 1273. The misdemeanor which is indictable is not neglect or refusal to remove trash, trees, rafts, and timber from the running streams within 15 days after notice from the commissioners requiring such removal, but is neglect to make such removal during the months of May and August in each year, as provided in section 1273. This last-mentioned section in no wise depends on section 1276, in itself defines what shall be deemed a misdemeanor,—a public offense,—and does not make any special and exclusive provision as to the manner of its enforcement. It follows that any person may institute a prosecution thereunder, as in other misdemeanors. The judgment of the circuit court is affirmed.

PAPWORTH v. CITY OF FITZGERALD.

(Supreme Court of Georgia. Feb. 2, 1899.)

ORDINANCE — VALIDITY — PROHIBITING SALE OF LIQUOR—EXCESSIVE SENTENCE.

1. The city council of the city of Fitzgerald has authority, by virtue of the general welfare provisions in its charter, to pass an ordinance prohibiting any one from keeping within the limits of the city any intoxicating liquors for the purpose of an illegal sale thereof; but this council has no power under its charter to prescribe, as a penalty for a violation of this ordinance, both a fine and a term of imprisonment in the city jail.

2. The accused having properly been found guilty of a violation of the city ordinance against keeping intoxicating liquors for the purpose of an illegal sale thereof, but the sentence of the municipal court being illegal, in that it imposed upon the accused, in addition to a fine of \$100, imprisonment in the city jail, direction is hereby given to the judge of the superior court to render a judgment upon the petition for certiorari setting aside the sentence of the recorder, and directing him to impose upon the accused a fine of the amount above stated, and, in default of its payment, imprisonment in the city jail, as prescribed by section 68 of the charter (Acts 1896, p. 174).

(Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

Frank Papworth was convicted of violating an order of the city of Fitzgerald, and brings error. Affirmed, with direction.

E. H. Williams and Hal Lawson, for plaintiff in error. E. W. Ryman and J. F. De Lacy, Sol. Gen., for defendant in error.

LEWIS, J. Papworth was arraigned before the recorder of the city of Fitzgerald for a violation of the following ordinance, passed by the city council of Fitzgerald: "Be it ordained by the city council of city of Fitzgerald, that any person, persons, firm or corporation, who shall within the limits of the city of Fitzgerald keep for the purpose of illegal sale any malt, spirituous, fermented or other intoxicating liquors, shall upon conviction in the municipal court be punished by a fine of one hundred dollars and imprisonment in city jail ninety days." The accused was found guilty, and the penalty provided for by the ordinance above quoted was imposed upon him by the recorder. The accused thereupon brought his petition for certiorari to the superior court, and, after hearing the same, the judge ordered that the petition for certiorari be overruled. Upon this judgment, error is assigned in the bill of exceptions.

It is alleged in the petition for certiorari that the petitioner was tried under "a complaint or accusation for keeping for the purpose of illegal sale, and selling, malt, spirituous, fermented, and other intoxicating liquors, against the provisions of Ordinance No. 81 of said city made and provided." A demurrer was filed to the complaint, and one ground insisted on in the demurrer was that the accusation in effect charged two offenses,

—one the keeping for illegal sale intoxicating liquors, and the other the actual sale of such liquors. It appears from the record that the city council had also passed an ordinance prescribing a penalty for selling without municipal license intoxicating liquors, and providing therefor a punishment different from that prescribed in the other ordinance against keeping such liquors for the purpose of illegal sale. Manifestly, the accused could not, over his objection, be properly placed upon trial under a single accusation charging him with a violation of two such distinct offenses against the penal laws of the city; but it appears from the record that the acts set forth were against the provisions of Ordinance 81 of the city, which is the ordinance above quoted, against the keeping for the purpose of illegal sale intoxicating liquors. The terms of the accusation, as set forth in the petition, are ambiguous. They may be construed to mean a charge against the accused of selling liquors, and also a charge of keeping liquors for the purpose of illegal sale; and they are also susceptible of the construction that the accused was simply charged with keeping liquors for the purpose of illegal sale, and for the purpose of selling the same. In view of the fact that the accusation is predicated upon the particular ordinance against keeping liquors for the purpose of illegal sale, and the accused, after conviction, was sentenced in accordance with the terms of this ordinance alone, we think it fair to construe the accusation into a charge, simply, of violating the provisions of the penal law of the city of Fitzgerald against keeping intoxicating liquors for the purpose of illegal sale, and that the words following, "and selling," were mere surplusage. We will therefore treat the case as a prosecution under the provisions of Ordinance 81, and will consider the controlling question in the record touching the validity of that ordinance.

It is insisted, in behalf of the plaintiff in error, that the ordinance in question is based upon the provisions in the charter of the city conferring upon the city council of Fitzgerald the sole and exclusive power and authority to regulate the sale of spirituous and other intoxicating liquors within its incorporate limits, and upon a further provision which empowers the city council to punish such persons as sell such liquors without a municipal license. See Acts 1896, p. 167, § 38; Id. p. 168, § 40. It is contended that these provisions in the act of incorporation are not constitutional; that the general law regulates the sale of liquors within the incorporate limits of the towns of this state, that section 431 of the Penal Code provides for the punishment by the state of persons selling intoxicating liquors within the limits of towns and cities without corporate license, and that, therefore, the act of the legislature conferring such powers upon the city council of Fitzgerald is violative of the provision of the constitution which declares that no special law shall be

enacted in any case for which provision has been made by an existing general law. As above indicated, this prosecution is not for selling liquors, nor is it based upon any ordinance regulating their sale. We therefore deem it unnecessary to consider the constitutional question, presented by the argument in behalf of the plaintiff in error, as to whether or not the city of Fitzgerald has the power to pass an ordinance prohibiting the sale of liquors within its limits, and prescribing a penalty for a violation of such ordinance. The question whether it has the power to enact a penal law against keeping intoxicating liquors for the purpose of illegal sale is an entirely different one. Such an ordinance does not in any wise relate to the regulation of the sale of liquors, nor is there any law making such an act a penal offense against the laws of the state. Section 33 of the act of 1896 (see page 166) empowers the city council of Fitzgerald to "regulate the police of the city, and to pass and enforce all necessary police ordinances." The following section provides, among other things, that this council shall have power "to do all acts, and make all regulations which may be necessary or expedient for the promotion of health, morals or temperance of the residents of the city." Even conceding, therefore, that the other provisions of the charter, with reference to punishments for the illegal sale of liquor, are unconstitutional, the general welfare clauses to which we have just referred clearly confer upon the corporate authority the power to pass the ordinance in question. This has been clearly ruled in the case of *Paulk v. Town of Sycamore* (Ga.) 31 S. E. 200, and in the authorities cited by Mr. Justice Cobb in the lucid and thorough opinion written by him in that case.

We fail to find, in the charter of the city of Fitzgerald as embodied in Acts 1896, pp. 157-183, any specific provision authorizing the city council to impose, as a penalty for violating any of its ordinances, both a fine and a term of imprisonment. On the contrary, it is provided in section 68 of the act of incorporation that it shall be a part of the judgment against one found guilty of the violation of any of the ordinances of the city that he "stand committed until such judgment be complied with, in no case to exceed one day for every one dollar of fine and cost assessed against the defendant, and no fine shall exceed one hundred dollars, together with costs." The words "stand committed," used in this section, evidently refer to incarceration or imprisonment, and the section quoted provides that such imprisonment shall in no case exceed one day for every dollar of fine and costs; and we think it necessarily implies that no imprisonment at all can be inflicted without there having first been given the defendant the opportunity of paying such fine and costs as may be imposed. Section 76 of the same act provides that "any person upon whom any fine or penalty shall be imposed

may, upon the order of the court before whom the conviction is had, be committed to the county jail, city prison, workhouse, house of correction or other place provided by the city for the incarceration of offenders, until such fine, penalty and costs shall be fully paid." The same section further provides that the city council may, by ordinance, require any male person over 18 years of age, when committed in default of payment of fine, to work for the corporation at such labor as his strength will permit, not exceeding 10 hours each working day. Section 33 of the charter grants the council power to "establish and erect a city jail, house of correction, and workhouse, for the confinement and reformation of disorderly persons, vagrants, tramps, idle persons, and persons convicted of violating any city ordinance"; but there is nothing in this section at all inconsistent with the provisions of the first two cited. After a careful reading of this long act of incorporation, we find no other provision therein relating to a punishment of offenders against city ordinances by imprisonment or commitment to jail. While it is true the sections referred to do not specifically limit the power of the town authorities in reference to punishing offenders against the city, by definitely stating that no punishment by imprisonment can be inflicted except in the alternative of a failure to pay the fine imposed, yet we can see no other reasonable construction that can be placed upon the language in the charter. From the use of the language quoted above, we are convinced that such was the intent of the legislature. We do not mean to say that, even under the general welfare clauses above referred to, in the absence of any other provision in the charter on the subject, a fine and imprisonment might not both be imposed by the municipal authorities upon those convicted of violating the penal laws of the city. It would be a remarkable grant of power, however, to imply from such a general provision, as it would practically give the city council unlimited power to fine and imprison. The subject of the power of the council to impose punishments having been dealt with in the charter itself, and the whole spirit, if not letter, of the incorporating act being evidently in accord with the view and construction above given, we conclude that the punishment prescribed by the ordinance now under consideration, and which was inflicted upon the defendant below, is without any valid law to sustain it.

Had the penalty been inflicted in accordance with the general law, as embodied in section 712 of the Political Code, the question would have been an entirely different one. It is provided in that section that "all police courts of this state, having authority to try offenses against the laws of the cities, towns and villages in which such courts are located, shall have power and authority to impose fines upon persons convicted of said offenses, with the alternative of other punishment al-

lowed by law, in case said fines are not paid." No such alternative was allowed in the sentence of the recorder of Fitzgerald, who imposed a fine of \$100 and also imprisonment in the city jail for 90 days. If we are wrong in the view we have taken of this case, then it would follow that, by virtue of the provisions of section 68 of the act of 1896, above mentioned, should the accused in this case fail to pay the fine of \$100, and the costs, after serving out his term of 90 days in jail, he could be further incarcerated for more than 100 days, thus making the total period of his incarceration longer than 190 days, when the limit of such confinement, clearly implied from the terms of the charter, is but 100 days.

There were several other grounds in the demurrer filed by counsel for the accused to the accusation in the recorder's court, and also a special plea filed by him; but the above views are controlling of the issues involved, and cover all the points insisted upon in the brief filed in behalf of the plaintiff in error.

2. It follows, from the above, that the portion of the city ordinance in effect making it illegal to keep intoxicating liquors within the limits of the city of Fitzgerald for the purpose of an illegal sale thereof, and the imposing of a fine of \$100 for a violation of the ordinance, is valid, but that portion of the ordinance imposing, in addition to such fine, a penalty of imprisonment in jail, is without authority of law to sustain it. We do not think, however, that this defect in the ordinance renders its entire provisions null and void. All of the ordinance is valid, and may be enforced, down to and including the imposition of the fine of \$100. The remaining portion, imposing, also, an absolute penalty of imprisonment, is an attempt to exercise a power which is ultra vires, and should be disregarded. Under section 68 of the charter, where the ordinance simply prescribes a fine as a penalty, the municipal court has the power also to impose imprisonment in the event of a failure to pay the fine. Direction is accordingly given as indicated in the second headnote. Judgment affirmed, with direction. All the justices concurring.

HARDIN v. STATE.

(Supreme Court of Georgia. Feb. 2, 1899.)

INDICTMENT—SUFFICIENCY.

Section 929 of the Penal Code is mandatory in its provision prescribing the form of every indictment or accusation of a grand jury. An indictment, therefore, from which there have been entirely omitted the words prescribed in the form, "contrary to the laws of said state, the good order, peace and dignity thereof," is defective; and a special demurrer thereto by the accused, made, on account of such defect, before trial, should be sustained, and the indictment quashed.

(Syllabus by the Court.)

Error from superior court, Putnam county; John C. Hart, Judge.

Henry Hardin was convicted of selling intoxicating liquors, and brings error. Reversed.

Jos. S. Turner, for plaintiff in error. H. G. Lewis, Sol. Gen., for the State.

LEWIS, J. This case came on for trial in the county court of Putnam county on an indictment found by the grand jury of that county, charging the accused with unlawfully selling spirituous liquors. There was an entire omission from the indictment of the following words embodied in the form prescribed by the statute for such instruments, namely, "contrary to the laws of said state, the good order, peace and dignity thereof." Before arraignment and plea, the accused demurred to the indictment "because the same does not follow the form prescribed by the statute, and does not allege that the acts therein charged were 'contrary to the laws of said state, the good order, peace and dignity thereof,' as required by the statute, and hence is fatally defective and void." The judge of the county court overruled the demurrer, whereupon the accused petitioned the superior court, praying for a writ of certiorari, alleging error in the judgment of the court overruling his demurrer. The judge of the superior court passed an order refusing to sanction this petition, which order is assigned as error in the bill of exceptions.

There can be no question that the legislature of this state has power to prescribe a particular form for an indictment by a grand jury. It can dispense with all forms and provide new ones. It can declare that no particular form is essential to the validity of such instruments, or it can imperatively require that they shall contain certain words and allegations. The simple question, then, in this case, is whether or not, there being no constitutional provision bearing upon the subject, the legislature of the state has, by a mandatory provision, specifically prescribed that every indictment shall contain the language referred to in the demurrer, and entirely omitted from the indictment against the accused. We think the question is answered in the affirmative by the language used in section 929 of the Penal Code, which declares that "the form of every indictment or accusation shall be as follows." Then follows the form prescribed, concluding with the language, "contrary to the laws of said state, the good order, peace and dignity thereof." It is true, this same section of the Code provides that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury." But it is manifest that this portion of the section does not in any wise refer to the form of the indictment prescribed by the statute. It has reference to the of-

fense itself, and to the terms and language used in describing the criminal act. It has reference to that portion of the indictment designated by parentheses in the form embodied in this section; that is, "where the offense is to be stated, and the time and place of committing the same, with sufficient certainty." The law requires simply that this statement shall be sufficiently technical and correct when the offense is charged in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury.

In *Horne v. State*, 37 Ga. 80, it was decided that: "An indictment should be 'in the name and behalf of the citizens of Georgia.' If these words be omitted, on exception taken at the proper time the indictment will be quashed. Such exception is not good in arrest of judgment." In that case the words quoted in the decision are as much a formal part of the instrument as the words omitted from the indictment in this case. The statute is no more mandatory in requiring that an indictment shall proceed "in the name and behalf of the citizens of Georgia," than it is in demanding that the criminal acts shall be charged as "contrary to the laws of said state, the good order, peace and dignity thereof." If, therefore, a demurrer is good on account of the omission of a certain portion of the form prescribed for the commencement of an indictment, we cannot see why it would not be equally good on account of leaving out the words prescribed for its conclusion. In the case of *Camp v. State*, 25 Ga. 689, it was held that "an indictment concludes properly, if it follows the form prescribed by the statute." See, also, *Crabb v. State*, 88 Ga. 584-588, 15 S. E. 455, 456, in which Justice Lumpkin stated in his opinion that it was not necessary that the indictment should specify any particular act upon which it is founded, but if it charges the criminal act was "contrary to the laws of said state, the good order, peace and dignity thereof," it is in this respect sufficient. We do not think the case of *Loyd v. State*, 45 Ga. 57, in conflict with our decision in this case. It appeared in that case that there were two counts in the indictment. The first count began and concluded in the form required by the statute. The second count, while it concluded with "contrary to the laws of said state," etc., omitted the words "And the jurors aforesaid, in the name and behalf of the citizens of Georgia." These words omitted from that count, however, appeared in the first count of the indictment. It is true, the statute requires that, where there is more than one count, each additional count shall commence with the words quoted. The words prescribed by the form having been used at the commencement of the indictment, it might be construed as qualifying all the counts that followed. This was simply a decision by two judges of this court that the form of an indictment, as prescribed by the

law, need not be followed to the letter; it is sufficient if it conform in all material particulars. The writer is inclined to doubt the correctness of that decision. It seems to be against the decided weight of authority. In *State v. Wagner* (Mo. Sup.) 24 S. W. 219, a similar defect in one count in an indictment was held to be fatal. The old rule was adhered to in that case, that "every separate count should charge the defendant as if he had committed a distinct offense"; and in the opinion of Sherwood, J., quite an array of authorities is cited in support of the decision. The difference, however, between the *Case of Loyd*, in 45 Ga., and the one we are now considering, is that the portion of the form omitted from this indictment was not only not followed in letter, but was entirely omitted, and not followed either in spirit or substance, or by other words substantially meaning the same thing. In entire accord with the decision in this case is the opinion of Warner, J., in *Bulloch v. State*, 10 Ga. 61-63.

When we consider, however, the history of technical pleading in criminal procedure, we think the question is easily solved, and that our conclusion in this case is beyond doubt correct. One special feature in an indictment, recognized at common law, was that it should conclude with words indicating that the acts committed were an offense against the peace and dignity of the sovereign power in whose name the accusation proceeded. In England the usual words were, "against the peace of our lord, the king [or lady, the queen], his crown and dignity." In this country the words are simply changed to conform to the proper designation of the sovereign power, and are generally such words as are used in the statute of our state,—"contrary to the laws of the state, the good order, peace and dignity thereof." As far as our investigation has gone,—which has been quite extensive,—the authorities seem to be absolutely uniform, that, when the rule in relation to this particular form in an indictment is expressly provided for by the written law of a state, it must be strictly applied, and the omission of the words thus formally prescribed, either by the constitution or statute of a state, is fatal. 2 Hale, Pl. Cr. p. 187 et seq.; Bish. New Cr. Proc. 648-652; 10 Am. & Eng. Enc. Law, p. 513; 10 Enc. Pl. & Prac. pp. 441, 442; *State v. Nunn*, 29 La. Ann. 589; *State v. Pemberton*, 30 Mo. 376; *State v. Sims*, 43 Tex. 521; *Lemons v. State*, 4 W. Va. 755; *Williams v. State*, 27 Wis. 402; *Rice v. State*, 8 Helsk. 215; *Holden v. State*, 1 Tex. App. 225; *Anderson v. State*, 5 Ark. 444; *State v. Joyner*, 81 N. C. 534; *State v. Dyer* (Md.) 36 Atl. 763; *Wright v. State* (Tex. Cr. App.) 85 S. W. 150. Some of the authorities above cited have gone to the extent of declaring that such a defect in an indictment is fatal, whether especially excepted to or not. Such is the ruling in the case of *Holden v. State*, 1 Tex. App. 225, above cited. This, however, is not the rule

of pleading in Georgia. Section 955 of our Penal Code provides that exceptions merely to the form of an indictment shall be made before trial. Others have gone to the extent of holding that the smallest and most immaterial variation from the words prescribed would be fatally defective. In the case of *Lemons v. State*, 4 W. Va. 755, the supreme court of that state ruled that where the constitution required the indictment to conclude, "against the peace and dignity of the state of West Virginia," the conclusion, "against the peace and dignity of the state of W. Virginia," was not sufficient, and was fatally defective. The question made by this record, however, does not require a decision on the point as to whether any variation in the words prescribed in the form would necessarily be fatal. It may be that a substantial compliance with the form, by the use of terms varying a little from those prescribed, but meaning identically the same thing, would be sufficient. It is contended by state's counsel that, the accused in this case being charged with "unlawfully" selling liquors, this substantially complies with that part of the form prescribing the words, "contrary to the laws of said state," etc. To this it might be answered that there may be an unlawful sale of liquor against the revenue laws of the United States, without a violation of the laws of this state regulating the sale of such an article. But, in any event, there is nothing in the indictment that can possibly be urged as a compliance with the remaining portion of the form prescribed for the conclusion of this instrument, to wit, contrary to "the good order, peace and dignity thereof." From the authorities cited, it will be seen that in many of the states the words "contrary to the statutes or laws of the states" are not adhered to in the prescribed forms, but it seems that words charging the criminal acts as an offense against the dignity of the sovereign in whose name the indictment is found are uniformly adhered to, unless dispensed with by statute. It is true, where no form is prescribed by the organic law of the state, its legislature can by statute provide that no indictment or accusation by a grand jury shall be deemed insufficient by reason of any defect or imperfection in matter of form not tending to the prejudice of the defendant. This was done by the act of congress embodied in section 1025 of the Revised Statutes of the United States; and it was accordingly ruled, in the case of *Frisbie v. U. S.*, 157 U. S. 160, 161, 15 Sup. Ct. 586, that, by virtue of this provision in the Revised Statutes, the omission to charge that the offense was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," was immaterial.

While in most of the cases cited above the rulings were based upon mandatory provisions of the state constitutions providing the specific words to be used in an indictment, it

can, however, make no difference whether the mandate is in the constitution or the statute law; for, of course, a constitutional statute is as binding upon the court as any provision in the constitution itself. In *Anderson v. State*, 5 Ark. 444, it was decided that the form adopted by the constitution is merely declaratory, and in affirmance of an old principle, not the creation of a new one. Sebastian, J., delivering the opinion of the court in that case, on page 450, says: "This form derives no new consideration from its being found in the constitution. Such would have been the law without its insertion there. It was only declaratory and in affirmance of an old principle, and not a creation of a new one. Its end and office here are the same as in England, whence the form was borrowed. It is used merely as an accomplishment in the form of pleading, to indicate clearly the sovereign power offended in the violation of law." In *State v. Joyner*, 81 N. C. 534, it was decided that an indictment, whether for a common-law or a statutory offense, which does not conclude "against the peace and dignity of the state," is fatally defective. It appears in that case that while, at one time, under the constitution of North Carolina, it was required that indictments should conclude "against the peace and dignity of the state," yet, under the constitution of force when that decision was rendered (see page 538 of opinion delivered by Smith, C. J.), this clause was left out of the organic law of the state, and that there was really no written law on the subject in that state. Notwithstanding that fact, the court held that the omission of the words was a material and fatal defect. It would seem, therefore, from the trend of authority upon the subject, that, even where there is no provision in the organic or statute law of the state in reference to the matter, the courts are bound by the doctrine of the common law, that an indictment which does not conclude with words, either substantially or literally, that the crime charged is "contrary to the laws of the state, the good order, peace and dignity thereof," is no indictment at all. In 10 Enc. Pl. & Prac. p. 441, it is declared: "It is an old rule in the law of criminal procedure that an indictment must conclude against the peace and dignity of the government whose laws have been violated; and the requirement of this conclusion, in words appropriate to our form of government, has at various times been incorporated into the organic law of many of the United States. It is also sometimes expressly provided for by statute. The rule, when established by the written law, is strictly applied; and the omission thus formally to conclude an indictment is fatal, except when the necessity is obviated by statute not inconsistent with the organic law." This text is supported by a number of decisions cited in the notes. But, instead of there being any statute in Georgia which obviates the necessity of such words, we have,

on the contrary, a provision mandatory by its terms, recognizing the doctrine of the old common law on the subject, and substantially ingrafting its provisions in our statute. It is no answer to these views that this particular form of an indictment is purely technical, and cannot possibly affect any substantial rights of the accused; that its omission from the indictment cannot possibly work any prejudice or injury to the accused. The lawmaking power has a right to define what an indictment is, and prescribe such a form for it as would distinguish it from other ordinary complaints in court. When it does so prescribe in plain terms, and an instrument is presented by the grand jury of a county which does not undertake, either in substance or form, to comply with the requirements of the law, it is no indictment; and it is the duty of the court so to hold, when the question is made in the proper time and manner, as was done in this case. As Chief Justice Bleckley said in *Lumpkin v. State*, 87 Ga. 524, 13 S. E. 524, "If he insists upon it, he has a right to be tried upon an indictment good in form as well as in substance." Our system of pleading, as a rule, wisely has more regard to the substance than it has to the form of what is alleged; but, notwithstanding the many changes which have been made in old usages pertaining to judicial procedure, this particular form of indictment now under consideration, which grew up with the common law of England, has not only not been dispensed with by our written laws, but by a positive statute has been ingrafted on our system of criminal pleading; and therefore it still exists in this state as an ancient landmark that has survived the pruning and culture of modern legislation. We think, therefore, the demurrer to the indictment in this case should have been sustained, and the indictment quashed, and that the judge below erred in refusing to sanction the petition for certiorari. Judgment reversed. All the justices concurring.

DEEN et al. v. TANNER et al.

(Supreme Court of Georgia. Feb. 2, 1899.)

MANDAMUS TO SUPERINTENDENTS OF ELECTION.

A writ of mandamus, designed to compel the superintendents of an election held in a given county "to consolidate the vote of the county," and perform the other duties prescribed in paragraph 9 of section 72 of the Political Code, must be directed to all the superintendents who participated in holding such election; and this is true although a number less than the whole may, under the statute, constitute a lawful quorum of the entire body.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Petition by Elijah Tanner and W. M. Tanner for mandamus directed to T. S. Deen and others. Judgment for plaintiffs, and defendants bring error. Reversed.

C. A. Ward, Jr., R. A. Hendricks, F. W. Dart, and Spencer R. Atkinson, for plaintiffs in error. Quincey & McDonald and Leon A. Wilson, for defendants in error.

LUMPKIN, P. J. At the general election held in this state on the first Wednesday in October, 1898, Elijah Tanner and John Vickers were opposing candidates for the office of representative from Coffee county in the general assembly, and W. M. Tanner and J. A. Daugherty were opposing candidates for the office of sheriff of that county. On the day after the election, certain persons, who had been election superintendents at the county site and at the various precincts, met for the purpose of consolidating the vote of the county, and making official returns of the result. The persons thus assembled did not include all of the superintendents by whom the election on the previous day had been held in the county of Coffee. Those present differed among themselves as to whether or not the returns from the McDonald precinct had been properly sent up, and, consequently, as to whether or not the same should be considered in consolidating the vote; and, as a result, no definite conclusion was reached or final action taken at that meeting. Subsequently Elijah Tanner and W. M. Tanner presented to the judge of the superior court a petition for mandamus, by which they sought to compel the making by the persons who had thus met of a return based upon a computation of all the votes cast at the election, including those polled at the McDonald precinct. The petition alleged that, after the failure to consolidate on the day after the election, there had been other meetings of election superintendents, the persons present at which were not identical with those who participated in the first meeting, but that no final action had ever been taken or any lawful returns made. The defendants to this petition, viz. the election superintendents who met on the day after the election, demurred to the petition. Their demurrer alleged, among other things, a nonjoinder of defendants, for the reason that, in addition to themselves, there were eight other superintendents of the election (the names of whom were given), clothed with all the powers and privileges vested in the defendants, including the right and duty of being present and participating in the consolidation of the vote, and that these eight additional superintendents were necessary and essential parties defendant to the present proceeding. This demurrer was overruled, a hearing on the merits was had, and a judgment rendered, ordering and directing the defendants to meet and consolidate the votes, including those cast at the McDonald precinct. The defendants excepted to the overruling of their demurrer, and also to the judgment rendered in favor of the plaintiffs.

As we are of the opinion that the court should have sustained the demurrer, the merits of the case are not properly before us for

adjudication. After very careful and anxious deliberation, our conclusion is that the writ of mandamus should have been directed to all of the superintendents who participated in holding the election. Our statutes bearing upon this subject are not as perspicuous as they might be, as will be observed from the following excerpts therefrom:

Section 66 of the Political Code declares that: "The persons qualified to hold such elections are ordinaries, justices of the peace, and freeholders. There must be three superintendents, and one must either be an ordinary or a justice of the peace, except in a certain contingency hereinafter set forth. Persons who cannot read and write shall not be competent to serve as managers of elections in this state." Paragraphs 7, 8, and 9 of section 72 furnish but meager information concerning the duty of consolidating the vote and making returns of the result. They are as follows: "When the votes are all counted out, there must be a certificate, signed by all of the superintendents, stating the number of votes each person voted for received; and each list of voters and tally sheet must have placed thereon the signature of the superintendents." "The superintendents of the precincts must send their certificates, and all other papers of the election, including the ballots, under the seal, to the county site for consolidation, in charge of one of their number, which must be delivered there by twelve o'clock m., of the next day. Such person is allowed two dollars, to be paid out of the county treasury, for such service." "The superintendents, to consolidate the vote of the county, must consist of all those who officiated at the county site, or a majority of them, and at least one from each precinct. They shall make and subscribe two certificates, stating the whole number of votes each person received in the county; one of them, together with one list of voters and one tally sheet from each place of holding the election, shall be sealed up and, without delay, mailed to the governor; the other, with like accompaniments, shall be directed to the clerk of the superior court of the county, and by him deposited in his office. Each of said returns must contain copies of the original oaths taken by the superintendents at the court-house and precincts." Section 73 provides: "If said superintendents do not deliver said lists and accompaniments to said clerks within three days from the day of the election, they are liable to indictment. Any superintendent of an election, failing to discharge any duty required of him by law, is liable to a like proceeding and penalty."

It is certain, from the foregoing provisions, especially those contained in the section last quoted, that every election superintendent is a competent and qualified person to participate in the consolidation of the vote, and therefore that a full board would consist of all the superintendents. It is provided, however, that a quorum, consisting of at least two

of the superintendents who officiated at the county site and at least one of those who officiated at each precinct, may lawfully consolidate the vote. The law does not point out how the members of this quorum shall be fixed upon or ascertained. It provides no means for the selection of any particular two of the three who acted at the county site, or of any particular one of a given three who acted at a precinct located elsewhere. On the contrary, the duty of participating in consolidating the vote of the county seems to devolve equally upon each and every one of the superintendents, though a number less than the whole, if each precinct is represented as the statute provides, may make a lawful return. While the law declares that the superintendents of each precinct must send their certificates and all other papers pertaining to the election "to the county site for consolidation, in charge of one of their number," this by no means excludes the other two from appearing and acting at the county site in consolidating the vote, or places the duty of so doing exclusively upon the one selected as their messenger to carry up the papers. The duty thus imposed upon this messenger is an entirely distinct one from the duty resting upon all three alike of taking part in the consolidation and making returns of the result. The law provides that the person who carries the election papers to the county site shall be paid \$2 for this distinct service. The selection of him for this purpose can in no fair sense be said to commission him as the sole representative of the superintendents acting at his precinct; for, in making such selection in conformity with the statute, the other superintendents cannot properly be deemed to have forfeited their right to appear and participate in the meeting at the county site, nor does the law contain any intimation that they can in this manner relieve themselves of the duty of seeing that returns are made pursuant to the terms of the statute.

It certainly cannot be doubted that, if there was a total failure on the part of the election superintendents of the county to take any action towards consolidating the vote, the writ of mandamus to compel the performance of this duty would have to be directed to all the superintendents by whom the election for the county was held. This must be so, because no reason can be suggested for seeking to compel the performance of this duty as against any one or more superintendents, rather than as against others of them, or all of them. Indeed, it might lead to most pernicious results to allow a person interested in the performance of this duty to select at his pleasure the superintendents upon whom he wished the mandamus to operate; for it might be an easy matter to choose out of the whole number those apparently willing to consolidate the returns in accordance with the desires of the petitioner, and therefore not disposed to vigorously defend the proceeding against them, or present to the court reasons

why the returns should not be made in accordance with the petitioner's wishes. Undoubtedly, when a legal quorum meets and takes final action, it is an end of the matter; but, until this has been done, every election superintendent has a right, and is charged with the corresponding duty, to meet with the other superintendents, and comply with the requirements of the law. Inasmuch, therefore, as it is the legal duty of each and every superintendent to meet and act, it must follow that, when there is a necessity for compelling action, the process of the law should be directed to each and every person upon whom the duty devolves. "The writ should be directed to all the persons whose duty it is to perform the act required, though some of them may be applicants for the writ." 14 Am. & Eng. Enc. Law, 219, 220.

The soundness of what is said above cannot be seriously questioned. But it is contended that when a quorum of the election superintendents has once met, those present, and they alone, constitute the board for consolidating the vote, and that no other superintendent in the county can, even though no final action has been taken by the board as thus composed, at the meeting when the same was organized, ever at any time afterwards become a member of it, or participate in its deliberations or action. We cannot assent to the correctness of this contention. It is contrary to the spirit and genius of our institutions, and is certainly not sustained by anything in our statutes relating to this matter. It seems purely arbitrary to say that a man holding an office, the duties of which he is to perform in connection with others holding a like office, should be deprived of the right, or absolved from the duty, of doing acts required of him by law, simply because he failed to be present upon a single occasion, when a quorum of his fellows met, but did not actually perform the duty chargeable alike upon all. It happens every day that a quorum of officials meet to transact business when others entitled to participate in its transaction are absent. If those present conclude the work in hand, the absentees are bound by the action taken in the premises; but, if the work is not concluded, and at a later period the absentees present themselves, surely it cannot be said they can have no voice as regards the unfinished business. A familiar illustration is presented in the case of legislative bodies. For instance, the house of representatives might have under consideration a bill when a dozen or more of its members were not in their seats. If the bill passed by the requisite constitutional majority, its validity, so far as that house was concerned, would be unquestioned. In case the bill was defeated, absentees who would have voted in favor of it would be bound by the result; but, if an adjournment took place while the bill was under consideration, and before final action had been taken thereon, and on a subsequent day it came up again for consideration, at which

time those absent on the previous occasion occupied their seats, no one could question their undoubted right to vote upon the measure.

For the reasons above given, we conclude the demurrer ought to have been sustained, and the plaintiffs' petition dismissed. It was fatally defective for want of essential parties, and therefore could not be made the basis of any legal and valid judgment. Judgment reversed. All the justices concurring.

BAKER v. MAGRATH.

(Supreme Court of Georgia. Feb. 3, 1899.)

COMMISSIONER OF DEEDS — PAUPER AFFIDAVIT — DIRECTING VERDICT.

1. A commissioner of deeds for the state of Georgia residing in another state has authority to administer there a pauper affidavit required of plaintiff in error to relieve him from payment of costs in this court.

2. In the trial of a suit upon unconditional promissory notes given by defendant to plaintiff, it is not error for the court to direct a verdict for the plaintiff, when there is no testimony to sustain the plea relied on by defendant. (Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Suit by J. W. Magrath against W. A. Baker. Verdict directed for plaintiff. Defendant brings error. Affirmed.

Burton Smith and C. B. Reynolds, for plaintiff in error. W. D. Ellis, Jr., for defendant in error.

LEWIS, J. This was a suit by J. Walter Magrath against W. A. Baker for \$4,000, besides interest, alleged to be due on two promissory notes given by defendant to plaintiff for the principal amount of \$2,000 each. Defendant filed a plea, denying his indebtedness as alleged; admitting that the notes sued upon were signed as stated in the petition; but alleged that only a part of said sum was received by him, not as a loan, but to be used by defendant in the speculative purchase of cotton for the joint benefit of plaintiff and defendant; that the notes were given for an illegal consideration, are invalid, and no recovery can be had thereon. At the conclusion of the evidence, the court directed a verdict for the plaintiff, to which direction the defendant below excepted, and now assigns it as error.

1. When this case was called for hearing, our attention was called to the fact that the pauper affidavit executed by the plaintiff in error, for the purpose of relieving himself from the payment of costs in this court, was sworn to and signed before a commissioner of deeds for the state of Georgia, in the state of New York, and the question is presented whether or not such an official has authority to administer this oath. Under the act of 1829, as embodied in Cobb, Dig. pp. 173, 174, such a commissioner unquestionably had authority to administer this oath; and it was

accordingly decided in *Sugar v. Sackett*, 18 Ga. 462, that "a commissioner for this state, in New York, duly appointed, is empowered by our law to administer an oath in any case in which a magistrate, resident in our state, may administer it." There was evidently an effort upon the part of the codifiers to embody in the present Code the provisions of this act of 1829. See Pol. Code, § 120, which, in its present shape, first appeared in the Code of 1863, and has been embodied in every subsequent Code since that date. That section does not contain specifically the provisions of section 2 of the act of 1829, giving such a commissioner of this state authority to administer an oath or affirmation to any person who shall be willing and desirous of making the same, but we think there was an evident intention to embody in the Code the provisions of that section, as well as the one just preceding, in a condensed form and in general terms. Section 120 of the Political Code declares that such commissioners shall have power "to take and certify the acknowledgment or proof of deeds or other conveyance of property in this state, of depositions under commissions or otherwise, of powers of attorney," etc. That is to say, such officers shall have power to take and certify the acknowledgment "of depositions under commissions or otherwise." The word "deposition" may be used in two senses. In its restricted and technical sense, it is usually limited to the written testimony of a witness given in the course of a judicial proceeding, at law or in equity; but it is also a generic expression, which embraces all written evidence verified by oath, and thus includes "affidavits." And. Law Dict. p. 346; 9 Am. & Eng. Enc. Law (2d Ed.) p. 297. The term, therefore, being susceptible of these two constructions, we think it proper to give it its generic meaning; especially in view of the original statute, all the provisions of which were evidently intended to have been codified; and in view of the further fact that the term "deposition" is not limited by the section of the Code to such only as are taken by commission, as is usually the case in testimony taken in judicial proceedings, but the expression "or otherwise" is used, thus indicating that the codifiers intended to apply the term in the broad sense of a written oath of any sort. We conclude, therefore, that the plaintiff in error is not chargeable with payment of costs in this court.

2. On the trial of the case there was no testimony to sustain the plea that this was an illegal contract which the plaintiff was seeking to enforce. The defendant below testified that plaintiff knew the money for which the notes were given was to be used for speculation in cotton. He also testified that the money received by him from plaintiff was used in buying cotton futures, and was lost in this speculation; but it nowhere appears from the testimony that Magrath had any knowledge of the fact that the

money was to be used in this particular kind of speculation. There may be a lawful as well as an unlawful speculation in cotton. Besides, it does not appear from the testimony that, under the contract between these parties, Magrath had any interest whatever in the profits or losses which Baker might make or sustain in the course of speculation. The notes were given for a certain amount. They were unconditional upon their face, and the amount therein stipulated, by virtue of the contract between the parties, was to be paid regardless of any losses that Magrath might sustain in buying cotton futures, or otherwise engaging in cotton speculation. There was testimony to the effect that only \$3,000 were actually loaned by Magrath to Baker, and that \$1,000 were to be paid for the use of the money; but this, of course, would have simply tainted the contract with usury, and did not tend to establish in any respect the defense relied on in this case. There being no plea of usury, the court did not err in directing a verdict for the plaintiff. Judgment affirmed. All the justices concurring.

G. OBER & SONS CO. v. DRANE et al.

(Supreme Court of Georgia. Feb. 3, 1899.)

PLEADING—AMENDMENT OF ANSWER—COLLATERAL NOTE—PAYMENT—PAROL EVIDENCE.

1. The defendant in a civil action brought before the passage of the act of December 21, 1897 (which amends section 5057 of the Civil Code), had the right to set up any new facts or defenses by way of amendment, by making the prescribed affidavit.

2. When it appears that the note sued on was deposited as collateral to secure the payment of a sum of money for which the depositor was indebted, and with such collateral there were also deposited certain rent notes, to secure the payment of the collateral note, and that the holder of the latter had received from the rent notes and other sources a sufficient amount to discharge the collateral note, it will be held to have been paid, and the sureties thereon discharged from further liability.

3. Parol evidence tending to show the facts indicated in the preceding headnote was admissible. Such evidence in no manner varied the terms of the written instrument sued on, but went alone to the question of payment.

4. There was no error in the admission of evidence, nor in charging the jury. The evidence was sufficient to support the verdict.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by G. Ober & Sons Co. against W. R. Drane and others. Judgment for defendants. Plaintiffs bring error. Affirmed.

W. P. Wallis, for plaintiffs in error. Jas. Dodson & Son, for defendants in error.

LITTLE, J. 1. Error is assigned on the ruling of the court allowing amendments to the answer. The specific objections were that the amendments were offered too late, and defendants did not comply with the statute, and because there was no original plea filed,

such as could be amended. The answer was divided into paragraphs, in which some of the allegations of the petition were admitted. There was a denial of any indebtedness, and the defendants set up that they never made any such note as that sued on, nor was the execution of said note their act or deed, nor that of any one authorized by them. This answer was filed in January, 1897. The amendment set up the additional defense that the note was to be secured by certain rent notes belonging to the maker, a list of which was given in the plea, and that, but for the fact that these notes were to accompany the note sued on as collateral, they would not have signed the original note; that the note sued on was given to the plaintiffs as collateral to secure the payment of another sum owed to the plaintiffs by the maker; and that the plaintiffs had received, from the collateral deposited for the payment of the note sued on, a sum more than sufficient to pay that note in full. To the amendment was attached an affidavit that the facts set up by amendment were unknown to the defendants, and that they did not have notice or knowledge of the same at the time of filing the original plea. We think the amendment was properly allowed. The suit was brought on the 27th of October, 1896. The amended plea was offered and admitted at the trial, in February, 1898.

Our Code (section 5057) prescribes that, after the time allowed for answer has expired, the defendant cannot, by amendment, set up any new facts or defense of which notice was not given by the original plea or answer, unless, at the time of the filing of the amended plea or answer which contains new matter, he shall attach an affidavit that, at the time of filing the original plea or answer, he did not have notice or knowledge of the new facts or defense set out in the amended plea or answer. The affidavits attached to the amended pleas clearly brought the defendants within the rule laid down by the statute. A defendant may interpose his defense by plea or answer, but it is not now essential, under the system of pleading which prevails in this state, that any amendment to be allowed thereto must be germane to the original plea. By section 5052 of the Civil Code it is provided that the plea or answer may contain as many several matters as the defendant thinks necessary for his defense; and the provision which controls amendments expressly refers to new matter, notice of which is not given in the original plea or answer; and it is only necessary for the allowance of the amendment that, as to the new matter offered, the defendant shall make oath that he had no notice or knowledge of the new facts or defense at the time of the filing of the original plea. When, at the time of trial, the defendants offered an amendment, it was not a good objection that there was no original plea which could be amended by the new matter offered, but they were entitled to

add to the answer filed by them new matter, on compliance with the statute. Besides, the section of the Code in relation to amendments of pleas or answers has been amended by the act of 1897. See Acts 1897, p. 35. It is now, under that act, in the discretion of the court to allow amendments to be filed without the affidavit prescribed by the original section; and it would seem, even if the amendment sought to be made had not been verified, that it was within the discretion of the presiding judge, at the time of the trial, to allow it to be filed.

2. It was contended by the defendants that the note sued on, and which they had signed as sureties, had, by the principal, been delivered to the plaintiffs in error as collateral to secure the payment of another note for a larger amount which the principal owed them, and that, when the note so deposited was turned over, other and additional notes given for rent, etc., were at the same time delivered to the plaintiffs in error, as collateral to secure payment of the note sued on, and that from such collateral the plaintiffs in error had collected and received an amount more than sufficient to pay off the note on which they were sued. This was disputed by the plaintiffs in error, who insisted that the note sued on and the rent notes were alike delivered to them as collateral to secure this other indebtedness owing by the principal of the note. It was therefore a clear issue of fact to be determined by the evidence. Several pleas having been filed, the court charged the jury, if they should find for the defendants, to designate the plea upon which their verdict was rendered. The jury did so in their verdict, and returned that the collateral (referring to the rent note, etc.) should have been applied to the note sued on. The record contains sufficient evidence to support the verdict so rendered, and, the question of fact having been determined, the effect of the finding was to release the securities from liability on the note. Whenever the holder of the note on which they were sureties received from any source payment of the money due thereon, it was extinguished, whether such payments were entered upon the note or not. The jury having found such to be the fact, their verdict must stand, and the securities be held to be discharged.

3. It was complained that the court erred in admitting parol evidence showing the deposit by the maker of the note sued on, of certain rent notes, etc., as collateral to secure its payment, and that the admission of such testimony tended to vary the terms of the written contract. It appears that the note sued on was made by W. R. Drane as principal, and the defendants in error as sureties, and that it was an unconditional promise to pay to the plaintiffs in error at the Bank of Southwestern Georgia a sum of money therein named, with interest and attorney's fees. We see no objection to the admission of the evidence on the ground taken. It in no manner had the

effect of changing the terms of this contract, but simply tended to show that the promise, as made, had been complied with, and the money agreed to be paid had been paid. True, it was not paid by the securities, but it was paid with the effects of the maker; and it is an immaterial matter who made the payment or from what source it came, provided that the holder of the note, according to its terms, received the sum it represented. This case, as presented in the record, turns upon the facts as to whether the rent notes, etc., were deposited with the note sued on, and as collateral to secure the payment of the latter, and whether the holder had received from such rent notes and other sources a sum sufficient to pay the note. No new contract was shown by the admission of this evidence, and it was admissible to illustrate the fact of payment.

4. A number of errors are assigned on the admission of evidence, and to the charge of the court, as set out in the motion for new trial. An examination of the rulings and charge fails to show that the court committed any material error. The rulings admitting evidence were right, and the charge of the court, taken as a whole, and including the parts complained of, was a proper legal presentation of the law governing the issues raised. There is sufficient evidence in the record to support the finding of the jury, and the judgment of the court below overruling the motion for new trial is affirmed. All the justices concurring.

ANDERSON v. FOSTER et al.

(Supreme Court of Georgia. Feb. 3, 1899.)

TORTS OF EXECUTOR—LIABILITY OF ESTATE—MISAPPROPRIATION OF FUNDS.

The estate of a testator is not liable for the wrongful act of the executor. (a) Where the petition of an administrator against two executors of separate estates alleges, in substance, that a certain sum of money belonging to plaintiff's intestate, which was in the hands of one of these executors, was by such executor misapplied in part payment of a judgment rendered against himself as an individual and the plaintiff as administrator, and that the other defendant, as the executor of an estate which owned the judgment, received the money, knowing at the time of its reception of the misappropriation, such petition stated no cause of action against the defendants in their respective representative capacities.

(Syllabus by the Court.)

Error from superior court, Morgan county; B. E. Thrasher, Judge.

Action by Clifford L. Anderson, administrator of A. G. Foster, against T. C. Foster, executor of A. G. Foster, and E. W. Butler, executor of Joshua Hill. Judgment for defendants, and plaintiff brings error. Affirmed.

The following is the official report:

The petition alleged: A. G. Foster died, testate, in 1880; and his will was probated in the court of ordinary of the county at the

August term, 1880, and F. C. Foster was nominated as one of the executors of the will, and qualified as sole executor August 2, 1880, and has never been discharged as such executor. Joshua Hill died, testate, in 1891. His will was probated in the court of ordinary of the county at the May term, 1891; and E. W. Butler was nominated as executor of the will, and qualified as such May 4, 1891, and has never been discharged as such executor. Petitioner's intestate was a son of said A. G. Foster, and a legatee under his said will; and, under the terms of the will, all of the property of the testator, after payment of certain specified legacies to the testator's wife as therein stated, was bequeathed to the testator's children, six in number, to be equally divided between them. A. G. Foster had no debts at the time of his death, and his estate is solvent. F. C. Foster, executor of A. G. Foster, and E. W. Butler, executor of Joshua Hill, are indebted to petitioner, as administrator aforesaid, \$273.20, besides interest from January 2, 1895, at 7 per cent. per annum, for that F. C. Foster, executor as aforesaid, received on January 1, 1895, \$2,000, which had been deposited by A. G. Foster in one of the banks in Augusta, Ga., which sum was a part of the property of said testator, as devised in the residuary clause of said will to be equally divided between all of his children. Of said \$2,000, the sum of \$273.20 was the property of the estate of Albert W. Foster, deceased, and was due and payable by F. C. Foster, executor as aforesaid, to petitioner, as administrator of Albert W. Foster. The estate of Albert W. Foster is insolvent, and though F. C. Foster, executor as aforesaid, knew at the time of the receipt of the \$2,000 that Albert W. Foster had died intestate, that petitioner was his duly-qualified administrator, that his estate was insolvent, and that of the \$2,000 so received by him \$273.20 was due to the estate of Albert W. Foster, and was payable only to petitioner, he, nevertheless, without petitioner's consent or knowledge, and without authority of law, on January 2, 1895, paid said share of Albert W. Foster to E. W. Butler, as executor of Joshua Hill; and it has been applied by said Butler, executor as aforesaid, in part payment of an execution issued from the city court of Atlanta, based on a judgment rendered in said court April 17, 1894, in favor of E. W. Butler, executor of Joshua Hill, against F. C. Foster and petitioner, as administrator of A. W. Foster. At the time of the receipt of the \$273.20 by E. W. Butler, executor, he knew that A. W. Foster had died, intestate; that his estate was insolvent; that petitioner was his duly-qualified administrator; and that the \$273.20 so received by him was the money of, and was due and owing to, the estate of A. W. Foster by said F. C. Foster, executor of A. G. Foster; and that said Foster had no authority in law or equity to misapply said fund. By reason of this knowledge, said E. W. Butler, executor

as aforesaid, at and before the time he received the \$278.20, became, by virtue of the law in such cases provided, jointly liable with F. C. Foster, executor of A. G. Foster, the petitioner, as administrator aforesaid, in the sum of \$278.20, besides interest, as stated. Petitioner, as administrator as aforesaid, has demanded payment of said \$278.20 and interest, both from F. C. Foster, executor of A. G. Foster, and from E. W. Butler, executor of Joshua Hill; and they refused, and now refuse, to pay the same. Attached to the petition was a copy of the will, which was to the effect stated in the petition. Process was prayed against F. C. Foster, executor of A. G. Foster, and against E. W. Butler, executor of Joshua Hill. F. C. Foster, executor, demurred to the petition on the ground that the estate of A. G. Foster ought not to be held liable for any act of F. C. Foster not in his representative character as executor of A. G. Foster. E. W. Butler demurred on the ground that there was a misjoinder of action and parties; that the plaintiff's remedy, if he had any, was against the estate of A. G. Foster, and not against the estate of Joshua Hill; and that no sufficient cause of action was alleged against Butler as executor of Hill. The court sustained both demurrers, and plaintiff excepted.

W. R. Mustin, for plaintiff in error. F. C. Foster and E. W. Butler, for defendants in error.

FISH, J. This case, as the record shows, was treated in the trial below, by all the parties thereto and the judge, as an action against F. C. Foster and E. W. Butler as the executors, respectively, of the wills of A. G. Foster and Joshua Hill, deceased. It was argued before this court by both sides upon this theory. Whatever, therefore, may have been the true legal character of the petition, this court, under the circumstances, will consider it as against the defendants in their representative capacities. In *Laverty v. Woodward*, 16 Iowa, 1, it was held that where the descriptive words "executor of" were not treated as surplusage by the parties, or either of them, in the trial court, they would not be so considered in the supreme court. In *Fritz v. McGill*, 31 Minn. 536, 18 N. W. 753, the declaration did not clearly disclose whether it was intended to charge the defendant individually or in his representative capacity. In deciding an interlocutory motion, the court construed the declaration as being against the defendant in his representative character. The plaintiff proceeded to trial without electing in which manner to prosecute the action, and offered no amendment. It was held that he could not afterwards contend that the action was against the defendant personally. See *Aultman v. Mason*, 83 Ga. 218, 9 S. E. 536.

As will be seen from the petition, the substance of which is set forth in the reporter's

statement, the plaintiff, as administrator of Albert W. Foster, sought to recover of the defendants for assets of the plaintiff's intestate alleged to have been misapplied and misappropriated by the defendants. As before stated, the action was treated as charging the defendants, as executors, with the misapplication of such assets. The controlling question, under the demurrers, therefore, is: Did the petition state a cause of action against the defendants in their capacities as executors? In other words, were the estates of A. G. Foster and Joshua Hill liable to the plaintiff if the allegations in his petition were true? We think not. While it is true that, under section 3200 of the Civil Code, "all persons aiding and assisting trustees of any character, with a knowledge of their misconduct, in misapplying assets, are directly accountable to the persons injured," yet it is a personal liability that the law puts upon the trustee and those aiding him in such misappropriation of trust funds. The rule that an executor or administrator is liable individually, and not in his representative capacity, for injury to third parties by his tortious acts, is well established. 3 *Williams, Ex'rs*, *1691-1726, and note 1; *Schouler, Ex'rs*, §§ 383-385.

If F. C. Foster, as executor of A. G. Foster, had money in his hands belonging to the estate of plaintiff's intestate, and wrongfully paid it to E. W. Butler, as executor of Hill, and Butler received it with knowledge of F. C. Foster's misappropriation of it, then they were joint tortfeasors, and, without more, liable individually to plaintiff, as administrator; but, manifestly, the estates which they respectfully represented would not be chargeable with their misdoing. The fact that Butler received the money, as the executor of Hill, knowing that it belonged to the estate of plaintiff's intestate, and appropriated it upon an execution in favor of Butler, as executor of Hill, against plaintiff, as administrator of Albert W. Foster, would not render the estate of Hill chargeable for Butler's wrongful receipt of the money. This is not an action against Butler, as executor, for money had and received for use of plaintiff, as administrator, nor an attempt to make Hill's estate liable for money belonging to plaintiff's intestate, of which it has received the benefit, but, as before stated, is an effort to recover of the estates of Hill and A. G. Foster for the alleged misapplication of assets of the estate of plaintiff's intestate by the defendants. Whether, conceding all the allegations of the petition, the plaintiff could recover of the defendants, or either of them, in any capacity, or in any form of action, we do not decide, for the simple reason that such questions are not in this case. There was no error in sustaining the demurrers to the petition, on the ground that it set out no cause of action against the defendants as executors. Judgment affirmed. All the justices concurring.

SMITH v. ROBERTS et al.

(Supreme Court of Georgia. Feb. 3, 1890.)

JUDICIAL SALE—CONDITIONAL BID—FAILURE TO COMPLETE—PURCHASER'S LIABILITY—RESALE—NECESSITY.

When a bid for the purchase of property in the hands of a receiver, which has been ordered to be sold, has been submitted to, and duly accepted by, the court, the bidder is liable for the difference between the amount which he bid and that which the property brings at a proper resale ordered by the court to be made at his risk. But, in order to render him so liable, it must appear that the same property for which he bid was actually resold; and, unless it so appears, a proceeding to establish such liability cannot be maintained. It is not sufficient, to fix liability upon the bidder, to show that some of the property was sold under order of the court, and other items, on which liens existed, were surrendered to the holders of the liens, and sold by them at private sale, when, according to the terms of the bid, the purchase was conditioned on the extinguishment of the liens so as to vest full and unincumbered title to the property in the purchaser, and when it also appears that the bid was made for various items of property as a whole, constituting a manufacturing plant or outfit, and as such, with the conditions, it was accepted by the court.

(Syllabus by the Court.)

Error from superior court, Lowndes county; A. H. Hansell, Judge.

Suit by J. T. Roberts, as receiver, and others, against James M. Smith, to recover damages for defendant's failure to complete a judicial sale. From an order denying defendant's motion to dismiss the petition, he brings error. Reversed.

J. L. Hopkins & Sons and D. W. Meadow, for plaintiff in error. Denmark & Ashley and S. T. Kingsbery, for defendants in error.

LITTLE, J. There are several assignments of error made to the ruling of the court refusing to dismiss the petition. From the view we take of the case, it is only necessary to refer to two of the questions presented by the motion to dismiss. It is a general proposition, well recognized in equity pleading and practice, that one who submits a bid for property offered for sale by a receiver under order of the court brings himself within the jurisdiction of the court for the purpose of having the sale completed, and to this end the court may, by rule or attachment, compel the bidder to perform his part of the contract, and either pay the amount of his bid and take the property, or make good the difference between his bid and the amount realized at a subsequent sale of the same property. But the plaintiff in error avers that he was a resident of the county of Oglethorpe, and was not at the time the petition was filed, nor now, a resident of Lowndes county, where the proceedings were pending, and that the superior court of Oglethorpe county alone has jurisdiction of him for the trial of the matters alleged against him in the petition, and that the constitution of this state, in paragraph

6, § 16, of article 6, fixes the venue of such a suit against him in the county of Oglethorpe, where he resides. We do not find it necessary, however, to discuss or decide the question of jurisdiction raised in this case, because, on its merits, as shown by the petition, the case must be adjudged against the defendants in error.

Assuming that the superior court of Lowndes county had acquired jurisdiction of plaintiff in error for the purpose of compelling him to pay the difference between the amount of his bid and that which the property brought at a resale, it only becomes material to pass on the question raised in the fifth ground of the motion to dismiss; that is, it does not appear from the petition or the record in the case that the property sold on the first Tuesday in April, 1897, was the same and the whole of the property bid for by the plaintiff in error. In express terms, the written bid alleged to have been made by Smith was for the purchase of "the saw mill, planing mill, engines, boilers, locomotives, tram roads, railroad iron, and all fixtures, furniture, utensils, and appurtenances, and all other property, of any kind, character, and description, owned by Mineola Lumber Company on December 13th, 1895." This bid specifically included, not only all the property which the company owned at that time, but to which they had an equitable title, where the legal title was in some other person to secure a debt, or there was a lien for purchase money. And the bid was made with the understanding, as expressed in the writing, that the court was to provide for the payment or discharge of the debts for which the title was so held, by proper order. Evidently the purchaser did not propose to buy any single interest of the Mineola Company, nor any particular item of property. A fair construction of his bid manifests that his purpose was to purchase the entire property, as an outfit or plant,—not only those items which the company held absolutely, but other particular and necessary pieces of property, where the legal title was in the original vendor, or a lien existed for the payment of some particular sum. This, in effect, was his bid, and with these terms and conditions it was accepted by the court.

It is contended that when this bid was submitted and accepted by the court a valid sale was contemplated, under the terms of which the receiver was entitled to have the purchase money on tender of the property according to the terms of the bid. Assuming the bid to have been made, such a conclusion must follow. The compilers of the American and English Encyclopedia of Law, in volume 12, p. 234, have, from authorities cited in notes 1 and 2, condensed the rules which are applicable to the question under consideration in the following language: "Where the sale is made under a decree in chancery, the power of the court to enforce

the contract of purchase is broader than in case of an ordinary execution sale. In addition to an action at law to recover the amount bid, or the deficiency upon a resale, the court of chancery may, upon motion or proper application, (1) set aside the sale, release the purchaser, and decree a resale; or (2) ratify the sale and decree a specific performance of the contract, enforcing its order by attachment and commitment of the person of the purchaser for contempt; or (3) order a resale, holding the purchaser liable for any deficiency and for the costs of the resale." See, also, *Jones, Mortg.* § 1642; 2 *Daniell, Ch. Pl. & Prac.* pp. 1281, 1282. In the case at bar the proceeding was instituted under the third of these rules; that is, ordering the property resold, with the expressed purpose to hold Smith liable for the deficiency and the costs of the second sale. In order to do so, it is essential that the same property, and all of it, should be resold; otherwise, it would be impossible to ascertain the deficiency, so as to fix the amount for which the bidder at the first sale is to be held responsible. It must be noted that no element of uncertainty can be allowed to enter, in establishing this liability. The first purchaser is liable for a fixed, definite amount, to be ascertained by subtracting from the purchase price which he contracted to pay the amount realized at the second sale of the same property, or he is liable for nothing. The difference measures the liability. Without stopping to ascertain the rules which govern the manner of the second sale, in relation to the liability of the first purchaser, further than to say that the mode, manner, and terms are left to the sound discretion of the chancellor in the accomplishment of the purpose to obtain the best price at the second sale for the protection of the original purchaser, we refer to certain established principles which must be considered in determining, in a proceeding of this character, the liability which attaches to the first purchaser, who is able, but refuses, to comply with the terms of his purchase. The summary process exercised by courts of equity to compel a purchaser to complete his bid is cumulative of the remedy to recover the amount in an action at law, not exclusive. *Townshend v. Simon*, 38 N. J. Law, 289; *Shinn v. Roberts*, 43 Am. Dec. 636; *Municipality No. 2 v. Hennen*, 14 La. 559. See, also, *Miltenberger v. Hill*, 17 La. Ann. 52. And the resale must be made upon the same terms, as near as may be, in order to render the first purchaser liable for the difference. *Shinn v. Roberts*, supra; *Riggs v. Pursell*, 74 N. Y. 370. If the terms of the sale differed materially, it is proper to restrain plaintiffs from collecting the difference. *Id.* Our statute law (Civ. Code, § 5466), in dealing with liability of the purchaser at a sale of real or personal property, when made by an executor, administrator, etc., or by a sheriff under legal process, declares that the trustee

or officer making the sale may either proceed against the purchaser for the full amount of the purchase money, or resell the property and proceed against the first purchaser for the deficiency; and in construing this provision of the law this court has made repeated rulings on the question as to what defense may be urged by such purchaser in a suit to recover the deficiency. The applicability of the principles ruled may be questioned when sought to be followed in a court of equity. It may be answered, however, that equity is ancillary, not antagonistic, to the law; that it follows the law where the rule of law is applicable, and the analogy of the law where no rule is directly applicable. Civ. Code, § 3923.

We are not dealing with the powers of a court of equity to enforce its orders, nor attempting to limit the practice incident to such a court to enforce its decrees or adjudications by rule or attachment; but the principles which govern the liability of a purchaser of property for a deficiency in price on a resale must be the same whether it arises in a suit at law under a sale made under legal process issued by a court of competent jurisdiction, or the sale be had under an order of the same court, by a receiver, in the exercise of its chancery powers, and the proceeding is in the nature of a petition for attachment. The incidents are different, but the rules of law which afford a defense, when resting on similar facts, must be the same in both jurisdictions. In the case of *Hendrick v. Davis*, 27 Ga. 171, which was a suit to recover the difference between the amount originally bid and that which the property brought at a resale by the sheriff, the court ruled, "For Hendrick to be liable, the same property must have been resold, and resold as the property of the identical defendants as whose property it has been bid off by him." In the case of *Saunders v. Bell*, 56 Ga. 442, which was an administrator's sale, it was ruled that a nonsuit was proper where the resale was delayed 12 months. See, also, *Cureton v. Wright*, 73 Ga. 8.

As we have seen, the bid of Smith was made for the property as a whole, and in a certain condition, relatively to its situation as it existed at a particular time,—December 13, 1895. In order to hold Smith liable for the difference between his bid and the amount realized at a resale, it is a condition precedent that a resale of the property for which he bid, and as he bid,—that is to say, as to extinguishment of liens on the property,—should be made. Confessedly, this was not done. The rails, upon which there existed a lien, were taken up, and turned over to a bank, which held the lien. One of the locomotives was similarly disposed of, and so was the iron safe. It is true, the petition alleges that he is entitled to a credit for the prices at which these items of property sold, less the amount necessary to extinguish the liens on them; but he bid for this

property in a certain condition, free of all liens, and as parts of a whole plant, and made his bid on the condition that he should have the property divested of liens; and, in order to hold him good for the difference, the same property must have been sold with the same conditions as to title. While the receiver might have pursued one of the other remedies which the law gives him (for instance, he might have, without a resale, tendered the property to Smith according to his bid, and demanded the purchase money, and, on his refusal to comply, instituted an action to recover the amount bid), yet, when he, or the interveners, proceeding in his name, selects another remedy which the law allows (that of holding the purchaser for the difference between the bid and the amount realized at a resale), it is essential, before recovery, either in law or in equity, that a resale of the property as originally purchased must be alleged and proven. This not having been done, as shown by the petition, the proceeding should have been dismissed, and the judgment overruling the motion to dismiss is reversed. All the justices concurring.

BEDDARD et ux. v. HARRINGTON et al.
(Supreme Court of North Carolina. Feb. 28, 1899.)

WILLS — CONSTRUCTION — EJECTMENT — TITLE TO SUPPORT ACTION.

1. A devise to testator's wife during her natural life or widowhood terminates on her remarriage.

2. Since plaintiff in ejectment must recover on the strength of his title, defects in that of defendant do not avail him.

3. Lands were devised to testator's widow during her life or widowhood, and on her death to another. The widow remarried. *Held*, that the lands went to testator's heirs for the period intervening between the widow's remarriage and death.

Appeal from superior court, Pitt county; Bryan, Judge.

Ejectment by H. C. Beddard and wife against Will Harrington and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

Harding & Harding, for appellants. J. L. Fleming, for appellees.

CLARK, J. The devise to the wife "during her natural life or widowhood," by the settled rules of construction, was determinable either upon her death or remarriage, otherwise the words "or widowhood" would be meaningless. 2 Redf. Wills, 219. The widow, having remarried, cannot maintain the action to recover possession. The devise to the granddaughter, the defendant, "after the death of my said wife," cannot take effect till that event; but that cannot avail the plaintiff, who must recover on the strength of her own title, not upon defects in that of the defendant. If there is no provision in

the will (the whole of which is not before us) devising the realty after remarriage of the widow until the devise to the granddaughter is to take effect,—i. e. at death of the widow,—the realty would go to the heirs at law of the deviser for such interval, and the granddaughter would be entitled in that capacity as sole heir, unless there were others, in which event she would be tenant in common till the death of the widow, when she would become sole owner under the terms of the devise. In any aspect, the plaintiff is not entitled to recover, and upon the case agreed judgment should be entered in favor of the defendant. Reversed.

STATE v. FULFORD et al.
(Supreme Court of North Carolina. Feb. 28, 1899.)

CRIMINAL LAW—INSTRUCTIONS—SUFFICIENCY—OBJECTIONS—HARMLESS ERROR—LARCENY.

1. When an exception "to the instruction of the court as given" refers to the want of instruction, it is sufficient as presenting one proposition of law applicable to the whole charge.

2. In a criminal case, whether request be made or not, the court must charge as to the nature of the offense, and the general principles of law essential to a conviction, under Code, § 413, requiring the court to declare and explain to the jury the law arising on the evidence.

3. Where there was no direct evidence of asportation in a larceny case, the failure to instruct as to the general principles of law essential to a conviction was not harmless.

Appeal from superior court, Hyde county; Hoke, Judge.

Stanly Fulford and others were convicted of larceny, and they appeal. New trial.

The Attorney General, for the State.

DOUGLAS, J. The defendants were convicted of the larceny of a sheep. Upon the close of the evidence, they requested the court to instruct the jury that the evidence submitted by the state was not sufficient to justify a verdict of guilty, and that upon the whole evidence they should return a verdict of not guilty. The court refused to charge as requested, and instructed the jury that "it was a question of fact for them to consider, and that if, upon considering the whole evidence, both for the state and for the defendants, they were satisfied beyond a reasonable doubt that defendants were guilty of the larceny of the sheep, as charged in the bill of indictment, they should convict the defendants; and if they were not so satisfied beyond a reasonable doubt of the guilt of the defendants, they should acquit them." The defendants excepted to the instruction of the court as given, and to its refusal to instruct the jury as requested.

The latter exception cannot be sustained, as there was some evidence, however slight, yet more than a mere scintilla, tending to prove the offense. The weight of that evidence the jury alone can determine, but in its consideration they should be aided and directed by correct principles of law, to be laid down by the

court. The entire charge seems to have been given, and we presume that the exception of the defendants "to the instruction of the court as given" refers to the want of instruction, as the charge is unobjectionable as far as it went. This exception is not obnoxious to the ground of being a "broadside exception," because it presents only one proposition of law, applicable to the whole charge. *State v. Webster*, 121 N. C. 587, 28 S. E. 254.

We think, however, that the charge of his honor was insufficient, inasmuch as it failed to explain the nature of the crime with which the defendants were charged. We are not inadvertent to the long line of uniform decisions to the effect that, in the absence of any request for special instructions, no exception can be maintained to the failure of the court to charge as to the particular phases of the case; but this rule does not exclude the duty of the court, at least in criminal cases, to charge the jury as to the nature of the offense and the general principles of law essential to their verdict. For instance, the crime of larceny is never complete without some asportation. *State v. Butler*, 65 N. C. 309; *State v. Jones*, Id. 395; *State v. Alexander*, 74 N. C. 232; *State v. Perkins*, 104 N. C. 710, 10 S. E. 175. This question was of particular importance, under the circumstances of the case at bar, where there was no direct evidence of asportation, and none whatever as to the ownership of the sheep. The jury might have inferred asportation from the evidence, but they must understand its nature before they can infer its existence. It is needless to review the different decisions upon this subject, as each case necessarily depends upon its own peculiar circumstances. But we think that section 413 of the Code requires the court to give to the jury such instructions as will enable them to understand the nature of the crime, and properly determine each material fact upon which may depend the guilt or innocence of the accused. Where it appears from the record that the failure to give such instructions could not possibly have prejudiced the accused, the omission might be such harmless error as would not vitiate the verdict, but in the case at bar the evident possibility of injury entitles the defendants to a new trial. New trial.

STANCELL v. BURGWIN.

(Supreme Court of North Carolina. Feb. 28, 1899.)

LIMITATIONS—MUTUAL ACCOUNTS.

A claim on an account is taken out of the statute of limitations, where the debtor by a written receipt acknowledges a payment by the creditor to him on another account between them, and agrees that when the unsettled accounts between them are examined, and the correct balance is found, he will credit the money paid, or refund it, accordingly.

Appeal from superior court, Northampton county; Norwood, Judge.

Action by M. F. Stancell against George P. Burgwin. Judgment for defendant, and plaintiff appeals. Affirmed.

R. B. Peebles and Thos. W. Mason, for appellant. MacRae & Day, for appellee.

MONTGOMERY, J. This action was like the old one of assumpsit for goods and wares sold and delivered by the plaintiff to the defendant. The answer sets up for defense a counterclaim for goods and wares sold to the plaintiff. In the replication the plaintiff pleads the statute of limitations to the counterclaim. The issue joined on the statute of limitations is the only matter before this court. In the judgment below for the defendant, the account between the parties was referred to Thomas N. Hill, Esq., for investigation and report. In the trial the plaintiff and defendant were both examined as witnesses each for himself; but we think it unnecessary to recite the evidence, for, in our view of the case, whether or not the statute of limitations avails the plaintiff depends upon the plain language and proper construction of a receipt which he gave to the defendant long after this action was commenced, and the complaint and answer filed. The receipt is as follows: "Jackson, N. C., April 2, 1898. Received of George P. Burgwin the sum of fifteen dollars, which, when the accounts between us, and now unsettled, are examined, and correct balance found, if said Burgwin is indebted to me, said sum is to go as a credit on such sum as may be found to be due me; and, if not indebted to me, said sum of fifteen dollars is to be refunded by me to said Burgwin, with interest from date. M. F. Stancell." That receipt was in evidence, and the court instructed the jury that, if they believed the evidence, they should answer the issue as to whether the defendant's claim was barred by the statute, "No." We think there was no error in the instruction. The receipt clearly recognized that there subsisted between the plaintiff and defendant transactions which were not disjointed and disconnected, but mutual ones. It recognized the fact that there had to be an adjustment between them as to these accounts against each other. The principle of mutuality of accounts is founded on the assent of the parties that the accounts shall be continuing and mutual. It is not, however, necessary that this assent must be the result of a direct agreement to that effect. It may be inferred. No error.

CAPEHART et al. v. BURRUS et ux.

(Supreme Court of North Carolina. Feb. 28, 1899.)

APPEAL—REHEARING.

Unless the error is manifest, a rehearing will be denied. It is not sufficient that respectable authority may be found, appearing to prove the decision erroneous.

On petition for rehearing. Petition dismissed.

For former opinion, see 29 S. E. 97.

FURCHES, J. The purpose of this action was to obtain a judicial construction of the will of W. J. Capehart, and it was decided by this court at February term, 1898. 122 N. C. 119, 29 S. E. 97. This is a petition to rehear the case, for alleged errors in the decision then made. This court does not claim that it does not sometimes commit errors in its decisions. This is, in fact, admitted by its providing by its own rules how a rehearing may be had. But, to entitle a party to a rehearing, the error should be manifest. It is not sufficient that respectable authority may be found, from which a reasonable argument may be made to prove that the decision was erroneous. Such authorities may be found, and such argument may be made, in almost every case of importance, while the authorities and arguments sustaining the decision are as strong as, or stronger than, those against it. This is manifested by every case that comes to this court upon appeal. They have all been decided by the court below. They can only come to this court upon questions of law. Each side is represented by learned attorneys. They have different opinions as to the law involved in the case, and it comes here by appeal that this difference of opinion may be settled. Both sides sustain their contentions by authority and by argument. But they cannot both be right. They cannot both win, and one or the other must lose. It is important to litigants that their cases should be properly decided, and this is not the only importance attaching to an opinion of this court. If it is erroneous, it may be used as a precedent, and lead to other erroneous decisions. But it is less likely to have this effect in cases construing wills than in almost any other case. It is said by this court in *Brawley v. Collins*, 88 N. C. 608, "It is seldom that we can derive any aid from an examination of adjudged cases, as we have had occasion before to remark, in consequence of the great diversity of terms in which a testator expresses himself, and hence each case must be determined by itself;" thus showing that such decisions are not considered of the same importance as precedents as are decisions upon other matters. But, while it is important that a case should be decided right, it is important that it should be decided, and that there should be an end to the litigation. It was said in *Wiesel v. Cobb*, 122 N. C. 67, 30 S. E. 312, which was a petition to rehear (decided at the same term that the decision in this case was rendered), that: "Every case coming before this court is thoroughly investigated and carefully considered, and, while we are liable to error, which we are always ready to correct, that error must be clearly pointed out to us before we can undertake to set aside

a solemn adjudication involving the rights of others. This is the clearly-defined policy of this court, and has been frequently enunciated in unmistakable terms. In *Watson v. Dodd*, 72 N. C. 240, Chief Justice Pearson, speaking for the court, says: "The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, or some material point was overlooked, or some direct authority was not called to the attention of the court." To support this position the learned justice who wrote the opinion of the court cited more than a dozen cases. This case was fully and carefully considered when the decision was made, and, upon a careful reconsideration, we see no satisfactory reason for reversing the decision heretofore made. Petition dismissed.

RIDLEY v. SEABOARD & R. R. CO

(Supreme Court of North Carolina. Feb. 28, 1899.)

RAILROADS—INJURY TO LAND—PERMANENT DAMAGES—SUBMISSION OF ISSUE BY DEFENDANT—RECOVERY OF PAST AND PERMANENT DAMAGES IN SAME ACTION—TAX LIST AS EVIDENCE OF VALUE.

1. In an action for past damages to crops by negligent construction of railroad, defendant may have permanent damages assessed, if demanded in the answer.

2. Permanent damages for injury to land, and past damages for injury to crops thereon, may be recovered in the same action, where the past damages were not considered in ascertaining the amount of the permanent damages.

3. The valuation of land for taxation, although not objected to as too low by the owner at the time, is not admissible against him as evidence of value.

Appeal from superior court, Northampton county; Norwood, Judge.

Action by U. T. Ridley against the Seaboard & Roanoke Railroad Company to recovery for injury to land. Judgment was for plaintiff, and on the issue as to permanent damages he appeals. Reversed as to such issue.

Winborne & Lawrence and R. B. Peebles, for appellant. MacRae & Day, for appellee.

CLARK, J. The plaintiff excepted to the submission of an issue as to the permanent damages, they not having been claimed by the complaint. But it was held in the same case, when here on a former appeal (118 N. C. 996, 24 S. E. 730, at page 1008, 118 N. C., and page 735, 24 S. E.), that either the plaintiff or defendant could have the permanent damages assessed, if demanded in either the complaint or answer. To same purpose is *Parker v. Railroad Co.*, 119 N. C. 677, 25 S. E. 722.

The jury found the permanent damages to be \$500, and the damages to the crops in the past three years to have been \$800. The court rendered judgment for only \$500. In this there was error. See defendant's appeal

in this case. 24 S. E. 730. The finding of permanent damages bars all actions for damages to future crops, but not the simultaneous recovery of past damages to the crops, except in actions brought since chapter 224, Acts 1895, unless, by the frame of the issue or the charge, it is clear that the past damages were considered in the ascertainment of permanent damages. Here the submission of separate issues shows that they were not.

The plaintiff objected to evidence as to the valuation of the land upon the tax list. There have been several decisions that the listing of land was some, though slight, evidence of claim of title and of the character of possession by the party listing the same. *Austin v. King*, 97 N. C. 369, 2 S. E. 678; *Pasley v. Richardson*, 119 N. C. 449, 26 S. E. 32; *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884; 1 Greenl. Ev. § 493. Acquiescence in listing and payment of taxes by another is evidence against the party out of possession. But, the tax valuation being placed on the land by the tax assessors without the intervention of the landowner, no inference that it is a correct valuation can be drawn from his failure to except that the valuation is too low. Such valuation was *res inter alios acta*, and is not competent against the plaintiff in this action. *Daniels v. Fowler*, 123 N. C. 35, 31 S. E. 508; *Flint v. Flint*, 6 Allen, 34; *Kennerson v. Henry*, 101 Mass. 152. On the issue as to permanent damages, let there be a new trial.

TEMPLE v. MASSACHUSETTS BEN. LIFE ASS'N.

(Supreme Court of North Carolina. Feb. 28, 1899.)

LIFE INSURANCE—TRIAL—INCONSISTENT FINDINGS.

A special finding, in effect, that the health of insured had changed in the six days between his application and the delivery of the policy, should be set aside where the evidence as to his health at each date is precisely the same.

Appeal from superior court, Pasquotank county; Timberlake, Judge.

Action by James A. Temple, administrator of W. F. Temple, deceased, against the Massachusetts Benefit Life Association on an insurance policy. The jury returned a special verdict, which plaintiff moved to set aside. The motion was overruled, and plaintiff appeals. Reversed.

G. W. Ward and E. F. Aydlott, for appellant. Shepherd & Busbee, J. W. Hinsdale, and Pruden & Pruden, for appellee.

CLARK, J. The application for insurance was made January 5, 1897, the policy was delivered to the assured January 11, 1897, and he died March 16, 1897. The defendant relies upon a clause on the back of the policy: "This policy shall not become operative so as to bind the association until the first annual premium is paid, and the

policy is actually delivered to the member herein named, during the life, and in good health." The jury responded "No" in response to the fourth issue, "Did insured make false representations in his application and examination?" and there was no exception. There was no evidence of a change of health between the application, January 5th, and the delivery of the policy and payment of premium, January 11th. On the contrary, the evidence of defendant's witnesses concurred with plaintiff's, that the assured was at work as usual in his business of hauling logs up to eight or ten days of his death; and the attending physician says he died of gastralgia, a disease which, from its nature, could not have possessed him on January 11th, at the delivery of the policy, if he worked hauling logs for nearly two months thereafter. The jury find "No" as to the sixth issue, "Was said policy delivered to W. F. Temple during his lifetime, and while in good health?" There being not a scintilla of evidence as to change of health between the application, on January 5th, when the response to the fourth issue finds that the applicant's representations as to his health were true, and the delivery of the policy, on January 11th, these findings are clearly inconsistent and contradictory. The brevity of time (six days) warranted no presumption of change of health, and upon identically the same evidence the jury have made contradictory findings. The court should have granted the plaintiff's motion to set aside the verdict upon that ground. New trial.

POWELL et al. v. WEATHINGTON et al.

(Supreme Court of North Carolina. Feb. 28, 1899.)

PARTITION—OWELTY—INFANTS.

Owely may be enforced against land inherited by infants from an adult who owned the land when the owelty was made a charge against it, though under Code, § 1900, owelty is not payable from the land partitioned to an infant co-tenant until he reaches his majority.

Appeal from superior court, Pitt county; Brown, Judge.

Action by Frank Powell and others against L. H. Weathington and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

It was admitted that plaintiffs and defendants claim title to the land from Edmund Evans, deceased, and that the tract in controversy is lot No. 1 in the division of the lands of the deceased. Plaintiffs introduced the record of such division, showing that lot No. 1 was assigned to Holland J. Evans charged with the payment of \$75 to lot No. 2, which was assigned to A. T. Porter and wife for owelty of partition. Plaintiff then introduced evidence showing that the plaintiffs were children and heirs at law of said Holland J. Evans, who died in September, 1878; that, at

the time of his death, and up to the 1st of November, 1878, the plaintiffs Louisa Evans, W. H. Evans, Sidney Evans, and Susan Dunn were infants,—Sidney and W. H. being under the age of 10; that the plaintiff Elizabeth Porter is the only child of Elizabeth Porter, who was a child of Holland J. Evans, and is now 9 years of age; that Elizabeth Porter was a married woman on the 1st of September, 1878, and up to the time of her death, several years after; that Louisa Evans married at the age of 19, and is still a married woman, and that Sidney Evans was 22 years of age at the time of bringing this action; that the annual rental value of the land in controversy is \$50. Plaintiffs rested. Defendants introduced the following testimony: Entries on the book called "The Division of Lands and Slaves," being the entries following the division of the lands of Edmund Evans in said book. October 31, 1878, notice issued to the heirs of H. J. Evans, the drawer of lot No. 1, to show cause why execution should not issue against lot No. 1 in favor of Allen T. Porter and wife on the 11th of November, 1878. Notice executed by the sheriff. Defendants failing to appear and show cause, "it is adjudged that plaintiffs Allen T. Porter and wife have execution against lot No. 1." Executed by publicly selling the same, at the court-house door in Greenville, to the highest bidder for cash, and Harry Skinner and A. F. Taft became the bidders at \$210, and they were declared the purchasers; the said sum being applied to the execution and costs to the amount of — dollars, and the balance paid A. H. Taft as having the subsequent claim on the land. "Received of Marcellus Moore, the present owner of lot No. 4 in the division of the lands of Edmund Evans, deceased, the sum of \$105, in full payment of the charge of \$79 made by the commissioners in the aforesaid division, on lot No. 4 in favor of lot No. 3 in said division. This 18th February, 1886. [Signed] Edmund Evans." Plaintiffs objected, objection overruled, and plaintiffs excepted. Plaintiffs then offered special-proceeding docket, case No. 196, entitled "Allen T. Porter and Wife, Mary, against Mary D. Evans et al.," with the entries upon the same, which are as follows: (These entries are the notice issued, as above alluded to, and the sale by the sheriff under the execution; and the plaintiffs objected to their introduction, objection overruled, and plaintiffs excepted.) A receipt given to the sheriff for \$148, in full satisfaction of the execution, signed by Allen T. Porter, as agent for Mary Porter, January 6, 1879, introduced by defendants. Plaintiffs objected; overruled; exception by plaintiffs. And the deed from the sheriff to Skinner and Taft, dated January 6, 1879, was also received in evidence, over the plaintiffs' objection, and the plaintiffs excepted. It was admitted that the deed covered lot No. 1. The court intimated an opinion that it would instruct the jury that, if the evidence is believed, the plaintiffs are not en-

titled to recover. Plaintiffs submitted to a nonsuit, and appealed.

L. I. Moore, for appellants. Jarvis & Blow, for appellees.

FAIRCLOTH, C. J. Action for possession of land, both parties claiming under Edmund Evans, who died, and his lands were partitioned among his children in 1863. Lot No. 1 was assigned to Holland J. Evans, and was charged with \$75 in favor of lot No. 2 for equality. Holland J. Evans died in September, 1878, leaving minor children, and they are plaintiffs in this action, suing to recover lot No. 1. Lot No. 2 was assigned to A. F. Porter and wife, in whose favor was the charge on lot No. 1. On notice to the children, some being of age and others minors and femes covert, a judgment was rendered, and execution issued November 11, 1878, against lot No. 1 for the amount charged on it for owelty in the partition proceedings. This lot, now the subject of controversy, was sold, and the defendants claim by mesne conveyances from the purchasers at the sale. During the trial below, these various records and proofs were put in evidence, and his honor held that the plaintiffs could not recover, and they appealed.

The plaintiffs contend that the lot could not be sold to pay the charge on it, as they, or some of them, were still infants, according to Code, § 1900, until they arrive at 21 years of age, and therefore the purchasers acquired no title. This position is a misapplication of section 1900 of the Code. That section operates when the parties to the partition proceeding, or some of them, are infants. It does not apply to the facts in this case. The plaintiffs acquired no title by the decree for partition; they were not parties. Their father, Holland J. Evans, had the title, and plaintiffs acquired it by descent from him. *Jones v. Cameron*, 81 N. C. 154. When the plaintiffs inherited the lot, charged as above, they took it cum onere. *Dobbin v. Rex*, 106 N. C. 444, 11 S. E. 260. This conclusion renders it unnecessary to consider some interesting questions presented in the argument. No error.

COX et al. v. BEAUFORT COUNTY LUMBER CO. et al.

(Supreme Court of North Carolina. Feb. 28, 1899.)

PARTITION—EJECTMENT—DESCENT—RECORDS—EVIDENCE—PRESUMPTIONS—WITNESSES—TRANSACTIONS WITH DECEDENTS.

1. A suit in partition becomes substantially an action of ejectment, subject to the rules in such actions, where the answer asserts sole ownership of the land.

2. Heirs at law are presumed to be entitled to their ancestors' land, in the absence of evidence to the contrary.

3. Parol evidence is admissible to prove the probate and recording of a will, where the court records are burned.

4. Code, § 590, making a party incompetent to testify in his own behalf as to transactions

and communications with a decedent, does not render a devisee incompetent to testify that he found the will, and caused it to be probated, where the court records are burned.

5. Heirs bringing ejectment for their ancestors' land do not establish title by proof of heirship, where they offer no proof in rebuttal of evidence that their ancestor made a will, which was probated; it being presumed that he willed the land.

Appeal from superior court, Pitt county; Brown, Judge.

Action by Arch Cox and others against the Beaufort County Lumber Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. M. Moore, for appellants. J. L. Fleming and Shepherd & Busbee, for appellees.

FURCHES, J. This proceeding was commenced before the clerk of the superior court of Pitt county for the partition of land, in which plaintiffs allege that they are tenants in common with defendants. This is denied by defendants, who claim to be the sole owners of said lands. This makes it substantially an action of ejectment, and subject to the law and rules governing in the trials of such cases. *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748.

It is admitted that James Wilson was the owner of the lands in controversy, and that both parties claim under him; the plaintiffs by descent, as heirs at law of James, who they allege died intestate in 1856. The defendants deny that the said James died intestate, and allege that he left a last will and testament, in which he devised said lands to his son Simon B. Wilson; that said will was, after the death of the testator, duly admitted to probate, and recorded in the clerk's office of Pitt county; and that defendants now own and hold said lands under Simon B. Wilson by successive conveyances from him to them. And, it being admitted that plaintiffs were children and heirs at law of James, the plaintiffs had a prima facie case, and the burden was upon defendants. Defendants then showed their chain of title from Simon B. Wilson to them, and then proposed to prove by parol that James Wilson left his last will properly executed; that this will was duly probated and recorded in Pitt county in 1856; that the court house in Greenville, Pitt county, was burned in 1858; and that this will, and all the records and entries showing its probate and registration, were burned and destroyed at that time. Defendants also proposed to prove by parol that the lands now in controversy were willed to the said Simon B. Wilson. To prove the existence, probate, and recording of said will, defendants introduced or read the deposition of the said Simon, under whom they hold. All this was objected to by plaintiffs, but allowed by the court, and plaintiffs excepted. Defendants offered another witness, one Dancy, not a party nor interested, whose evidence tended to

prove the probate and recording of said will. But, as the testimony of Simon B. Wilson was also offered and allowed for this purpose, it is only necessary to treat the case as presented by his evidence; for, if his evidence was improperly admitted, there must be a new trial.

Plaintiffs' first objection is that any parol evidence was incompetent on this trial to prove and establish the probate and recording of said will; that it is an effort on the part of defendants to prove and establish a record by parol testimony, which is not allowable. To do this, plaintiffs allege that there should have been a direct proceeding for that purpose, under the statute. But this position of plaintiffs cannot be sustained. *Mobley v. Watts*, 98 N. C. 284, 3 S. E. 677, and authorities cited. As we have seen, it is competent to show the existence of a will by parol, and where the records of the court have been burned and destroyed, destroying the will and record of its probate and registration, the same may be proved by parol. The question in this case is as to the competency of Simon B. Wilson to prove these facts. He is the assignor of the defendants, and is therefore incompetent to testify as to transactions and communications between him and his father, James, under whom the plaintiffs claim. The facts testified to by him are that four days after the death of his father he found this will among his papers; that he carried it to court, and had it probated and recorded; that he qualified as executor (being named as such therein); and that he settled the estate of his father. Were these transactions or communications with his father? They cannot be communications with his father, for his father was dead. The finding of the will among his father's papers, four days after his death, cannot be a transaction with his father. The taking the will to court, and having it proved and recorded, cannot be a transaction with the father, who was dead. These propositions seem to be too plain to admit of doubt or discussion.

The last ground in support of plaintiffs' contention is that, as Simon was a devisee in said will, this made it a transaction with the father. But it does not seem to us that this contention of plaintiffs can be sustained. Suppose it had been a promissory note given to Simon by his father; he would have been incompetent to prove the execution,—that he saw his father sign the note,—but he would have been a competent witness to prove the signature of his father, and then the note proved the transaction. In this case Simon did not prove the execution of the will. He was not a witness to it. It (the will) was proved by others, and when it was proved, like the note, it spoke for itself. It was then a matter of record, subject to the inspection of all persons, and not a transaction with any one. Simon was a competent witness, under section 589 of the Code, and only incompetent, under section 590, as to transactions and communications. *Fertilizer Co. v. Rippy*.

123 N. C. 656, 31 S. E. 879; *Sikes v. Parker*, 95 N. C. 232.

But, to our minds, there is quite a distinction between a note or any transaction *inter partes*, where there is necessarily a contract, or any agreement between the parties thereto, and a will, where there is no transaction between the parties. For this reason, it seems that section 560 of the Code does not apply to wills, but that they are governed by section 2147 of the Code. The competency of Simon B. Wilson to testify to the finding of the will, and to the probate and recording of the same, being shown, and the jury having found that James Wilson did not die intestate, but left a last will and testament, which was admitted to probate and was recorded in Pitt county, the presumption is that he willed the land in controversy. *Blue v. Ritter*, 118 N. C. 580, 24 S. E. 356, and authorities there cited. This being so, and plaintiffs having offered no evidence in rebuttal of this presumption, they have failed to establish title to the lands sued for, and their action must fail. *Blue v. Ritter*, *supra*.

Affirmed.

CHRISTIAN et al. v. YARBOROUGH et al.
(Supreme Court of North Carolina. Feb. 28, 1899.)

ATTORNEYS—AUTHORITY TO RELEASE MORTGAGE—
RATIFICATION—JUDGMENT NON OB-
STANTE VEREDICTO.

1. An attorney, employed to adjust a claim secured by deed of trust to personal property and by a mortgage, wrote his clients that the debtor would execute a new mortgage, and consent to a sale of the personal property by the trustee, only on condition that the old mortgage be canceled. They made no reply, and the attorney canceled the old mortgage, obtained a new one, and the debtor's consent to a sale of the personal property by the trustee, and mailed them to his clients, informing them that he had canceled the first mortgage. They returned the new mortgage, the consent to the sale of the personal property, and a bill of sale thereof by the trustee to them, to the attorney for registration. *Held*, that the release of the mortgage by the attorney had been ratified, since the mortgagees could not repudiate it as unauthorized and retain the consideration therefor.

2. The fact that, under the evidence, defendants are entitled to judgment, is no ground for a judgment non obstante veredicto in their favor, since that is only granted where plaintiff's cause of action is confessed, and matter relied on in avoidance is insufficient.

Appeal from superior court, Franklin county; Bryan, Judge.

Action by J. D. Christian and another against R. Y. Yarbrough and another, as administrators of the estate of John W. Erwin, deceased, and others. There was a judgment for plaintiffs, and defendants appeal. New trial.

C. M. Cooke, for appellants. Shepherd & Busbee and F. S. Spruill, for appellees.

MONTGOMERY, J. This action was brought to have declared null and void a re-

lease and satisfaction of the provisions of a certain mortgage from J. W. Erwin, now deceased, to J. D. and R. S. Christian entered on the margin of the registry in Franklin county, N. C. John W. Erwin (the intestate of the defendants, Yarbrough and Wheelass), in his lifetime, and the plaintiffs before they were incorporated, had between them numerous contracts and agreements concerning the indebtedness of the intestate to them. Erwin on the 1st day of March, 1892, executed a deed of trust to R. S. Christian upon all the goods, wares, and merchandise in the store of the intestate, to secure a debt due to J. D. and R. S. Christian. On the 5th of March following, he executed a deed of mortgage upon his interest in a certain tract of land in Franklin county to the same persons, to secure to them the amount of \$700.50, which they had paid for the intestate to Cohen, Sons & Co., and which amount had been secured by a deed of mortgage to the Cohens upon the same lands. The intestate in his lifetime was put in charge of the stock of goods conveyed in the deed of trust of March 1, 1892, as the agent of the trustee for the sale and disposition of the stock of goods, the same having been replenished from time to time. It further appeared from the testimony of T. B. Wilder that in March, 1894, Christian employed him as his attorney at law in regard to the debt against Erwin; that he said the matter had been standing about two years, and he wanted the trusteeship closed up; that Erwin would come to see him (Wilder), and sign certain papers agreed upon; that it was not understood between him and Christian that the mortgage on the land, especially, was to be released; that Erwin did come to see Wilder on 4th April following, and refused to execute the papers prepared for him until the mortgage on the land should be canceled; that Wilder wrote to the plaintiffs, at Richmond, on that day, informing them of Erwin's demand for the cancellation of the mortgage, as a condition precedent to his execution of the papers prepared for him, and requested an answer by the 9th inst., as on that day Erwin would return for the purpose of completing the business; that the letter to plaintiffs was sent by special delivery, and was received by them in time to have been answered before the 9th; that, no answer having been received, Wilder released and canceled the mortgage on the registry on the 10th; that on the last-named day Wilder sent to the plaintiffs a new mortgage, and the assent of Erwin to the conveyance by R. S. Christian (the trustee) to the plaintiffs of the property conveyed in the deed of trust of the 1st of March, 1892; that those papers, together with a bill of sale from R. S. Christian, trustee, to the plaintiffs, for the goods and merchandise conveyed in the deed of trust of March 1, 1892, were returned to Wilder for registration in Franklin county, as they were satisfactory, and that he had them all registered in Franklin county; that at the time he (Wilder) sent

these papers to the plaintiffs, in Richmond, he informed them by letter that he had canceled the mortgage upon the land, and they answered not a word until after Erwin's death. There was evidence for the plaintiffs offered, but none contradictory of Wilder's evidence as set out above. Upon the evidence the court instructed the jury to find the issue, "Has the mortgage from J. W. Erwin to J. D. and R. S. Christian, dated March 5, 1892, been duly released and discharged?" in the negative.

We think there was error in that instruction. It is certainly true that an attorney at law has no power to cancel or discharge a deed of mortgage, without the authority is conferred to do so by his client; and in this case, if nothing else appeared but the simple action of Mr. Wilder in canceling the mortgage, done as it was without the authority of the plaintiffs, the act would be of no force, and would not, therefore, bind the plaintiffs. But from the evidence in the case there seems to be a ratification, in law, of the act of Mr. Wilder. Before he canceled the deed, it is admitted by the plaintiffs themselves that they had received from him the knowledge of his purpose to do so; and, although they had time to instruct him to the contrary, they were silent. But, further than this, when the new mortgage from the intestate, and his assent to the sale and conveyance of the personal property conveyed in the deed of assignment of March 1, 1892, by R. S. Christian, the trustee, to the plaintiffs, were sent by Mr. Wilder to the plaintiffs, they were informed of the cancellation of the mortgage on the land. The new mortgage, and the assent by the intestate to the sale of the personal property, as above mentioned, were, in the eye of the law, substantial benefits accruing to the plaintiffs in the transaction; and they cannot be allowed to accept that part of the transaction which is for their benefit, and refuse to allow the intestate that which was favorable to him. Their conduct was a clear ratification of the action of Mr. Wilder, although he was not authorized to cancel the mortgage in the beginning. Where an agent goes beyond his authority, his principal must ratify the whole transaction, or repudiate the whole. He will not be allowed to ratify that portion of the contract which is for his benefit, and repudiate the other because it is against his interest. "A person cannot take the benefit of it [contract] without bearing its burdens. The contract must be performed in its integrity." *Ewell, Ev. Ag. (Ed. 1879) p. 95.* The principal cannot, of his own mere authority, ratify a transaction in part, and repudiate as to the rest. He must either adopt the whole or none. *Story, Ag. § 250.* The same principle is announced in *Rudasill v. Falls, 92 N. C. 222.* And there is no distinction, as to the question of ratification, between the action of an attorney at law and the action of an attorney in fact. They are both agencies, and the same rule applies as to ratification. 3

Am. & Eng. Enc. Law (2d Ed.) p. 374, and cases there cited. In *Tooker v. Sloan, 30 N. J. Eq. 394,* it was held that a release by an attorney in fact of a holder of a mortgage (the latter having accepted the consideration from the former with knowledge of the release) was held binding on the principal, though the attorney exceeded his authority. The new mortgage, and the assent of the intestate to the sale of the goods by the trustee, were the consideration of the cancellation of the old mortgage, and the plaintiffs accepted and received it. This case bears no resemblance to that of *Woodcock v. Merrimon, 122 N. C. 731, 30 S. E. 321.* There the trustee undertook to release and discharge on the registry, from the operation of a deed of trust, a portion of the land conveyed in the deed; and it was said that section 1271 of the Code only empowers a trustee to acknowledge satisfaction of the provisions of such trusts. It was never contemplated, as was said in *Brown v. Davis, 109 N. C. 23, 13 S. E. 703,* that the trustee could by this means release from an unsatisfied trust specified parts of the land. And it was further said in that case, "We do not mean to say, however, that the creditor might not be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee, if done with the creditor's consent and authority, properly shown."

The motion made in the present case by the defendants for judgment non obstante veredicto was properly overruled. "A judgment non obstante veredicto is granted in those cases where a plea or defense confesses a cause of action, and the matter relied upon in avoidance is insufficient." *Ward v. Phillips, 89 N. C. 215; Steph. Pl. p. 97.* There was error, for which there must be a new trial.

ROYSTER v. STALLINGS, Sheriff.
(Supreme Court of North Carolina. Feb. 28, 1899.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE—INTENT—FRAUD.

1. The burden is on an attaching creditor, attacking an assignment for the benefit of preferred creditors, to show that such assignment was executed to defraud and delay other creditors.

2. That an assignment is made in order to prefer some of assignor's creditors does not make it fraudulent, unless there was an intent to hinder and delay other creditors.

3. That an assignor for the benefit of preferred creditors had, shortly before the assignment, made promises to pay to other creditors, does not render the assignment fraudulent.

4. That there was a race between the assignee for the benefit of preferred creditors to register the deed of assignment, and the sheriff to levy execution for other creditors, does not render the assignment fraudulent.

Appeal from superior court, Edgecombe county; Norwood, Judge.

Action by F. S. Royster, trustee under an assignment for the benefit of preferred cred-

itors of John R. Pender, against W. L. Stallings, sheriff. Judgment was for defendant, and plaintiff appeals. Reversed.

John L. Bridgers and Staton & Johnston, for appellant. G. M. T. Fountain and Gilliam & Gilliam, for appellee.

FURCHES, J. Pender, an insolvent debtor, made an assignment of the property in controversy to the plaintiff, Royster, as trustee, for the benefit of creditors, in which he preferred a part of his creditors over others. The defendant is the sheriff of Edgecombe county, who levied upon and took said property into his possession by virtue of executions in his hands against said Pender; and this action is brought by the assignee, Royster, to recover possession of this property.

There had been an attempt to assign this property by Pender to the plaintiff a few days before the assignment now under consideration was made, which failed for the reason that the assignor did not file the schedule of debts within five days from the date of its execution, as required by law; and this assignment was then executed, being an exact copy of the first assignment, except as to date. The plaintiff offered in evidence the deed of assignment from Pender to him conveying the property in controversy, and the schedule of debts, and, the defendant having admitted the possession of the property, the plaintiff rested his case. The defendant admitted that the execution and registration of the deed of assignment to the plaintiff antedated his levies on the property, but contended that the deed of assignment was fraudulent and void as to creditors. He contended, first, that it was fraudulent on its face, and should be so declared as a matter of law, for the reason that plaintiff did not put in evidence the schedule of debts. But this exception seems not to be true in fact, as it appears from the record that the schedule was offered in evidence. But, if it should be held that the assignment is not fraudulent in law, he alleges that it is fraudulent in fact, and offered the following evidence to show that it is:

C. B. Mehegan, witness for defendant, testified as follows: "I remember when I heard deed of assignment was executed by Pender. I know that, before he returned from a trip that he took after executing the first deed, there were summons issued against Pender. I searched for an officer to serve summons. I found the township constable, and took him to the depot. The train had not come. I saw Mr. Clarence Johnson, clerk of plaintiff, get on the train, and go in the direction of Norfolk. Afterwards I saw Royster and Pender get off the train together. They came on the Norfolk & Carolina train. Johnson and Mr. Bridgers met Pender at the depot. They had a paper, which Pender signed as soon as he got off the train. Hilliard Matthewson,

constable, was there, and had summons. He was behind Johnson and Pender, and I did not see what he did. Johnson was on a bicycle, and passed me, going down town rapidly. I carried the constable down to the court house. Just after this I went to carry my horse to the stable, and when I came back I saw Johnson coming from the direction of the register's office. After this I asked Pender what he had gone off for. He said he had gone to wait until things had settled down and to avoid the annoyance of these summons. I told him I had only inquired in reference to his not having filed his inventory. Hilliard Matthewson told me they had made him read all the summons, and in this way got ahead of him."

The following evidence was offered: "Record of a judgment, Bank of Tarboro vs. Jno. R. Pender, docketed April 23, 1897, for \$2,000; record of judgment, John F. Shackelford vs. John R. Pender, for \$165, docketed April 23, 1897; record of two judgments, Watkins, Cottrell & Co. vs. John R. Pender, for \$200 each, docketed April 23, 1897; record of judgment, C. Billups & Co. vs. John R. Pender, for \$56.86, docketed April 23, 1897; record of judgment of Kellogg Paint Co. vs. John R. Pender, for \$23, docketed April 23, 1897; record of five judgments, Bank of Tarboro vs. John R. Pender, for \$200 each, docketed April 23, 1897; record of judgment, C. B. Mehegan vs. John R. Pender, for \$84, docketed April 23, 1897; judgment, Mitchell Mfg. Co. vs. John R. Pender, for \$8, docketed April 23, 1897; judgment of Shourting, Daly & Gates, for \$38.75, docketed same date; judgment, Henry Walk vs. John R. Pender, for \$71.59, docketed same date; judgment, J. G. Mehegan, for \$28.90, docketed same date; judgment, Duval & Reynolds, for \$45.37, docketed same date; two judgments, Buck Stove & Range Co. vs. John R. Pender, one for \$197.22 and another for \$190, docketed May 3, 1897; judgment, John T. Lewis & Bros. Co. vs. John R. Pender, for \$110.59, docketed June 9, 1897; Keen & Hagerty, judgment for \$60.36, docketed June 9, 1897. It is admitted by the defendants that these judgments were docketed subsequently, but immediately after, the deed was filed for registration."

Hilliard Matthewson testified for the defendant: "I am constable. I remember the time of the execution of the deed, but cannot give the date. I had summonses against Pender in my hands. Mr. Mehegan put most of them in my hands. Most of them were in favor of the Bank of Tarboro. I went to the train that morning. I saw Clarence Johnson there. I went again about 12 o'clock. I went back to meet the afternoon train.—N. & C. train. I saw Pender. He came from Rocky Mount. I saw Mr. Bridgers and Johnson there also. Mr. Bridgers called Pender, and they went into the operator's office together. I followed them. They had a paper. I read my summons to Pender. I don't know

whether Pender signed any paper there. After I got back to town I saw Johnson in the court-house yard. I had to read all the summonses. Mr. Bridgers said read them all. I told Mehegan this."

L. V. Hart testified for defendant: "I was teller in the Bank of Tarboro in 1897. I presented a note of \$200 to J. R. Pender for payment Saturday morning, April 17, 1897, before the registration of his first assignment. He told me that he would pay the note the first thing on Monday morning. I had four other notes, of \$200 each, against him, but this was the only one due at that time. (Letter examined by witness dated 4-3-97.) It is on Pender's letterhead. This letter and signature are in Pender's handwriting, to best of my knowledge and belief. (Examined letter dated February 10, 1897.) The signature to this letter is in Pender's handwriting, to the best of my knowledge and belief. Both these letters are written to C. Billups & Son. (Witness examined a contract between J. R. Pender and the Bank of Tarboro, dated March 18, 1897.) The signature to this paper is Pender's, to the best of my knowledge and belief."

J. F. Shackelford testified for the defendant: "I am president of Bank of Tarboro. Bank had claims against Pender when he made deed of assignment. I had instructed Hart to collect the \$200 note from Pender. He told me that he had seen Pender, and Pender had promised to pay it on Monday morning. On Monday morning Pender was absent from town."

Clarence A. Johnson testified for the defendant: "I was in the employment of Mr. Royster, the plaintiff, at the time the deed of trust was made and am still in his employ. Pender went off, and returned April 23d, the date of the second deed of trust. I went to the depot with Mr. Bridgers. I went to witness Pender's signature. Deed was executed at depot. I saw Matthewson, the constable, there. I went back to town on bicycle, and had deed registered. I did these things by direction of Mr. Bridgers, attorney for Pender. I went down to N. & C. R. R., 50 miles, to meet Pender, at the direction of Mr. Bridgers. I did not meet him." Cross-examination by plaintiff: "I witnessed the deed at the depot. Mr. Bridgers told me that the first deed of trust was void because no schedule was filed, and that it was necessary to execute another. Mr. Bridgers told me to have the papers recorded right away, and for that reason I made haste. I saw the constable with papers for Pender at the depot, and, after getting the second deed signed, I made haste for the register of deeds office."

Exhibits A, B, and C were offered in evidence. It was agreed that the value of the property, exclusive of the exemptions, was \$2,400.

The following issues were submitted to the jury: "(1) Was the deed executed to de-

fraud, hinder, and delay the creditors of John R. Pender? Ans. Yes. (2) Is the plaintiff the owner of the property, as alleged in the complaint? Ans. No. (3) What is the value of the property? Ans. \$2,400."

The burden of the first issue was upon the defendant, and, according to the view we take of the case, this is the only issue necessary to be considered. We have copied the whole of defendant's evidence, and do not think it proves, or tends to prove, in a legal sense, that said deed is a fraudulent one. It is true that under this deed some of the creditors of the assignor, Pender, will be paid in full, while other creditors will get little or nothing on their debts. This is the result of all such assignments, where the assignor is insolvent. But this does not make the assignment fraudulent, as understood in law, and make it void under the statute. The debtor has the right to prefer one creditor over another, if he sees proper to do so; provided he does this for the purpose of giving a preference to a part of his creditors, and not for the purpose of hindering, delaying, or defeating other creditors. It is not the effect that may result from the terms of the trust in preferring one creditor over another, but the intent with which it is made, that renders it fraudulent and void. It is the intent of the maker to hinder and delay his creditors that contains the virus of destruction. It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent—his purpose—to be to defraud his creditors, we need not look further. This will avoid the assignment. But, if he has not so declared his purpose, then we have to look to his acts to ascertain the intention with which the assignment was made,—to what are called the "badges of fraud." We have many cases in our reports defining what are "badges of fraud," under the statute (Code, § 1545), and what are not; and, as we are of the opinion that there is no evidence,—no "badges of fraud,"—it will be proper for us to state what are not badges of fraud, as well as to state what are the usual badges of fraud.

An assignor may prefer one creditor to another without committing fraud. *Moore v. Hinnant*, 89 N. C. 455; *Bump, Fraud. Conv.* 218; *Hafner v. Irwin*, 23 N. C. 490. To do so is not fraud. To avoid an assignment, it is absolutely necessary that there should be evidence of a fraudulent intent on the part of the assignor, and the fact that some of the creditors are preferred to others is no evidence of such intent. The usual badges of fraud are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. This case has none of these badges. The latest expression of this court on this subject is *Barber v. Buffalo*, 122 N.

C. 129, 29 S. E. 336. In that case it was held that there was sufficient evidence of fraud to take the case to the jury. But that was a much stronger case than this. There the party preferred was a relation of the assignor; went 16 miles, on Sunday night, with the attorney who drew the deed of assignment; bought in the property, with the debt secured; and allowed the assignor to remain in possession free of rent. This was evidence of a secret trust and benefit to the assignor, and the turning point in the case, and distinguished it from the same case when before this court at a former term (111 N. C. 206, 16 S. E. 386). The facts in this last case (111 N. C. 206, 16 S. E. 386) are very much the same as those in the case now being considered. They are as strong, and in our opinion stronger, and they were held in that case not to be sufficient evidence of fraud to carry the case to the jury.

There is an abundance of evidence in this case of promises to pay on the part of Pender that were not kept. Some of them may have been made to keep off his creditors as long as he could. But these false promises to pay are not badges of fraud, but of bad faith.

It is evident that there was quite a race between the plaintiff and the defendant as to the execution and registration of the deed of assignment and the levy of the executions, in which the plaintiff won. But this is no badge of fraud. *Barber v. Buffaloe*, 111 N. C. 206, 16 S. E. 386. There is no allegation but what the debts preferred in the assignment were just debts, due by the assignor, Pender. We do not like to say there was no evidence, after the matter has been submitted to a jury, and they have said by their verdict that there was sufficient evidence upon which to find a verdict, as we think cases are sometimes taken from the jury when they should have been submitted to them; but when we find, as in this case, that the issue has been submitted to the jury without evidence, it is our duty to say so. *Trumbull v. Gibbons*, 22 N. J. Law. 149. There were some exceptions as to evidence, but these are not tenable, and are not sustained. New trial.

PARKS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. March 7, 1899.)

RAILROADS—NEGLIGENCE.

It is negligence for a railroad company, in digging a trench along its track near a crossing, to throw a pile of dirt into the highway, so as to frighten horses thereon.

Appeal from superior court, Cabarrus county; Allen, Judge.

Action by H. B. Parks against the Southern

Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. F. Bason, F. H. Busbee, and A. B. Andrews, Jr., for appellant. Burwell, Walker & Canler, for appellee.

FURCHES, J. This is an action for damages received by the plaintiff at Harrisburg, Cabarrus county. The plaintiff was driving in a buggy drawn by a mule, and was intending to cross the defendant's road upon the public highway which crossed defendant's road at that point. The defendant was engaged at that time in repairing its roadbed at the point where the public highway crossed it, and in so doing had dug a trench along its track and across the public highway, and had thrown a pile of dirt from the ditch or excavation into the public road. But plaintiff alleges that this excavation was so made and the dirt so thrown that he could not see it until he got on defendant's road, and did not know they were there until he was on defendant's road; that he saw defendant's train coming before he went upon its road, and had plenty of time to have crossed in safety, but for the obstruction mentioned, put there by defendant, which frightened his mule, and caused it to become unmanageable; that he was in plain view of the approaching train, and was seen, or could easily have been seen, by the engineman, after it was plainly apparent that his mule was unmanageable, in time for defendant to have stopped its train; that, finding that defendant's train was not going to stop, as it approached at great speed, the plaintiff leaped from his buggy, and was badly injured. Defendant admits that it was at work repairing and moving its track and roadbed, which it says it had the right to do; and, although there was a small excavation across the public road, and some dirt thrown up in the road, it might easily have been seen by the plaintiff, and would have been seen by him but for the fact that he was running a race with defendant's train to get across the track before the train reached the crossing; that the train was in full view of plaintiff, and that it was his own fault and negligence to undertake to cross the track when he did; that defendant was guilty of no negligence, but plaintiff was, and cannot recover damages for his injury. The following issues were submitted without objection: (1) "Was the plaintiff injured by the negligence of the defendant?" (2) "Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?" (3) "If plaintiff, by his own negligence, contributed to his injury, could the defendant, notwithstanding the negligence of the plaintiff, have prevented the injury to the plaintiff by the exercise of care on its part?" (4) "What damage is plaintiff entitled to recover?" The jury answered the first issue "Yes," the second "No," and the fourth "\$2,000." The third issue was not an-

answered, under the direction of the court, as it became immaterial upon the first issue being answered "Yes" and the second "No." It is not contended but what there was evidence tending to prove the issues passed upon by the jury, and the verdict and judgment must stand unless there was error committed by the court in not charging the law as requested by the defendant, or in erroneously charging the law as claimed by the exceptions of the defendant. The defendant took and noted more than 30 exceptions to his honor's charge, which are presented by the record and case on appeal. All these exceptions have been carefully considered by the court. But defendant, in its brief (while not formally abandoning any of them), discusses only the first and seventh exceptions, which are prayers for instructions on the part of the defendant, and they are as follows: (1) "If the jury believe the evidence, the answer to the first issue should be 'No.'" (7) "If the jury believe the evidence, the answer to the second issue should be 'Yes.'" The first issue is as to whether the defendant was guilty of negligence, and the seventh is as to whether the plaintiff was guilty of contributory negligence. From the evidence in the case it is too plain for argument that neither of these exceptions can be sustained, and it seems that this would be an end of the case. But, as we have said, although these two exceptions are the only ones called to our attention by the brief of defendant, we have carefully considered all of them, and find no error. There is much learning displayed and many authorities cited in the brief, many of which have been examined by the court. But we find that it is unnecessary to call any of them into requisition in deciding this appeal. It would be but to "thrash over old straw," without profit to the parties or the profession. The judgment is affirmed.

PHILLIPS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. March 7, 1899.)

CARRIERS—PASSENGERS—RULES—REASONABLENESS.

1. One coming to a railroad station to take the next train becomes, in contemplation of law, a passenger, provided his coming is within a reasonable time before the time for departure of said train, whether or not he has purchased a ticket.

2. A railroad company has the right to establish reasonable rules providing when its waiting rooms at stations shall be closed.

3. A rule of a railroad company requiring its waiting rooms at a station to be closed after the departure of its trains, and until 30 minutes before the departure of its next train, is reasonable.

Appeal from superior court, Henderson county; Greene, Judge.

Action by M. F. Phillips against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

G. F. Bason, F. H. Busbee, and A. B. Andrews, Jr., for appellant. T. J. Rickman, for appellee.

FURCHES, J. On the 15th of December, 1896, the plaintiff, intending to take the next train on defendant's road to Hot Springs, in Madison county, entered the defendant's waiting room at Asheville about 8 o'clock at night, with the intention of remaining there until the departure of the next train on defendant's road for Hot Springs, which would leave 1:20 o'clock of the next morning. He was informed by defendant's agent, in charge of the waiting room, that, according to the rules of the company, she must close the room, and that he would have to get out. The plaintiff protested against this, and refused to leave. But when the clerk of defendant's baggage department (Graham) came, and told him that he could not stay, and made demonstrations as if he would put him out, he left. He had no place to go where he could be comfortable. The night was cold. He was thinly clad, and suffered very much from this exposure, and took violent cold therefrom, which ran into a spell of sickness, from which his health has been permanently injured. It was in evidence, and not disputed, that the rules of defendant company required the waiting room to be closed after the departure of defendant's train, and to remain closed until 30 minutes before the departure of its next train; that, under this rule of the defendant, it was time to close the waiting room when the plaintiff was ordered to leave the room, and he was informed that it would not be opened again until 30 minutes before the departure of defendant's next train, at 1:20 of the next morning. The plaintiff contended that he had purchased a ticket from Asheville to Hot Springs before he entered the waiting room; which he showed to the keeper of the room at the time he was ordered out. This was denied by defendant.

The defendant asked, in writing, a great number of instructions, which were not given. Among these was the following: "If the jury believe the evidence, the answer to the first issue should be, 'No.'" The first issue was as follows: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" The court, among other things, charged the jury that, if the plaintiff bought a ticket to take passage on the next train, he had a right to remain in the waiting room until that train left, and that if the jury found from the evidence that plaintiff had bought a ticket, and exhibited it, as he alleges he did, he is entitled to recover actual damages, but not punitive damages. To that part of the charge referring to the purchase of the ticket, and plaintiff's right to remain in the waiting room, the defendant excepted. We are of the opinion that both these exceptions are well taken, but it is not necessary that we should discuss them both. If either one of them is

sustained, it is substantially an end to the plaintiff's case. In fact, the discussion of the one involves the other. A party coming to a railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his honor. 1 Fetter, Carr. Pass. § 228. But the purchase of the ticket would probably be considered the highest evidence of his intention. But, still, it is his coming to the station within a reasonable time before, with the intention to take, the next train, that creates the relation of passenger and carrier. There is no dispute but what the plaintiff intended to take the defendant's next train to Hot Springs, and we must infer from the charge of the court and the verdict of the jury that they found that plaintiff had purchased his ticket.

So, the only question that remains is as to whether the defendant had the right to establish the rule for closing the waiting room, and was the rule a reasonable one? And we are of the opinion that the defendant had the right to establish the rule, and that it was a reasonable one. Webster v. Railroad Co., 161 Mass. 298, 37 N. E. 165; Boothby v. Railway Co. (N. H.) 34 Atl. 157; 1 Elliott, R. R. §§ 190, 200; 4 Elliott, R. R. § 1579. The rule would probably be different in the case of through passengers, and in the case of delayed trains; but, if so, these would be exceptions, and not the rule. Waiting rooms are not a part of the ordinary duties pertaining to the rights of passengers and common carriers; but they are established by carriers as ancillaries to the business of carriers, and for the accommodation of passengers, and not as a place of lodging and accommodation for those who are not passengers. This being so, it must be that the carrier should have a reasonable control over the same, or it could not protect its passengers in said rooms. There is error. New trial.

ROSCOE v. JOHN L. ROPER LUMBER CO.
(Supreme Court of North Carolina. Feb. 28, 1899.)

TRIAL — DISMISSAL — WILLS — PROBATE — CERTIFICATE — RECORDS — TENANCY IN COMMON — ADVERSE POSSESSION.

1. A motion to dismiss the action at the close of plaintiff's case, under Acts 1897, c. 109, waives the competency of the evidence.

2. The fact that Code, § 2149, requiring a certificate of probate of a will to embody the substance of the proofs and examination of witnesses, is not complied with, in that the examination is certified separately from the certificate of probate, is immaterial, where both certificates are of one date, and in the same pro-

ceeding, and the certificate of probate recites that the will has been duly proved.

3. A certificate to the record of probate proceedings which expressly refers to the certificate of probate embraces the certified examination of the attesting witnesses, where the certificate of probate refers to the examination.

4. Where a tenant in common by deed attempts to convey the entire estate, and the grantee enters, his possession is not presumed to be adverse to the co-tenant.

Appeal from superior court, Gates county; Norwood, Judge.

Action by Jane E. Roscoe against the John L. Roper Lumber Company. From a judgment for defendant, plaintiff appeals. Reversed.

Plaintiff offered in evidence the following record from the Book of Wills in the office of the clerk of Gates superior court (page 418 et seq.), as follows (last will and testament of H. E. Roscoe, deceased):

"I, H. E. Roscoe, of the town of Oxford, county of Lafayette, and state of Mississippi, being of sound mind, body, and understanding, do make and ordain this to be my last will and testament, revoking all other wills by me made. I give and bequeath to my beloved wife, Jane E. Roscoe, all my property, —personal, real, and mixed,—which I now have, or may hereafter acquire by purchase or otherwise. I hereby appoint my wife, Jane E. Roscoe, executrix of my last will, requiring that she make no bond or make any return whatever to the chancery court, but that she shall have entire control, without let or hindrance of the chancery court of Lafayette, and shall take possession of all my property, of whatever kind, and do with it just as she pleases, retaining or disposing of it as may be her pleasure to do. Given under my hand and seal this the thirteenth (13) day of January, one thousand eight hundred and eighty-two (1882). H. E. Roscoe. [Seal.] Witness: Silas Owens, Jr. A. T. Owens.

"State of Mississippi, Lafayette County. In the Chancery Court, in Vacation. Personally appeared before me, John F. Brown, clerk of the chancery court of the county and state aforesaid, Silas Owens, Jr., and A. T. Owens, subscribing witnesses to a certain instrument of writing purporting to be the last will and testament of H. E. Roscoe, late of said county, now deceased, bearing date the 13th day of January, A. D. 1882, who, being first duly sworn, depose and say that said H. E. Roscoe signed, sealed, and executed said instrument and testament in the presence of these deponents on the day of the date thereof; that said testator was then of sound, disposing mind and memory, and more than twenty-one years of age; and that these deponents subscribed said instrument as witnesses thereto at the instance and request and in the presence of said testator, and also in the presence of each other, on the day and year aforesaid. Silas Owens, Jr. A. T. Owens.

"Sworn to and subscribed before me this

11th day of March, A. D. 1885. [Seal.] J. F. Brown, Clerk, by A. G. Smith, D. C.

"No. 2,120. In the Chancery Court of Lafayette County, Mississippi, in Vacation, March 11, 1885. H. E. Roscoe, Deceased, against Jane E. Roscoe, Ex'trx. In the Matter of H. E. Roscoe, Deceased. This day came on to be heard the matter of the last will and testament of H. E. Roscoe, deceased; and it appearing that Jane E. Roscoe was appointed executrix under said last will and testament, and it appearing that said last will and testament has been duly proven as required by law, it is therefore ordered that the same be admitted to probate, and that letters be issued to said executrix upon her taking the oath required by law. Whereupon the said executrix took the oath prescribed by the statute, and letters were issued. J. F. Brown, Clerk.

"State of Mississippi, Lafayette County. Chancery Court. I, Ben P. Gray, clerk of chancery court of Lafayette county, state of Mississippi, do hereby certify that the foregoing is a full, true, and perfect copy of the last will and testament of H. E. Roscoe, deceased, and of the judgment of said court ordering probate thereof, which said will and testament was regularly admitted to probate as such in this court on the 11th day of March, 1885, as said will and testament and said judgment appear of record in this office. Witness my hand and seal of said court at office in Oxford, state of Mississippi, this 8th day of February, 1897. Ben P. Gray, Clerk of Chancery Court of Lafayette Co., Miss. [Seal.]

"State of Mississippi, Lafayette County. Chancery Court. I, B. T. Kimbrough, judge of chancery court of Lafayette county, state of Mississippi, do hereby certify that the foregoing attestation of Ben P. Gray, clerk of said court, is in due form. This 8th day of February, 1897. B. T. Kimbrough, Judge of Chancery Court, Lafayette Co., Miss.

"State of Mississippi, Lafayette County. Chancery Court. I, Ben P. Gray, clerk of chancery court of Lafayette county, state of Mississippi, do hereby certify that the signature to foregoing certificate is the genuine signature of B. T. Kimbrough, judge of said court. Witness my hand and seal of said court at office in Oxford, Mississippi, this 8th day of February, 1897. Ben P. Gray, Clerk of Chancery Court, Lafayette Co., Miss. [Seal.]

"North Carolina, Gates County. In the Superior Court. It appearing to the satisfaction of the court, from the exemplification of the record hereinafter mentioned, that the last will and testament of H. E. Roscoe, deceased, a citizen of Lafayette county, and state of Mississippi, has been duly proved and allowed in the proper court of probate of said county and state according to the laws of said state, and it further appearing that the said H. E. Roscoe left property in the county of Gates

and state of North Carolina, it is therefore ordered and adjudged that the exemplification of said will and of its probate in the proper court of the said county of Lafayette and state of Mississippi, which has been produced and exhibited here, duly certified and authenticated, be allowed, filed, and recorded in this court. This 18th day of February, 1897. W. T. Cross, Clerk Superior Court."

Defendant in apt time objected to this record, but it was admitted by the court.

W. M. Bond and S. G. Ryan, for appellant.
Pruden & Pruden, E. F. Aydtlett, and L. L. Smith, for appellee.

MONTGOMERY, J. In her complaint the plaintiff alleges that she is the owner in common with the defendants of the lands described in the complaint, her alleged interest being one-half of the whole; and this action was commenced to have herself adjudged the owner of her one-half interest in common, and that the lands may be sold for a division by a commissioner appointed by the court. In their answer the defendants denied the claim of the plaintiff, and also pleaded the statute of limitations of 20 years' adverse possession under known and visible lines and boundaries, and the 7-years statute under color and adverse possession. In the trial in the superior court, upon the conclusion of the plaintiff's evidence, the defendants moved to dismiss the action, under chapter 100, Acts 1897. The motion was allowed, and from the order the plaintiff appealed to this court.

In support of her title the plaintiff introduced a duly-certified copy of a record from the Book of Wills in the office of the clerk of the superior court of Gates county, containing the will of H. E. Roscoe, who died in Lafayette county, Miss., and its probate, which will had been filed and recorded in the clerk's office of Gates county, under section 2156 of the Code, as amended by chapter 393 of the Laws of 1885. She also introduced a copy of the will and probate thereof certified from the chancery court of Lafayette county, Miss. The plaintiff then introduced a deed from J. R. Riddick to H. E. Roscoe, her deceased husband, and S. W. Worrell, in fee simple, dated January 1, 1853, to the land described in allegation III of the complaint; then a deed dated October 7, 1865, from S. W. Worrell to Bond, Brady, Roberts & Wiley, purporting to convey the whole of the land in fee; and then successive deeds from these last grantees and their grantees to the defendants. The plaintiff further introduced in evidence sections 3, 4, and 5 of the complaint, which set out the ownership in common of the lands described therein between the plaintiff and defendants in the proportion of one half to the plaintiff and the other half to the defendants, and then the deeds under which the defendants

claim the entire interest in the lands, and the entry of the defendants thereon; and also section 8 of the answer is introduced, in which it is admitted that the defendants have entered upon the lands conveyed to them under the deeds set out in section 5 of the complaint.

Upon the argument here the counsel of defendants insisted that the question of competency of a part of the evidence which his honor received was a matter for the consideration of this court, objection having been made to its admission in the court below; but we think that the motion made by the defendant was, so far as the competency of the evidence is concerned, substantially a demurrer to the evidence, and that all objection to its competency was waived by the motion. A demurrer to the evidence admits as true all that the evidence tends to prove. *Hygienic Plate Ice-Mfg. Co. v. Raleigh & G. R. Co.*, 122 N. C. 881, 29 S. E. 575; *Bazemore v. Mountain*, 121 N. C. 59, 28 S. E. 17; *Whitley v. Railway Co.*, 122 N. C. 987, 29 S. E. 783. But the defendants' counsel insisted that if they were in error as to that position, and that their motion to dismiss was a waiver of all objection to the evidence received by the court below, yet the certificate of probate of the will by the clerk of the court of chancery of Lafayette county, Miss., did not show affirmatively that the will was executed according to the laws of North Carolina, and, therefore, that the lands situated in North Carolina did not pass to the plaintiff under the will. To an understanding of this contention, it becomes necessary to examine the proceedings of the Mississippi court in reference to the probate of the will. The record of that court was properly certified, and, from it, it appears that the will was subscribed by two witnesses; that the witnesses subscribed in the presence of the testator, and at his request; that the testator at the time of his signing the will was of sound and disposing memory; and that he was over 21 years of age. The examination of the witnesses to the will, however, was signed and certified by the clerk separately from the certificate of probate made by the clerk; and on that account the defendants contend that our statute (Code, § 2149), which provides that the certificate of probate shall embody the substance of the proofs and examination, was not complied with. The examination of the witnesses containing the essentials, according to the laws of North Carolina, for the order of probate of the will, was of the same date and in the same proceeding as the certificate of probate, and the certificate of probate set forth that the will had been duly proved as required by law. We think that the certificate of the clerk was sufficient, for it referred to the proof of the will already made in the proceedings of the probate. But the defendants further insist that the certificate of the officer to the rec-

ord of the proceedings did not refer to anything but the will and the certificate of probate; that it did not embrace the examination of the witnesses. That point is not directly presented by the appeal, for the record—the whole record—is in evidence, and without objection, so far as the appeal is concerned, and it embraces the examination of the witnesses to the will. However, we might as well say that we think the certificate of probate refers to the certified examinations of the witnesses, and that the whole forms one transaction. The exceptions were not by any means frivolous. They were urged by counsel, learned in the law, with zeal; but we cannot concur in their view of the matter.

The probate of the will, then, being sufficient to pass the property, that part of the case being treated as upon demurrer to the evidence, we are brought to the consideration of the other branch of the case. The plaintiff's evidence showed that her devisor and S. W. Worrell had been tenants in common of the lands, and that the defendant, at the time of the trial and before, was in possession of the same, claiming by deeds purporting to convey the whole from successive grantees of Worrell. Now, the contention of the defendant is that, as the plaintiff proved on the trial that the defendant went into possession of the lands under deeds purporting to convey the whole interest, the presumption (Code, § 146) that she had been in possession within 20 years before the bringing of this action (she having shown the legal title in her to her interest) had been rebutted, and, further, that from the plaintiff's evidence the presumption arose that the defendant's possession became adverse, and began from 1866, the date of the execution of the first deed conveying the entire estate, and that it was incumbent on the plaintiff to show possession in herself, or some one from whom she claimed, within 20 years before the commencement of the action. However plausible this contention may appear, it cannot be sustained upon reason, or under the decisions of this court. There had been a tenancy in common at one time between the plaintiff's devisor and Worrell, from whom, through successive conveyances, the defendant claims, and the plaintiff's evidence did not show any adverse possession on the part of the defendant. It only went to prove entry by the defendant on the land. Section 5 of the complaint and section 8 of the answer, put in evidence by the plaintiff. The possession of one tenant in common is, in law, the possession of all. *Covington v. Stewart*, 77 N. C. 150; *Neely v. Neely*, 79 N. C. 478. And the rule is the same when one enters to whom a tenant in common has by deed attempted to convey the whole land. In the case of *Ward v. Farmer*, 92 N. C. 93, the court said: "In the more recent case of *Caldwell v. Neely*, 81 N. C. 114, where there

were two tenants in common, and one of them undertook to convey the whole tract and a full estate therein to the defendant, and he took possession immediately, and claimed to be absolute owner, it was held that the ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract." To the same effect are the cases of *Page v. Branch*, 97 N. C. 97, 1 S. E. 625; *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691.

There was error in the order dismissing the action. New trial.

REDDITT v. SINGER MFG. CO.

(Supreme Court of North Carolina. March 7, 1899.)

CORPORATIONS—TORTS OF AGENTS.

Where a corporation authorizes its state agent to make a settlement with a subagent, it is not liable to the latter for slanderous statements made by the former pending the settlement, in the absence of evidence that the corporation expressly or impliedly authorized the statements, or ratified them.

Appeal from superior court, Pamlico county; Hoke, Judge.

Action by W. A. Redditt against the Singer Manufacturing Company. From a judgment for plaintiff, defendant appeals. Error.

Osborne, Maxwell & Keerans and D. L. Ward, for appellant. Shepherd & Busbee, for appellee.

FAIRCLOTH, C. J. The defendant is a corporation in the state of Virginia, manufacturing sewing machines, and has a state agent and subagents in North Carolina, and the plaintiff was one of the agents for selling the machines. The defendant's state agent was directed by the defendant to take possession of the machines in plaintiff's hands, and to have a settlement with plaintiff, and collect the amount due by plaintiff for machines already sold. The agent brought an action of claim and delivery for the machines, and they were delivered; and, pending negotiations in making the settlement, the plaintiff alleges that said agent used and uttered slanderous words of and concerning the plaintiff; and he institutes this action for damages, against the defendant corporation, resulting from the utterance of such slanderous words by said agent. There is no allegation nor any proof that said slanderous words were spoken by the authority or consent of the defendant, or that they have been ratified. At the close of the plaintiff's evidence, the defendant demurred, and

made a motion to dismiss the action, on the ground that the defendant is not liable for damages for the alleged slanderous words of its agent. The motion was refused, and exception entered.

The court charged the jury that "a corporation is responsible for slanderous words uttered by its agent in the course and scope of such agent's employment, and in aid of the company's interest." Exception. This charge presents the decisive question in this case. An examination in detail of the numerous authorities and decisions would be a tedious undertaking, and it may be remarked that a careful examination into the facts in each would reconcile many apparent conflicts. It is a fundamental principle that the law shall fit the facts in every case. A few general propositions may be stated: (1) That a corporation, contrary to the early cases, is now liable to civil and criminal actions under the same conditions and circumstances as natural persons are. (2) That, as a corporation must do business through agencies, it is liable for the misconduct of its agents, in the line of their duty, if they act under the express or implied authority of the company, or their tortious acts are ratified, as by taking the benefits of such misconduct. (3) That when liability is established, and the circumstances are aggravating or malicious, the company is subject to punitive damages on the same principle that natural persons are. From our examination, we think that in a vast majority of the cases the principle is recognized that in some way the company must authorize or approve the tortious act of its agent, and that it would be unreasonable to hold the company liable on a bare presumption, in the absence of allegation or any proof of authority or ratification. If A. sends his servant down town to purchase goods, and, in the act of purchasing, the servant should slander by words or assault the merchant, it would be a violent presumption that the master approved or had authorized such misconduct, and it would be unreasonable to hold him responsible without something indicating his approval. The principle which we approve is well stated in *State v. Morris & E. R. Co.*, 23 N. J. Law, 369: "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable civiliter for all torts committed by its servants or agents by authority of the corporation, express or implied. * * * The result of the modern cases is that a corporation is liable civiliter for torts committed by its servants or agents, precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act." This

view is cited and approved in *Railway Co. v. Harris*, 122 U. S. 608, 7 Sup. Ct. 1286, and cases referred to. *Hussey v. Railroad Co.*, 98 N. C. 34, 3 S. E. 923, was on demurrer, and, looking at the opinion (not the official syllabus), we see nothing in conflict with the view we are taking. In some respects the present case is similar to *Daniel v. Railroad Co.*, 117 N. C. 592, 23 S. E. 327, but not so in all respects. That was an action against a common carrier, owing important duties to the public, subject to the demands of the public, within the range of its chartered duties; and the defendant was held to a strict discharge of its duties as such carrier, on the ground of public policy. In the present case the defendant is a private corporation, owing no duty to the public, on whom the public can make no demand. It may make and sell machines at its own will and pleasure. The public has and feels no more interest in the manner of its business transactions than in that of any other individual business enterprise. We think there was error in law, and this makes any further discussion unnecessary. Error.

DOUGLAS, J. (concurring). While I concur in the judgment of the court, I cannot concur in the possible inference that a private corporation cannot be guilty of libel; nor do I see any material difference in that respect between a private and quasi public corporation. It is true, the latter owes to the public certain special duties, such, for instance, as the protection of its passengers by a common carrier; but these duties and consequent liabilities come under an entirely different principle. I think this distinction is clearly drawn, and the essential principles fully recognized, in *Hussey v. Railroad Co.*, 98 N. C. 34, 3 S. E. 923, and in *White v. Railroad Co.*, 115 N. C. 631, 636, 20 S. E. 191. The citation in the opinion of the court from *State v. Morris & E. R. Co.*, 23 N. J. Law, 369, cited with approval in *Railway Co. v. Harris*, 122 U. S. 597, 608, 7 Sup. Ct. 1286, *Hussey v. Railroad Co.*, *supra*, and *White v. Railroad Co.*, *supra*, lays down the general principle, applicable to all corporations, that a corporation is civilly liable, precisely as a natural person, for torts committed by its servants or agents by its authority, express or implied. It seems to me there must be, at least, implied authority for all acts done by an agent "within the course and scope of his employment." For this reason I am not prepared to say that it was error in the court below to charge that "a corporation is responsible for slanderous words uttered by its agent in the course and scope of such agent's employment, and in aid of the company's interest." I see no error in it as far as it goes. If a corporation or individual should place in the hands of an agent a claim for collection, with a false statement showing the alleged debtor guilty of embezzle-

ment, and such agent should, on the authority of such statement, charge the debtor with felony, I do not see why the principal should not be liable. Again, if the corporation should place in the hands of its agent a claim, with instructions to enforce its payment by threats of criminal prosecution, I think it would be liable for false accusations made by its agent in pursuance of such instructions. Of course, in both instances this view is based upon the general liability of the corporation, regardless of its right of possible justification. Under all the circumstances of this case, which it is unnecessary for me to review at length in a concurring opinion, I assent to a new trial, when the facts can be more fully developed, and the law, perhaps, more clearly applied; but I do not wish to be bound by an apparent concurrence in principles that do not meet my approval.

CLARK and MONTGOMERY, JJ., concur in the concurring opinion of DOUGLAS, J.

Ex parte BECKWITH et al.

(Supreme Court of North Carolina. March 7, 1899.)

COSTS—WITNESS' FEES—QUESTIONS OF FACT.

Code, § 1370, provides that "the party cast shall not be obliged to pay for more than two witnesses to prove a single fact." *Held*, that when a question of fact—as a question of the value of land—involves several single facts, which must be proved before the ultimate fact can be intelligently found, a party may be allowed two witnesses to prove each single fact, if necessary.

Appeal from superior court, Johnston county; Timberlake, Judge.

Proceeding by B. C. Beckwith and others for partition. A decree was rendered and costs were taxed, and from an order denying a motion to retax the costs B. C. Beckwith and certain others appeal. Affirmed.

B. C. Beckwith, for appellants. Simmons, Pon & Ward, for appellees.

MONTGOMERY, J. This was a special proceeding ex parte commenced in the superior court of Johnston county for the purpose of having partition made of certain lands among the petitioners according to their several interests. The exceptions of the appellants to the report of the commissioners for alleged unfairness in the partition and inequality in the shares were not sustained by the clerk. The report was confirmed, and the exceptants appealed from the clerk's decision to the judge of the superior court. At the request of the appellants, the other petitioners in the original proceeding making no objection, the judge ordered the proceeding to be docketed on the trial docket of Johnston superior court, for the purpose of having as-

certained by the verdict of a jury whether the share allotted to the appellants was their full share in value of the lands described in the partition. Upon the evidence offered the jury found the question submitted to them in the affirmative, and the court taxed the appellants with all of the costs arising out of their exceptions to the report of the second set of commissioners. The appellants, at a subsequent term of the court, made a motion to retax the bill of costs, the clerk having made it out according to the directions of the court. The basis of the motion was the allegation that all of the witnesses of the appellees were subpoenaed to give testimony on a single point,—the value of the lots of land,—and that, therefore, no more than two witnesses could be allowed to prove against the appellants under section 1370 of the Code. The motion was heard and overruled by the court, and the bill of costs as made out was approved and confirmed. In the order to that effect it was stated by his honor that no greater number of witnesses were examined by the appellees than were necessary, and that such of them as were not examined were sworn, and tendered to the appellants. The construction of the proviso of section 1370 of the Code, which is in the following language: "Provided that the party cast shall not be obliged to pay for more than two witnesses to prove a single fact," is the matter before us for decision; and first it is in place to say that the matter which was carried before the judge in chambers on the appeal from the clerk was not such an issue of fact as is referred to in section 256 of the Code, but was a question of fact, and therefore that the verdict of the jury was simply a method of determining a question of fact which the judge had adopted by an order made at chambers at the request of the appellants, and without objection on the part of the appellees. There were no issues of any kind raised by the pleadings, for they were *ex parte*, as we have said. The same relief was demanded, and the matter of the fairness of the partition made by the commissioners was a question of fact to be in the first instance decided by the clerk, subject to review by the judge, on appeal from the clerk, under the first part of section 256 of the Code. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123. The matter, then, which was submitted to the jury was of broader scope than the finding by them of a single isolated fact. There were three tracts of land and two town lots, the subject of the partition, and to arrive at the value of the share allotted to the appellants the value of each tract and lot had to be ascertained upon evidence adduced for that purpose. In such an investigation a multiplicity of single facts might be necessary to be proved, and on the investigation in this matter it appears from the case on appeal that the appellees, in reply to the testimony of the witnesses for the appellants, offered evidence as to each and every

tract of land, as to the timber, buildings, rental value, and prospective value of the town lots. The evidence under each one of these heads was material matter to be gone into before a correct conclusion could be arrived at by the jury as to the value of the appellants' share. His honor having certified in his order overruling the motion to retax the costs that the witnesses examined and those tendered by the appellees were no greater in number than were necessary for the purposes of the trial, and the examination appearing from the record to have extended into various matters of single facts, all material to the question at issue, we are of the opinion that under the statute (Code, § 1370) the appellees ought to be allowed against the appellants as many as two witnesses introduced to prove each single fact necessary to give to the jury such information as would enable them intelligently to answer the question submitted to them for their determination. No more than that number appear to have been subpoenaed by the appellees. Of course, the trial judge will always see to it that such evidence is not introduced for merely cumulative effect, and for the oppression of the party cast. It is in his power, and always has been, in judicial proceedings in this state to see to it that no oppression in the way of excessive cost bills is practiced by successful litigants upon the party cast. We can find no direct authority in our reports as applicable to the facts in this case. In connection with the matter, however, the cases of *Wooley v. Robinson*, 52 N. C. 80, and *Holmes v. Johnson*, 38 N. C. 55, may be read with interest as having an indirect bearing. We feel it necessary to say that we cannot commend the course of his honor in calling in the aid of a jury to decide a question which he, by law, was required to decide himself; and we must think that there were strong reasons which induced him to make such a departure from the usual course of practice, although they do not appear of record. Affirmed.

STRATFORD v. CITY OF GREENSBORO et al.

(Supreme Court of North Carolina. March 7, 1899.)

EMINENT DOMAIN—PUBLIC USE—NECESSITY—REVIEW OF DETERMINATION BY MUNICIPALITY—JURISDICTION—PERSONS ENTITLED TO SUE—FRAUD.

1. Property taken for the laying out or altering of a street is not taken for a private use merely because an individual contributes to the cost of the improvement.

2. Courts have no jurisdiction to review the determination of a municipality that the appropriation of property for a public use is expedient or necessary, the question being political.

3. The determination of a municipality that the use to which it is attempting to appropriate private property is public is subject to review by the courts, the question being a judicial one.

4. The right to object that an appropriation of private property by a municipality is not for a public use is not confined to the owner of the property attempted to be appropriated, but any taxpayer of the municipality, subject to assessment for the cost of such taking, may make the objection.

5. An appropriation of property for a private use by a municipality may be restrained, though there be no fraud.

6. Where the substantial benefit from the appropriation of lands by a city under the right of eminent domain is for a private individual, and the benefit to the city is only incidental, and purely prospective, the use is not public.

Appeal from superior court, Guilford county; Robinson, Judge.

Action by W. O. Stratford against the city of Greensboro and another for injunction. There was a judgment for defendants, and plaintiff appeals. Reversed.

J. T. Morehead, for appellant. Bynum & Taylor, R. R. King, and Shaw & Scales, for appellees.

MONTGOMERY, J. At the time of the commencement of this action the defendant Cone was the owner of about 1,600 acres of land (less that part of it which he had sold to the Cone Export & Commission Company of New York, in which company he was a stockholder), situated on the north and northeast of the city of Greensboro, and lying partly within the corporate limits of the city; that part lying within the city limits containing between 300 and 500 acres. That property was connected with the city by the street, Summit avenue. On the 21st and 24th days of January, 1896, the board of aldermen of Greensboro made an order that a portion of Church street be widened, and then extended as a new street from Lindsay street, in a northeasterly direction, to and on the line of Summit avenue, and then over said avenue, as at first laid out, to the corporate limits of the city, and that the strip of land necessary for the street be condemned according to law. On the 7th of February following, the board made an order providing for the borrowing of a sum of money not exceeding \$15,000 for the purpose of opening and building the streets referred to in the orders of the 21st and 24th days of January, 1896, and repairing other streets, and other public improvements in the city, and also for an election to be held for the purpose of submitting the question of the creation of the debt to the qualified voters of the city. The plaintiff, a resident and taxpayer of Greensboro, brought this action to have these orders made by the board declared ultra vires and void, that the defendant board of aldermen be perpetually enjoined and restrained from holding the election and from opening the streets, and that defendant Cone be restrained from lending to his co-defendant, the city of Greensboro, the money with which to grade and macadamize, curb and bridge, the street to be called "Summit Avenue." In the complaint the plaintiff alleged that the

opening and making of the new street and the widening of Church street were not necessary and not required for the public use of the city, but, on the contrary, that they were to be made for the private use and benefit of defendant Cone, that such benefits as might accrue to the city were only incidental, and that the aldermen had entered into a contract with defendant Cone to make the orders concerning the opening of the streets, by which many private advantages would accrue to him, upon his paying to the owners of the condemned lands the assessed or agreed damages, all of which are set out in paragraph 5 of the complaint, which is in the following language: "That in order to carry out his wishes of improving his property outlying the city limits, and other personal and private advantages to be gained thereby, he and his co-defendant, the city of Greensboro, acting through its mayor and aldermen, have entered into a contract in which it is agreed that Cone shall pay for the right of way over the land of the property holders, except that of the First Presbyterian Church, over which said proposed Summit avenue will run, to build ten houses (whether cheap cottages for operatives, or other kind of houses, the plaintiff does not know, as nothing in said contract discloses) on his property lying within the city limits, and to move to Greensboro the offices of the Cone Export & Commission Company, a foreign corporation, which pays no taxes to the state, county, or city, and to lend to the city money sufficient (at 6% per annum, payable semiannually) to perform its part of the contract; and the city is to at once grade and macadamize, ditch and curb, said street, from North Elm street to the corporate limits, and to build an iron bridge over the track of the Southern Railway, which said street crosses." The plaintiff further alleged that the defendant city was not authorized in law to take the property of its citizens for private use, although by such a course incidental benefit might accrue to the city, and that all of the acts done and threatened to be done under the orders of the board made in reference to the opening and widening of these streets were ultra vires. The judgment prayed for by plaintiff was that the alleged contract, and the action of the board in condemning the lands for the new street, be declared unlawful and ultra vires, that its action looking to the borrowing of money from Cone for the purposes alleged in the complaint is unlawful, and that defendants be restrained from further proceedings in the matter. In their several answers the defendants aver that the proceedings of the board were in good faith, that the opening of the new street and the widening of Church street were necessary and for the public benefit, and that of these matters the determination of the board was final. In the answer of the city, however, to paragraph 5 of the complaint, the contract alleged by the plaintiff as having been made between the city and Cone is denied out and out, while

Cone in his answer avers that the contract was made as set out by the plaintiff in paragraph 5 of the complaint, and that he was ready then to comply with it in every respect. This contradiction in the two answers is so apparent as to attract attention. If it was the only fact connected with the transaction in reference to the connection Cone had with the enterprise, the contract would not be material. There can be no objection to the contributing of an individual to the expense of laying out or altering a street, nor will such an act prove that the property was taken for the accommodation of private individuals, and not for public use. If, in point of fact, the public necessity and convenience require the improvement of a street, or the opening of one, it can make no difference who pays the damages of condemnation. It might be that a party contributing a part or the whole of the assessed damages in the condemnation of land for a public street, when the public necessity requires such street, might have lands adjacent which might be improved by the opening of the street; and surely, if nothing else appeared, it would not be either immoral or illegal for him to pay the damages growing out of the condemnation proceedings. *Chicago, B. & Q. R. Co. v. City of Naperville* (Ill. Sup.) 48 N. E. 335; *Parks v. Boston*, 8 Pick. 218. But the contradiction in the answers was significant.

The following were the issues submitted to the jury: "(1) Was the resolution passed by the board of aldermen of the city of Greensboro at its meeting on the 21st day of January, 1896, for the purpose of widening Church street and opening Summit avenue, the result of a colorable collusion between said board and Caesar Cone or any other person? (2) Has said street been opened? (3) Has the money, to restrain the borrowing of which this suit was instituted, been borrowed?" The plaintiff excepted to the issues. The exception to the first issue ought to have been sustained. It was framed on the view that in all cases where municipal authorities proceed to open and build new streets, having authority so to do in their charter or general law, such proceedings cannot be made the subject of judicial investigation, except in cases of actual fraud. That is an erroneous view of the law in such cases. In cases where the municipal authorities are empowered by the general law or by their charters, as in this case, to open up, grade, and pave streets, the expediency or necessity of doing so, and the power of exercising the right of eminent domain, condemning the private property of the citizen for that purpose, are entirely within the determination of the corporate body, and their action is conclusive against judicial interference, since such a question is not judicial; it is political. 2 Dill. Mun. Corp. § 600. "When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." Lewis, Em.

Dom. § 238; *Boom Co. v. Patterson*, 98 U. S. 403; *Brodnax v. Groom*, 64 N. C. 244; *Vaughn v. Commissioners*, 117 N. C. 434, 23 S. E. 354. It is also true that municipal authorities, when lawfully exercising the power of condemning private lands for the public use, do and must determine, in the first instance, that the use to which they intend the land is a public use. But that decision is not conclusive. But whether the use of the property which the delegated legislative authority has declared to be a public use be such a use as would sustain the authorities in taking, against the will of the owner, his property, is a judicial question. If the taking be in fact for the purposes of private use,—if the basis of condemnation be the benefit of an individual, and not the public interest and convenience,—the courts cannot be concluded by the action of legislative authority from exercising jurisdiction in determining whether the use is a public use, or one for private gain and advantage. 2 Dill. Mun. Corp. § 600; *Call v. Town of Wilkesboro*, 115 N. C. 337, 20 S. E. 468. "All the courts, we believe, concur in holding that whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary." Lewis, Em. Dom. § 158; *Cooley, Tax'n*, 110, 120; *Clee v. Sanders*, 74 Mich. 692, 42 N. W. 154.

But the defendants contend that, even if the question whether the use for which private property has been taken is a public use is a matter for judicial determination, the plaintiff is not the proper person to raise that question, for the reason that he was not the owner of any part of the land taken by the defendant corporation in the opening of the streets, and therefore he has suffered no injury on account of that proceeding. It is certain, however, that in cases where the board of aldermen of a town or city have taken private property for private use under the claim of exercising the right of eminent domain for the public use, a resident taxpayer may have his remedy in the courts against the proceedings, and may have them declared ultra vires and void, thereby saving himself from the imposition of unjust and unlawful taxes that would be required to meet the expenses of such unlawful proceedings. If such rights were denied to exist against municipal corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities. In *Crampton v. Zabriskie*, 101 U. S. 601, Mr. Justice Field said, in delivering the opinion of the court, that: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county,—of the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be

compelled to pay.—there is at this day no serious question. The right has been recognized by the state courts in numerous cases, and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would be eminently proper for courts of equity to interfere, upon the application of the taxpayers of the county, to prevent the consummation of a wrong, when the officers of these corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or the county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power. * * * In *Mayor, etc., v. Gill*, 31 Md. 375, it was held that resident taxpayers could restrain the corporation and its officers from taking steps to carry out a city ordinance creating a debt and a violation of the constitution.

In the case before us, the main question raised by the pleadings was whether the use to which the new street and improvements were to be devoted was a public use. It was not necessary on the part of the plaintiff to allege or prove actual fraud in the transaction. If the substantial benefit was for the defendant Cone as an individual, and the benefit to the city only incidental and purely prospective, then the proceedings of the board were ultra vires and void. An issue should therefore have been submitted as to whether the action of the board in making the orders and carrying them out was for the public benefit, and whether the lands condemned were for the public use; and upon that issue the court should have instructed the jury in the law as to what constitutes a public use. In addition, the language of the issue that was submitted was doubtful as to its meaning, and it was submitted without instruction, except that, if the jury believed the plaintiff's evidence, they should answer it "No." There was evidence of the plaintiff going to show that the basis of the orders and acts of the board of aldermen was the private benefit of Cone, and the instruction was erroneous, even if the issue had been properly framed and submitted.

There was error, for which there must be a new trial. New trial.

JOHNSON v. BLAKE et al.

(Supreme Court of North Carolina. March 7, 1899.)

APPEAL—EXCEPTIONS—TRUSTS—ESTATE CREATED.

1. A defendant's exception to the introduction of evidence cannot be considered where he does not appeal.

2. A conveyance of land in fee to a trustee, "to hold the same for the sole and separate use of [a married woman], and to allow her to live upon the same, or retain the rents and profits thereof, free from the interest of her present or any future husband, as completely as if she were feme sole; and to sell, and reinvest the proceeds in other personal or real property, to be held on the same terms and trust as specified herein, and no other," vests a fee-simple trust estate in such wife.

Appeal from superior court, Wake county; Timberlake, Judge.

Action by John Johnson against W. Z. Blake and others. From a judgment for defendants, plaintiff appeals. Affirmed.

S. G. Ryan, for appellant. W. N. Jones and J. H. Fleming, for appellees.

FURCHES, J. In 1857, Sion H. Rogers conveyed the land in controversy to E. Johnson in fee simple, "to hold the same for the sole and separate use of Mary Ann Finnell, wife of Richard Finnell, and to allow her to live upon the same, or retain the rents and profits thereof, free from the interest of her present or any future husband, as completely as if she were feme sole; and to sell, and reinvest the proceeds in other personal or real estate, to be held upon the same terms and trust as specified herein, and no other." Rogers, the grantor, Johnson, the grantee, Mary Ann Finnell, and Richard Finnell are all dead. After the death of Mary Ann, Richard Finnell executed a mortgage conveying said land to the plaintiff as a security for debt, and plaintiff claims under this mortgage. After the death of both Mary Ann and Richard Finnell, said land was sold, by order of court, as the land of Mary Ann, for partition between her children and heirs at law, and defendant became the purchaser at said sale, and claims thereunder. Defendant has also bought and is the owner of any estate the said Rogers may have had in said land by way of a resulting trust. The plaintiff offered Mrs. Jones, former wife of E. Johnson, the trustee, who testified that after the death of Richard Finnell she heard her husband say that "Dick Finnell's money paid for the land." Plaintiff also introduced one Thompson, who testified that he "heard Eldridge Johnson [the trustee] say that he held the land for Mary Ann Finnell, but that Richard Finnell's money paid for the land." This witness further testified that he knew Mrs. Finnell, and did not think she had any money. This evidence was all objected to by the defendant, but allowed by the court. Upon this evidence the plaintiff rested his case, and "defendant demurred to the plaintiff's evidence, and moved for judgment as in case of nonsuit." Defendant's motion was allowed, and plaintiff appealed from the judgment pronounced.

The defendant's exceptions to evidence cannot be considered, for the reason that he did not appeal.

The plaintiff contends that the deed from Rogers to Johnson only declared a trust in Mrs. Finnell for life, and that this evidence proved, or tended to prove, that Richard Finnell, under whom he claims, paid the purchase money; and that upon the death of Mrs. Finnell he became the owner of this land, as the presumptive or resulting cestui que trust; and that it was error in the court not to submit an issue to the jury as to whether Richard Finnell paid the purchase money or not. We cannot say that this evidence (its admissibility being out of the way) did not tend to prove that Richard Finnell paid the purchase money. Therefore, if it was material for the plaintiff to prove that Richard paid the purchase money, there was error in the court not to submit it to the jury.

There is no question but what the deed from Rogers to Eldridge Johnson conveyed the legal estate in fee simple, and that a trust was declared in favor of Mrs. Finnell. But whether that trust was in fee simple or for her life only is the principal question in the case. The general rule is that trust estates are governed by the same rules and limitations that legal estates are. But it is said that there are some exceptions to this general rule. *Holmes v. Holmes*, 86 N. C. 205. In that case the legal estate was conveyed in fee simple to trustees "in trust for Sarah Moore," and it was held that this created a fee-simple trust estate in Sarah. If this case is controlled by *Holmes v. Holmes*, Mrs. Finnell had the fee-simple estate, and the plaintiff cannot recover. But the plaintiff says that this case is not controlled by *Holmes v. Holmes*; that the terms creating the trust in this case differ from those contained in that case; that they are substantially the same as those creating the trust in *Levy v. Griffin*, 65 N. C. 236. and that this case is governed by *Levy v. Griffin*. In *Levy v. Griffin* the legal estate is conveyed in fee simple to Briggs, "in trust for the sole, separate, and exclusive use and benefit of Caroline Nicholson, free from the control of her present or any future husband, with the right of the said Caroline to dispose of the said piece or lot of land to any person she may wish by deed or appointment in writing in the nature of a will." Anderson Nicholson was the husband of Caroline when this deed was made, and paid the purchase money. Anderson died intestate, and then Caroline died intestate, and without having made any disposition of said land. The plaintiff was a daughter of the said Anderson, and his heir at law; and the defendant was a son of said Caroline, and her heir at law. It

was held that Caroline had only a life estate, coupled with a power of appointment, which she never exercised; and that, as Anderson paid the purchase money, the trust "resulted" to him; and the plaintiff, being his heir, was entitled to the land. If *Levy's Case* controls the case under consideration, the plaintiff is entitled to the land. It will be observed that the language used in the deed under consideration differs to some extent from that used in *Holmes v. Holmes* and also from that used in *Levy v. Griffin*. In *Holmes' Case* the declaration of the trust was simply "to Sarah Moore," and this was held to pass the fee simple. In *Levy's Case*, it was to the separate use and benefit of Caroline Nicholson, free from the control of her present or future husband, with the power to dispose of the fee simple in writing, as by will. It will be seen that the trust estate in Caroline is limited to a life estate by giving her the power to convey the estate in fee simple by deed or in writing, as by will. This power of appointment is inconsistent with the idea that she was the fee-simple owner. and by implication limits the trust estate to an estate for life. In the case under consideration, the fee simple in the legal estate is conveyed to the trustee, Johnson, "to hold the same for the sole and separate use of Mary Ann Finnell, wife of Richard Finnell, and to allow her to live upon the same, or retain the rents and profits thereof free from the interest of her present or any future husband, as completely as if she were feme sole; and to sell, and reinvest the proceeds in other personal or real estate, to be held upon the same terms and trust as specified herein, and no other." This declaration of trust to Mrs. Finnell contains more words than are contained in the declaration of "trust to Sarah Moore" in *Holmes v. Holmes*. But none of them, by construction or implication, in any way limit her estate. She is to do nothing. Whatever is to be done is to be done by the trustee, and not by her. The trustee may allow her to live upon the trust estate, to receive the rents and profits, and the trustee may sell, and reinvest in other properties; but he is to hold the new estate (if a sale and reinvestment should take place) under the same trusts and conditions as the original trust, and no other. As we find nothing in this deed to limit the trust estate to Mrs. Finnell, it seems to us that it falls within the rule declaring the trust estate in *Holmes v. Holmes*, and is governed by that case. This being so, Richard Finnell had no estate to convey to the plaintiff, and the judgment of the court below is affirmed.

PIERCE v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. March 7, 1899.)

LEASED RAILROADS—NEGLECT—LIABILITY OF LESSOR—INJURIES TO TRESPASSERS—ACTION FOR DEATH BY WRONGFUL ACT—ISSUES—APPEAL—EXCEPTIONS—HARMLESS ERROR.

1. A railroad company which has leased its road is liable for negligence of its lessee in operating it, unless its charter, or a subsequent act of the legislature, specially exempts it from liability.

2. In an action for death of a trespasser on a train by wrongful act of defendant's servant, the proper issues are whether plaintiff's intestate was killed by defendant's negligence, whether he contributed to his death by his own negligence, and whether defendant by the exercise of reasonable care and prudence could have avoided the accident notwithstanding intestate's contributory negligence.

3. The refusal of an instruction furnishes no ground for complaint, where the court's charge is to the same effect.

4. Where an employé of a railroad company, acting within the scope of his employment, compels a trespasser to get off a moving train, and, because of being compelled to so get off, the trespasser is killed, the railroad company is liable, though the employé's act was wanton and malicious.

5. Under Code, § 550, requiring the appellant to prepare a concise statement of the case, embodying the instructions and exceptions thereto, and stating separately, in articles numbered, the errors alleged, an exception "to the charge as given" is too general to be considered.

Appeal from superior court, Rowan county; Allen, Judge.

Action by J. A. Pierce, as administrator of the estate of Frank H. Pierce, deceased, against the North Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This was an action for the recovery of damages for the death of the plaintiff's intestate, a boy of from 12 to 13 years of age, who was run over and killed by the defendant's engine and tender while shifting cars in the town of Sallsbury. There was no exception to evidence. At the close of plaintiff's evidence the defendant moved to dismiss the complaint, and for judgment as of nonsuit. Motion overruled, and defendant excepted. The examination of other witnesses was then proceeded with, and at the close of the evidence the defendant asked for the following instructions in writing: "(1) There is no evidence of any negligence as alleged in the complaint, and the jury should find the first issue 'No.' (2) If the jury believe that the intestate of plaintiff was killed by the wanton, willful, and malicious act of one of the employés of the railroad company, then the company would not be liable, and they should find the first issue in favor of the defendant, and answer the same 'No.' (3) If the jury find that the intestate's death was caused by the wanton and malicious act of the fireman, and that his act was not done in the furtherance of the business of the defendant, they should find the first issue

in favor of the defendant, and answer the same 'No.' (4) It is incumbent upon plaintiff to show that the act of the defendant's servant was within the scope of his duties and authority, and there is no evidence that this was the fact. (5) The jury must find that the primary cause of the death of plaintiff's intestate was the act of the fireman in throwing coal or other missile at the intestate, before they can answer the third issue 'Yes.' (6) There is no evidence that the fireman of the defendant's lessee struck the deceased and knocked him off the steps of the tender. (7) The deceased was violating an ordinance of the town, and violating the law, when he was killed, in swinging on the tender of the engine."

The court, after reading over the evidence to the jury, gave the following charge to the jury:

"You have heard the evidence as taken down read over. That is done for the purpose of refreshing your minds, as well as that of the court, and for the purpose of aiding the court in instructing you. You are to remember the evidence as it came to you from the witnesses on the stand, if there is any difference in the evidence as read over to you and the way you remember it from the witnesses. Upon this evidence these issues are submitted to you: (1) Was the plaintiff's intestate killed by the negligence of the defendant, as alleged? (2) Did the plaintiff's intestate by his own negligence contribute to his death? (3) Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury, notwithstanding the contributory negligence of the deceased? (4) What damage is plaintiff entitled to recover? The burden is upon the plaintiff to show by a preponderance of evidence facts sufficient to enable him to recover. Upon the first, third, and fourth issues, it is upon plaintiff. Upon the second issue,—that of contributory negligence,—the burden is upon the defendant.

"In this case the plaintiff contends: First that the deceased was not negligent, and that he was killed by reason of the negligence of the defendant, and that, even if the deceased was negligent, if you find that he was negligent, still defendant could have stopped the engine and put the boy off; and, second, that his death was due to the throwing of coal or missiles at him, which caused him to jump from the train or to fall from the train, and he was thereby killed. Now, the defendant denies this, and says that the engineer and fireman did not know that the deceased was on the tender, if he was on the tender, at the time he was killed, and that they were exercising reasonable care and prudence at the time of the killing; that the fireman did not knock him (they deny that) or frighten him off, or throw coal at him, or any other missile; and that the engine was so constructed that the fireman could not have thrown coal and struck him, or frightened him from the train,

owing to what was, the defendant contends, the peculiar construction of the tender,—the defendant contending that it was so constructed that he could not have thrown coal according to the way in which the plaintiff says coal was thrown at him. The plaintiff contends that it was constructed differently from the way the defendant contends, and was so constructed that he could have seen the boy, and could at least have thrown over at him and struck him or frightened him. The defendant further contends that the deceased's negligence and his conduct was the sole cause of his death, and that the defendant is in no wise liable. A master— And, for the purpose of this case, when I speak of 'master' I mean the principal; and the railroad or the corporation would be a master in a case of this kind. A master is liable for the conduct of its agents or servants, when acting in the cause or scope of his employment or line of duty, and his wrongful acts are not in consequence of something outside of his duty. The defendant lessee would be liable for the violent or unlawful conduct of its employes on the shifting engine, when they were acting in the scope or line of their duty, and it is incumbent on the plaintiff to show this; and whether or not the lessee's servants on the shifting engine were guilty of violent conduct causing the death of plaintiff's intestate, and also whether such violent conduct, if you find there was such violent conduct, was committed by the engineer or fireman, or either of them, while serving the lessee, and while acting in the scope or course of their employment, are facts for the jury, to be determined upon consideration of all the evidence.

"In considering the first issue, as the issues are shaped in this case, you will not consider as to whether the negligence of the defendant was the proximate cause; but did the employes of the defendant kill the deceased, and were they guilty of negligence in doing so? is the inquiry. If you find that the defendant's lessee put an engineer and fireman in control of its shifting engine, and they were in control of it, and while they were in the discharge of their duty and acting in the scope and course of their employment, the fireman threw coal or other missiles at plaintiff's intestate, and you further find that the plaintiff's intestate was a boy between 12 and 13 years of age, or about 13 years of age, and that he was a trespasser, riding upon the tender without consent and without paying fare, and you find that by reason of the violence so employed by the fireman the said boy fell from the tender, or was knocked off, or was caused to jump off the tender from fright, while the engine was in motion, and was thereby run over and killed, you will answer the first issue 'Yes,' provided the boy acted with reasonable care and prudence of a child of his age. If you find he jumped or fell from such fright. If the jury find that the fireman in the course

of his employment as aforesaid used force for the eviction of the deceased from the tender in the manner just mentioned, and further that the engineer, by keeping a prudent lookout and using usual appliances, could have caused the removal of the deceased without injury by slowing up or by stopping the engine, it would be negligence, and you would answer the first issue 'Yes.' In dealing with a trespasser a party is not held to the highest degree of care, such as is due to a passenger, but he is required to exercise ordinary care; and if the servant or employé does not exercise ordinary care towards a trespasser while in the line of his employment, and injury result therefrom, the master is liable, unless the act of the servant is something outside of his employment and for his own purpose. If the deceased got upon the tender of the defendant while its engineer and fireman, in the course of their employment, were switching cars, without their knowledge or consent, and they could not by the exercise of ordinary care and watchfulness have seen him or known it, and whilst so upon it, or in attempting to get off of it, either from fright or any other cause not attributable to the negligence of the fireman or engineer, he jumped or fell, and was run over and killed, it would not be negligence, and you should answer the first issue 'No.' If the deceased was not upon the tender, out was along the track, and the engineer or fireman could not by the exercise of ordinary care and watchfulness have seen him, the first issue should be answered 'No.' After you have settled the first issue, if you answer it 'No,' you proceed no further; but, if you answer the first issue 'Yes,' then you proceed to the second issue.

"If the jury find that the deceased got upon the tender, without the consent of the engineer or fireman, while it was running over the defendant's track, then he was not only violating a town ordinance, but would be a trespasser, independently of that; and if the injury would not have occurred, but for his having gotten on, then he contributed to his injury and death, either remotely or proximately, and your answer to the second issue should be 'Yes.' If he was not on the tender at the time of the injury, but was negligently on the track, and killed, the answer to the second issue should be 'Yes.' The second issue is, did the plaintiff's intestate by his own negligence contribute to his death? Contributory negligence can only exist when the negligence of both parties has combined and concurred in producing the injury. A failure on the part of the deceased to exercise ordinary care to avoid the injury would constitute contributory negligence. Children who have not reached the age where they are wholly responsible are not required to use the same degree of care and prudence that a grown person similarly situated is; but a child can be guilty of con-

tributory negligence, and the jury are the ones to say whether he is or not.

"If you find the second issue 'No' (that he did not contribute to his injury and death), and you have answered the first issue 'Yes,' then you need not consider the third issue; but if you answer the first issue 'Yes,' and the second issue 'Yes,' then you proceed to the third issue,—could the defendant by the exercise of reasonable care and prudence have avoided the injury, notwithstanding the contributory negligence of the intestate? When I speak of the 'intestate' and 'deceased,' you will understand who I mean by that,—the boy; and, when I speak of the 'defendant,' you will understand that I mean the defendant company, the lessee of the defendant. So now I instruct you as to the third issue, if you reach the third issue; that is, if you answer the first issue 'Yes,' and the second issue 'Yes,' then you come to consider the third issue,—could the defendant by the exercise of reasonable care and prudence have avoided the injury, notwithstanding the contributory negligence of intestate? By 'reasonable care and prudence,' if you find the deceased was a trespasser, is meant ordinary care and prudence. If, notwithstanding the defendant's negligence and the deceased's negligence, if found to be so, the defendant could, by the exercise of due care and prudence, have avoided the injury, the failure to do so would be the proximate cause of the injury and death, and the defendant would be liable for damages. If you find the deceased was negligent by getting on the tender, then could the defendant's lessee, the engineer or fireman, or both, have avoided the injury and death by the exercise of reasonable care and prudence, either by stopping the engine and putting him off, if you find he was on, and they knew it, or if you find he was forced or frightened off by having omitted the acts that frightened him off, and was this the proximate cause of his death? and, if so, you will answer the third issue 'Yes.' Could the defendant's engineer or fireman, by the exercise of ordinary watchfulness, have seen the deceased in time to have avoided the injury? And, if so, was the failure to do so the proximate cause of the injury? Did the fireman throw coal or other missiles at the deceased, and cause him, in the exercise of ordinary care and prudence, commensurate with his age, in consequence to jump off or fall from the tender, and was that the proximate cause of the death? If so, the third issue should be answered 'Yes.' If the defendant's servants or employes in charge of the engine (the engineer and fireman) could not by the exercise of ordinary care and prudence have avoided the injury, and if the defendant's employes' negligence, if you find them negligent, was not the proximate cause of the injury, then the third issue should be answered 'No.' The jury must find that the primary

or proximate cause of the death was an act of negligence on the part of the engineer or fireman, before they can answer the third issue 'Yes.'

"Now, if you answer the third issue 'No,' then you need go no further, but if you answer the third issue 'Yes,' and have previously answered the first and second issues 'Yes,' or if you answer the first issue 'Yes,' and the second issue 'No,' then you are to consider the fourth issue; that is, the issue as to damages,—what damage is the plaintiff entitled to recover? In estimating the damages, it must necessarily be left, in a great degree, to the sound sense and discretion of the jury, in view of all the facts and circumstances, to determine. Whether the deceased would have earned something or nothing to the pecuniary advantage of his next of kin, or, if anything, then how much, and of what value, is a question for the jury. The rule by which this estimate is to be made is decided to be the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. As a basis on which to enable the jury to base their calculations or estimate, they may consider the age of the deceased, his prospects of life, his habits and character, his industry and skill, his means for making money, and his capacity for work or business; the end of it all being to ascertain the present value of the net income of the deceased which might be reasonably expected, if death had not ensued. If you reach this issue as to damages, you should seek to be fair and reasonable. You have no right to seek to punish the defendant by excessive damages, nor to give what you think would be an equivalent for life. You are not seeking to value a human life, in the sense that we speak of when we say what would a man take for his life; nor should you seek to compensate the parent for his grief, nor allow anything for the suffering either of the parent or of the deceased. That is not the question at all. And you should divest yourselves of all sympathy. It is a matter that appeals to our sympathies, but when you come to render your verdict you have to lay that aside. Nor should you allow yourselves to be influenced by any prejudices, if you have any, but seek to render a fair and reasonable verdict, not only as to the issue on damages, but upon all the issues. You may retire and make up your verdict."

The defendant excepted to the court's refusal to charge the jury, as prayed for in its prayer, and also to the charge as given.

The issues were as follows, to wit: "(1) Was the plaintiff's intestate killed by the negligence of the defendant, as alleged? (2) Did plaintiff's intestate by his own negligence contribute to his death? (3) Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury, notwithstanding the contributory negligence of

said intestate? (4) What damage is plaintiff entitled to recover?" The findings by the jury were as follows: "In answer to the first issue, response, yes; in answer to the second issue, yes; in answer to the third issue, yes; in answer to fourth issue, two thousand dollars."

Upon these findings the defendant asked for judgment in its behalf, which was denied, and the court gave judgment for the plaintiff, from which defendant appealed.

The defendant assigns the following as errors committed by the court, to wit: "The failure and refusal on part of the court to give judgment of nonsuit upon motion of defendant after plaintiff rested his case; the failure and refusal of the court to give the instructions asked for by the defendant; the giving the charge to the jury as set out in the court's written instructions; the refusal and denial of judgment for the defendant upon the findings of the jury upon the issues submitted."

Chas. Price and G. F. Bason, for appellant. L. S. Overman, B. F. Long, and R. L. Wright, for appellee.

CLARK, J. The motion to dismiss the complaint and for judgment of nonsuit appears, from the brief of defendant's counsel, to be intended to raise again the question whether the lessor company, the North Carolina Railroad Company, the defendant herein, is liable "for all acts done by the lessee in the operation of the road," as was held in *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959; but why the counsel should feel "encouraged to believe" that "this court will retire from the position it has taken upon this question," we are not advised. We have perceived no lack of "soundness of reasoning" therein. The decision in *Logan's Case* was made after full deliberation, and with full appreciation and careful discussion of the important principle now again called in question, and it was held that "a railroad company cannot escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act of the legislature specially exempts it from liability in such case"; and it was made in an action to which the appellant herein was the party raising the question. The same proposition had been theretofore laid down by *Smith, C. J.*, in *Aycock v. Railroad Co.*, 89 N. C., at page 330, with cases there cited; and *Logan's Case* upon this point has been expressly cited and sustained in *Tillett v. Railroad Co.*, 118 N. C., at page 1043, 24 S. E. 113; *James v. Railroad Co.*, 121 N. C., at page 528, 28 S. E. 538; *Benton v. Railroad Co.* (decided May 24, 1898) 122 N. C. 1007, 30 S. E. 333; and *Norton v. Railroad Co.*, 122 N. C., at pages 930, 937, 29 S. E. 894.

The issues excepted to are those suggested

for cases of this nature in *Denmark v. Railroad Co.*, 107 N. C. 185, 12 S. E. 54, and which have been time and again approved since. Every phase of the defendant's contention could have been presented upon the issues submitted, and there could be, therefore, no just ground of exception in that respect. *Willis v. Railroad Co.*, 122 N. C. 905, 29 S. E. 941, and cases there cited.

The exception for refusal of the first prayer, to instruct the jury that there was no evidence of negligence, and of the fourth prayer, to instruct them that there was no evidence that the act of defendant's servant was within the scope of his duties, and of the sixth prayer, to instruct them that there was no evidence that the fireman of defendant's lessee struck the deceased and knocked him off the steps of the tender, were, upon the evidence, properly refused. The other part of the fourth prayer and the seventh prayer for instructions were given in the charge. The charge of the court given in lieu of the fifth prayer for instruction gives the defendant no ground to complain at the refusal of that prayer.

We will now consider the second and third prayers for instructions, which were: "(2) If the jury believe that the intestate of plaintiff was killed by the wanton, willful, and malicious act of one of the employes of the railroad company, then the company would not be liable, and the jury should respond to the first issue 'No.' (3) If the jury find that the intestate's death was caused by the wanton and malicious act of the fireman, and that his act was not done in the furtherance of the business of the defendant, they should find the first issue in favor of the defendant, 'No.'" The assumption in these prayers that the defendant is not liable if the plaintiff's intestate was killed by the wanton, willful, and malicious act of one of the employes of the defendant, and especially if such act was not done in furtherance of the business of the defendant, cannot be sustained. The true test is, was it done by such employe in the scope of the discharge of duties assigned him by the defendant, and while in the discharge of such duties? "In furtherance of the business of employer" means simply in the discharge of the duties of the employment; and the court properly told the jury that the defendant is responsible for the injury, if caused by the wrongful act of the employe while acting in the scope of his employment. In *Ramsden v. Railroad Co.*, 104 Mass., at page 120, *Gray, J.*, says: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent (*Howe v. Newmarch*, 12 Allen, 49), or even if it is contrary to an express order of the master (*Railroad Co. v. Derby*, 14 How. 468)." The rule is thus laid down in 2 Wood. R. R. (2d Ed.) § 316, at page 1404: "Where

the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from the result of his negligence, or from his willfulness and wantonness. Nor is it necessary that the master should have known that the act was to be done. It is enough if it is within the scope of the servant's authority. Thus, where a servant of a railway company, employed to clean and scour its cars and keep persons out of them, kicked a boy 11 years old from a railing while the cars were in motion, whereby he was thrown under the cars and killed, it was held that, the act (although in nobody's line of duty) being done in the course of the servant's employment, the company was chargeable therefor"; citing *Railroad Co. v. Hack*, 66 Ill. 238, and other cases as authorities. Among many other cases almost on "all fours" with the present are *Railroad Co. v. Kelly*, 36 Kan. 655, 14 Pac. 172, in which it was held that "where a boy 15 years old gets upon a freight train wrongfully and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, in the nighttime, and in obedience to that command, and in fear of being thrown off, jumps off the train and is run over and injured, the company is liable"; and it is further held that whether the brakeman "acted wantonly and maliciously, or merely failed to exercise due care and caution, the railroad company is liable" for damages resulting from the brakeman's conduct,—citing many cases. In *Rounds v. Railroad Co.*, 64 N. Y. 129, the defendant was held liable where the plaintiff jumped upon the platform of a baggage car to ride to a place where the cars were being backed to make up a train (this being against the regulations of the defendant), and the baggage master knocked him off, and in falling he fell upon some wood, rolled under the car, and was injured; the court holding that, to "make the master liable, it is not necessary to show that it expressly authorized the particular act; it is sufficient to show that the servant was acting at the time in the general scope of his authority; and this although he departed from his instructions, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury." In *Lovett v. Railroad Co.*, 9 Allen, 557, it was held that where a boy of 10 years old wrongfully got upon a street car, and the driver ordered him to jump off while running at a dangerous speed, the company is responsible for the injuries sustained by the boy in doing so, unless it was found that the injury was caused by the boy's negligent manner of getting off. Another instance of liability for injuries sustained by a trespasser from the servant's violently and forcibly putting the trespasser off is *Carter v. Railroad Co.*, 8 Am. & Eng. Ry. Cas. 347, which cites numerous precedents of like purport.

But it is needless to multiply cases. All of them hold that such ejectment is done by the servant in the general scope of his employment, and if done recklessly or wantonly and maliciously, and even if in a manner forbidden by the master's orders, the company is liable for the tortious act. The ground is that the proximate cause of the injury is not the trespasser's wrongfully getting on the cars, but the tortious manner in which the servant makes him get off, and that, this act being in the general scope of the servant's employment, the master is liable. In the present case, whether the child jumped off because ordered by the brakeman, or by reason of the hint of a lump of coal whizzing by his head, or was actually struck and knocked off, this mode of getting him off the moving car was tortious, and the defendant is liable for the injury caused thereby. 14 Am. & Eng. Enc. Law, 822, 823, and cases cited in the notes thereto; *Pierce*, R. R. 278, 279; *Kline v. Railroad Co.*, 90 Am. Dec. 282, and notes; *Peck v. Railroad Co.*, 70 N. Y. 587; *Railway v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286. The defendant, however, earnestly contends that, if the servant's act was malicious, the company is not liable for negligence. If that theory ever obtained, the above authorities show that it was contrary to reason, and has been duly and fully exploded. The company is not charged in this case with malice because of the alleged malice of its agent, and whether it could be held liable for punitive damages is not before us. It is certainly liable for compensatory damages for the injury sustained from the tort of its servant.

The brief of the learned counsel for the defendant strenuously insists that a case of this kind cannot be understood by the court, and justice properly administered, unless we translate the action back into one of the old common-law forms of actions, and that when that is done it would be seen that the plaintiff cannot sustain his demand. It is precisely because the old division into forms of action lent itself to finespun metaphysical distinctions, whereby the form of proceeding became more important than the subject-matter, and led to frequent miscarriages of justice, that the common sense of an enlightened age swept the old system away; and for more than 50 years the discarded legal jargon of a former age has sounded strange, if referred to at all, at Westminster Hall, in which it grew up. In our own state the constitution abolished the old system, and by statute we have substituted the simple requirement that the complaint shall contain "a plain and concise statement of the cause of action." Code, § 233, subd. 2. That is the case here. We shall not delve in the débris of dead and forgotten centuries, nor disturb the dust that sleeps upon the volumes of an outworn and long-rejected legal system.

To do so would be to obscure the substantial justice which it should be the sole object of every legal inquiry to ascertain. We need not darken counsel by multitude of words, nor entangle ourselves in the scholastic disputations which once obtained in legal proceedings, and very often defeated their object. This suggestion of counsel has its precedent in the physician, who, in a difficult case, proposed to give his patient something to throw him into fits, on the ground that he was infallible in curing fits. Here the plaintiff's intestate was admittedly run over and killed by the defendant's train. Upon the uncontroverted facts of this case, the brakeman, as a matter of law, was acting in the scope of his general employment; and the court properly instructed the jury that if the boy was made to get off the car (though he was on there wrongfully) by the act of the brakeman, whether malicious or not, while the train was moving, so that the boy was killed in consequence of so doing, the defendant was liable for the damage caused by the negligent conduct of its lessee in thus operating its train. The child was on the train in violation of a town ordinance, but the penalty for this was a small fine and not a license to defendant's servants to kill or cripple him at will.

The defendant further excepted "to the charge as given." This is a "broadside" exception, which cannot be considered. This has been uniformly so held for a long series of years, and in possibly more than 50 cases, and has been recently reaffirmed by Furches, J., in *Hampton v. Railroad Co.*, 120 N. C., at page 538, 27 S. E. 97, and *State v. Moore*, 120 N. C., at page 571, 26 S. E. 697; by Faircloth, C. J., in *State v. Ashford*, 120 N. C. 588, 26 S. E. 915; and by Douglas, J., in *State v. Webster*, 121 N. C. 586, 28 S. E. 254; and in other recent cases,—two of them at this term. Indeed, the statute (Code, § 550) is explicit, requiring the appellant to prepare "a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the requests of the counsel for parties for instructions, if there be exception on account of the granting or withholding thereof, and stating separately in articles numbered the errors alleged." It would be so eminently unjust to an appellee to have an entire charge excepted to, without any specifications of the errors alleged therein, that he might prepare himself for argument thereof on appeal; and the decisions that such broadside exception will be disregarded here have been so uniform that we would feel impelled to adhere to so just and uniform a ruling, even if the statute law had not so explicitly prescribed it. A careful consideration of the charge shows, besides, that there is no error therein of which the defendant could complain.

The last exception, which is for refusal of judgment in favor of defendant upon the findings of the jury, needs no consideration be-

yond what is involved in the preceding discussion. Affirmed.

COMMONWEALTH MUT. FIRE INS. CO.
et al. v. EDWARDS et al.

(Supreme Court of North Carolina. March 7, 1899.)

INSURANCE — FOREIGN RECEIVERS — POLICY — VALIDITY.

1. Under Code, § 3062, providing that it shall be unlawful to transact any fire insurance business in the state before making the required deposit of bonds, and Laws 1893, c. 290, § 8, providing that all contracts of insurance, the application for which is taken within the state, shall be deemed to be made in the state, where an application is taken by a broker for a foreign insurance company which has not made the deposit, the policy is a North Carolina contract, and void; hence assessments thereon cannot be collected.

2. A receiver of a foreign insurance company that has complied with Code, § 3062, as to doing business in North Carolina, who alleges, without denial, that an assessment sued on was properly levied to meet obligations while defendant's policy was in force, is entitled to recover.

3. Under Laws 1893, c. 290, § 6, providing that the standard fire insurance policy, as prescribed by section 121 of the insurance laws of New York, shall be exclusively used in the state by all fire insurance companies, from and after the 1st day of May, 1893, a policy providing for assessments is not void, since it was not intended to exclude assessment companies which had otherwise complied with the laws.

Faircloth, C. J., dissenting.

Appeal from superior court, Wake county; Brown, Judge.

Action by the Commonwealth Mutual Fire Insurance Company and others against Edwards & Broughton. There was a judgment for plaintiffs, and defendants appeal. Modified.

Douglass & Simms, for appellants. J. W. Hinsdale and Perrin Busbee, for appellees.

DOUGLAS, J. This is an action brought by the receiver of a mutual insurance company for the collection of certain assessments upon the defendants levied under a decree of the superior judicial court of the state of Massachusetts. The case comes before us on demurrer. This disposes, in limine, of all statutes of limitation, which in cases like the present can be availed of only by answer. Code, § 138; *Guthrie v. Bacon*, 107 N. C. 337, 12 S. E. 204; *Randolph v. Randolph*, 107 N. C. 506, 12 S. E. 374; *Albertson v. Terry*, 109 N. C. 8, 13 S. E. 713. This rule, however, does not apply to possessory titles, which are more in the nature of presumptions than strict limitations. *Freeman v. Sprague*, 82 N. C. 366; *Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467.

The following allegations appearing in the complaint must be taken as facts for the

purposes of this appeal: The plaintiff corporation issues to the defendants two policies of fire insurance,—one for \$2,000, dated June 29, 1894, and the other for \$3,000, dated July 14, 1894. It was stipulated in the policies that the insured should pay, in addition to the cash premium, all such sums as might be lawfully assessed by the directors of said company, but not to exceed three times the amount of said cash premium. The present assessments are within the limit. The policies were obtained and delivered through a local agent, denominated a "broker" by the plaintiff, but whose legal status, as between the parties, is a question of law on admitted facts. On March 19, 1895, suit was brought by the insurance commissioner of Massachusetts to wind up the affairs of the plaintiff company, and on May 28, 1895, the plaintiff Stevens was appointed receiver, to whom the company, on the 7th day of March, 1896, executed an assignment of all its assets. After the institution of the suit, to wit, on March 7, 1896, the directors of the plaintiff corporation, in accordance with a decree in the cause, levied "an assessment of \$250,000 upon the former and present members of the corporation liable thereto, the same being necessary for the payment of losses incurred after the issue of the policies held by the members of the said corporation, and before their respective expiration or cancellation, and while the said defendants and the other policy holders against whom the said assessment was made were members of said corporation, and the expenses of collecting and the expenses of the receivership for which the defendants, together with the other policy holders and members, were liable." It is further alleged that all the proceedings were had in all respects in conformity to sections 47 and 49 of chapter 522 of the Laws of the State of Massachusetts of 1894, which, in the absence of an answer, we presume govern the proceedings in such cases. There are other allegations in amplification of the above, and also as to notice, individual assessment, and nonpayment, with the important averment that the plaintiff corporation complied with the requirements of section 3062 of the Code of North Carolina, and received license to transact the business of fire insurance on the 2d day of July, 1894. This was subsequent to the issuing of the first policy, but previous to the second policy.

The learned counsel for the plaintiff say in their brief that "if policy No. 4,214, dated June 29, 1894, were made in North Carolina, of course it would be void, and the assessment could not be collected." We think that, in contemplation of law, it was made in North Carolina, and that the broker, in taking the applications for the policies, acted as the agent of the plaintiff corporation. Section 8 of chapter 299 of the Public Laws of 1893 provides that "all contracts of insurance, the application for which is taken with-

in the state, shall be deemed to have been made within this state and subject to the laws thereof." Therefore the plaintiffs cannot maintain their action for any assessment or other liability arising under the policy dated June 29, 1894.

Our attention has been called to chapter 383 of the Laws of 1889, allowing any citizen of this state to contract on his own account for insurance with any company doing an insurance business outside of the state, and allowing the company to be sued and to adjust the loss without being subject to penalties for taxes. We do not question the right of any citizen to apply outside the state for insurance, but in the present case the application was made within the state, and therefore subject to the act of 1893. The act of 1889 allows an outside company—that is, one that has not complied with our laws—to be sued, but not to sue. Its evident purpose was to allow such companies to adjust their fire losses without thereby making themselves liable for penalties or taxes. It certainly never intended to permit such companies to practically nullify our insurance laws by the legal fiction of doing business through a broker instead of an agent. To do so would ultimately turn over our vast insurance business to foreign corporations, whose solvency we had no means of ascertaining, and who not only contributed nothing to our revenues, but who ignored our laws, and were practically beyond our jurisdiction. Our insurance laws, applicable equally to domestic and to foreign corporations, are intended, not simply for purposes of revenue, but primarily for the protection of our people. The vast bulk of insured property is never burned, and those who continue to pay their premiums, for perhaps a long series of years, with no resulting loss or profit beyond the feeling of protection, have the right to demand the fullest security. In the case at bar, the plaintiff corporation admitted its insolvency within less than 10 months after it issued its policies to the defendants, and it was then apparently worth \$250,000 less than nothing. When or how it became insolvent, if it were ever solvent, we have no means of knowing. In the light of these facts, can there be any question as to the justice or policy of our insurance laws?

The prevailing tendency to corporate absorption cannot be ignored, and it is the increasing duty of the state, while giving to all corporations the equal protection of its laws, to equally protect its citizens against corporate abuses. There should be no prejudice against corporations simply because they are corporations. They are not outlaws, but are the creatures of the law, and are not only capable of becoming the most powerful agencies of civilization, but have become absolutely necessary in our present stage of material development. They can be justly condemned only when their powers are

abused, but, in proportion as their powers are greater than those of an individual, they are more liable to abuse, and should be more carefully guarded. One of their great dangers is the risk of insolvency arising from the want of any personal liability of their stockholders, and the uncertain, and perhaps fictitious, nature of their assets. Some are afflicted with what may be called "congenital" insolvency. They are born insolvent, capitalized into insolvency at the moment of their creation, and eke out a precarious existence in an apparent effort to solve the old paradox of living on the interest of their debts. Such corporations are not only intrinsically dangerous, but lay the foundation for an unjust suspicion of all other corporate bodies. The state of North Carolina extends to all foreign corporations a cordial welcome, with the fullest measure of domestic equality, but with her rest the right and the duty of requiring them to comply with such reasonable regulations as may be necessary for the protection of her own people. In upholding such laws, we are influenced, not only by the letter of the statute, but equally so by the highest principles of justice to our own citizens, and to other companies that do comply with the law, as well as that of public policy.

This finally disposes of the first policy of insurance, but as to the second policy we think a sufficient cause of action has been stated in the complaint. There are 23 stated grounds of demurrer, but as many of them are in the nature of defenses that can be set up only by answer, while others present different views of the same question, it is not necessary to consider them separately. At this stage of the case we must assume that the suit in Massachusetts was properly conducted, and we see no reason why the courts of that state should not wind up the affairs of its own insolvent corporation. Nor is there any objection to the receiver of a foreign court suing in the courts of this state. What may be the result of that suit is a different matter, but he will be given a hearing. It is true that in *Kruger v. Bank*, 123 N. C. 16, 31 S. E. 270, we thought that it was too severe a strain upon the law of comity to permit a foreign receiver, refusing to become a party to the action, to enter a special appearance simply for the purpose of obstructing the administration of our laws and defeating the rights of our citizens. Such is not the case before us. The complaint substantially alleges that the assessment was necessarily and properly levied to meet obligations while the policy of the defendants was in force. In the absence of any denial, this would entitle the plaintiffs to recover as to the second policy. What defensive facts may be set up in the answer we do not know, and we cannot now properly determine how far the defendants may attack the amount or validity of their individual assessment.

There is no merit in the contention of the defendants that the second policy is void, under Acts 1893, c. 299, § 6, because it provided for assessments. The standard policy specifically permits such necessary alterations in the case of assessment companies, and the act of 1893 was not intended to exclude, by indirection, assessment companies who had otherwise complied with our laws. Its purpose was, as stated in *Horton v. Insurance Co.*, 122 N. C. 498, 507, 29 S. E. 944, "to have a uniform policy, which would eventually become familiar to our people, and by repeated adjudications acquire a settled meaning." For the reasons stated above, the demurrer should have been sustained as to the first policy. With this modification, the judgment of the court below overruling the demurrer is affirmed, but, in view of the modification, the costs in this court will be equally divided between the parties. Modified and affirmed.

FAIRCLOTH, C. J., dissents.

STATE v. COLEMAN.

(Supreme Court of South Carolina. Feb. 28, 1899.)

DE FACTO CLERK OF COURT—FORMER JEOPARDY.

1. One elected, qualified, and commissioned clerk of court, and who is in possession of the office, discharging its duties, without any one claiming it, is a de facto clerk, though he has accepted the office of intendant of a town; and Const. 1895, art. 2, § 2, provides that no one shall hold two offices of honor or profit at the same time; and 1 Rev. St. 1893, § 775, provides that the judge of probate shall exercise the duties of the office of clerk in case of vacancy therein, till appointment to fill the vacancy.

2. The fact that after a jury was impaneled, and a witness for the state had testified, it was discovered that one of the jurors was not sitting, but that another person was in his place, whereupon the jury was dismissed on defendant's motion, does not constitute former jeopardy.

Appeal from general sessions circuit court of Saluda county; Ernest Gary, Judge.

Abe Coleman was convicted of a violation of the liquor laws, and appeals. Affirmed.

John H. Peurifoy and C. J. Ramage, for appellant. J. Wm. Thurmond, for the State.

POPE, J. The defendant was convicted of the misdemeanor of selling liquor contrary to the statute law of this state. After sentence, he appealed therefrom, and for error alleged—First, that the court of general sessions for Saluda county was without jurisdiction to try him, because the person who acted as clerk was not such officer, having accepted the office of intendant to the town of Saluda after he had been elected, qualified, and commissioned as clerk of the court of common

pleas and general sessions for said county of Saluda; second, that the circuit judge erred in overruling the plea of former jeopardy. We will pass upon these questions in their order.

1. The facts underlying the contested matter are admitted; hence the law applying to such a state of facts is all that will be necessary to consider in disposing of the first question. The distinction between an officer *de jure* and one *de facto* is too well recognized to need any words of explanation. In the case at bar it is established that Mr. Crouch had been duly elected, qualified, and commissioned as clerk of common pleas and general sessions, and had been for a year or two in possession of such office, and fully discharging its duties. But it is claimed that although Mr. Crouch was *de jure* clerk of the circuit court up to, say, 14th April in the year 1898, after that date he was no longer entitled to be considered a *de jure* clerk, because he had accepted the office of intendant of the village or town of Saluda; not only so, but that he was not entitled to be considered a *de facto* officer. The constitution adopted in the year 1895, in article 2, § 2, provides: "But no person shall hold two offices of honor or profit at the same time." Unquestionably, the intendant of the town of Saluda is an office of honor, and the office of clerk of the circuit court for Saluda county is an office of profit. It would seem, therefore, that Mr. Crouch fell within these words of the constitution. Our General Statutes provide that the judge of probate shall exercise the duties of the office of clerk of the circuit court in the event there is a vacancy in said office, until the governor shall have made an appointment to fill the vacancy. See 1 Rev. St. S. C. 1893, § 775. The judge of probate did not seek this office, it may be, because he did not consider that there was any vacancy; for in fact, after Mr. Crouch accepted the office of intendant, he continued to exercise the duties of his office of clerk of the circuit court. Nor did the governor of this state appoint any one to fill this alleged vacant office. This court did hold in the case of *State v. Buttz*, 9 S. C. 166, that Buttz, who was solicitor, and who during his term of office as solicitor accepted the office of member of congress, had, by the acceptance of the second office, thereby vacated the office of solicitor. This case is much relied upon by the appellant. It seems to us that the question of *de jure* as to the office of solicitor was involved in the case cited, and no question of *de facto* was considered; and herein it cannot, except by its reasoning and admissible summing of the law, assist us here, for we are not called upon to determine the right of Mr. Crouch to hold this office as clerk *de jure*; on the contrary, we are to determine if the acts of Mr. Crouch as clerk of the court of general sessions in the case at bar are good as those

of a *de facto* officer. He certainly holds the office by color of title, for he has a commission to said office, based upon an election thereto by the people. He is discharging all the duties of said office, and no person is claiming such office. These things being so, why does not the law refer his discharge of such duties to him as a *de facto* clerk of the circuit court? See *McBee v. Hoke*, 2 Speer, 188; *Kottman v. Ayer*, 3 Strob. 92. We overrule the grounds of appeal covered by the first proposition.

2. We will now examine the second proposition, based, as it is, upon the constitutional ground that the prisoner could not be twice put in jeopardy of his liberty upon the same offense. The following statement of the facts relating to this matter is extracted from the "case": "The jury was drawn in the manner as usual in misdemeanors, and sworn. After the swearing, and before the examination of the witnesses had begun, it appeared that Lee Mack, one of the jurors who had been summoned on the venire, but whose name had not been drawn out of the hat, was sitting in the place of Mr. Crout, whose name had been drawn out of the hat. The defendant's attorneys agreed for Mr. Mack to take Mr. Crout's place. Joe Moss, the joint witness for the state, was then sworn. The direct examination had been finished, and the cross-examination was nearly complete, when it was brought to the attention of the court that Mr. Mack, as a matter of fact, was sitting in the place of Mr. W. A. Edwards, Jr., whose name had been drawn and called, and that Mr. Crout was really sitting on the jury. Defendant's attorneys refused to waive the right of objection to this, and then moved to dismiss the jury, on the ground that they had not consented for Mr. Mack to take the place of Mr. W. A. Edwards, Jr. On motion of the defendant's attorneys, the defendant being present, Judge Gary dismissed the jury, and proceeded to arraign the defendant, and impanel a new jury. Before the arraignment, defendant's attorneys raised the objection of former jeopardy. His honor overruled the objection. The trial proceeded, and the defendant was convicted." After sentence this appeal was taken. The constitution adopted in the year 1895, in article 1, § 17, provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty." So that if, under the above statement of facts, the defendant was twice put in jeopardy of his liberty, this ground of appeal should be sustained. The constitution of 1895 requires, in article 5, § 22: "The petit jury of the circuit courts shall consist of twelve men, all of whom must agree to a verdict in order to render same." By the statement of facts as appears by the quotation from the "case" for appeal, it appears that there were present only 11 jurors, for Mr. Mack could not take Mr. W. A. Edwards, Jr.'s place, unless the defendant had

expressly consented to the same. The defendant never consented thereto. Practically, therefore, the testimony of the state's witness was given before 11 jurors. The constitution required 12 jurors. So, it would seem that the prisoner was not put in jeopardy when his case was before the jury of 11 persons. But, apart from this, the decision of this court in the case of *State v. Stephenson*, 32 S. E. 305, which decision was prepared by Mr. Justice Jones, and which is yet officially unreported, holds that when a jury is set aside on the motion of the defendant, and thereafter another is had with the same defendant, on the same charge, the defendant cannot successfully plead former jeopardy. It is the judgment of this court that the judgment of the circuit court be affirmed.

STATE v. COUCH.

(Supreme Court of South Carolina. Feb. 23, 1899.)

INDICTMENT—LIQUOR LAWS.

Under Const. art. 1, § 18, providing that in criminal prosecutions the accused shall be "fully informed" of the nature and cause of the accusation, there cannot be a conviction for the sale of intoxicants to O. under an indictment to certain persons, not including O., and "to divers other persons to the jurors aforesaid unknown," though Dispensary Act 1896, § 43, allows use of these words in an indictment.

Appeal from general sessions circuit court of Pickens county.

Walter Couch was convicted of a violation of the liquor laws, and appeals. Reversed.

J. P. Casey, for appellant. Solicitor Ansel, for the State.

POPE, J. The appellant was convicted of selling a quart of liquor to Newton Oates under an indictment charging him with the sale of spirituous liquors to "one W. S. Newell, R. L. Bryant, Robert Holder, G. W. Russell, and to divers other persons to the jurors aforesaid unknown." The appellant appeals from the sentence under said conviction upon several grounds. This court does not deem it necessary to pursue the questions presented by the appellant, except one of them, for it is important that this single question should be met. We hold that the conviction of the appellant under this indictment was illegal, because opposed to the constitution of the state. In article 1, § 18, it is provided: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to be fully informed of the nature and cause of the accusation. * * *" It is the office of an indictment to fully disclose to the accused the nature and cause of the accusation. Any indictment which fails to fully disclose the offense to the accused is defective. In the indictment under review in

the present case it will be observed that the name of Newton Oates does not appear as one of the persons to whom the defendant (appellant) is charged as having sold intoxicating liquors. However, it is sought to justify the absence of Oates' name from the indictment by proof that the defendant (appellant) sold him liquor, which sale, under and by virtue of the forty-third section of the dispensary act, approved in 1896, allowing an indictment to contain the words, "to divers other persons to the jurors aforesaid unknown," was punishable just as if the name of Newton Oates had been actually set forth in the indictment. In the recent case of *State v. Jeffcoat*, 32 S. E. 298, this court held that in an indictment, where these words, "to divers other persons to the jurors aforesaid unknown," occur, such words might be treated as surplusage if one or more persons were called by name, and the persons so named in the indictment were on trial. This last-named case is practically decisive of the question raised here. The forty-third section of the dispensary act of 1896, authorizing the use of the words "divers other persons," etc., cannot be made to override the constitutional requirement that every accused must have his offense fully set forth in the indictment or presentment of the grand jury. It is the judgment of this court that the judgment of the circuit court be reversed.

FLORIDA CENT. & P. R. CO. v. CITY OF COLUMBIA et al.

(Supreme Court of South Carolina. Feb. 23, 1899.)

RAILROAD COMPANIES—LICENSE TAX—STATUTES—ORDINANCES—CONSTRUCTION—REPEAL.

1. Act 1871, § 8 (14 St. at Large, p. 569), empowering a city to impose a license tax on persons engaged in any business or avocation, is not repealed by Act 1897 (22 St. at Large, p. 409), entitled "An act to render uniform the mode of taxation in towns and cities," declaring that "all municipal taxes levied by cities and towns * * * shall be levied on all property, real and personal" (section 1), and that "the clauses of the charters of any towns or cities restricting taxation * * * to real estate only are hereby repealed" (section 2); the purpose of the act of 1897 being merely to secure uniformity in mode of taxation of property, and having no reference to taxation of persons.

2. Act 1871, § 8 (14 St. at Large, p. 569), empowering a city "to require all persons, companies and corporations engaged in any business or avocation of any kind whatever within" its limits to take out a license, authorizes the requiring of a license of a corporation doing business of a similar character outside the city.

3. A railroad company does business in a city, so as to be subject to a license tax, under Act 1871, § 8 (14 St. at Large, p. 569), though it has no tracks within the city, but runs its trains into the city over the tracks of another railroad company, and has for its agent therein the agent of such other company.

4. An ordinance imposing a license tax on railroad companies "for business done exclu-

sively within the city" does not mean to subject thereto only those companies doing business exclusively within the city.

5. A license tax is not a tax on property, and therefore not affected by statutory provisions for ascertaining the value of property for the purpose of taxation thereof.

6. It will not, in the absence of allegations to that effect, in a complaint seeking to recover a license tax paid under protest, be presumed that it was not graduated as required by Const. art. 8, § 6.

7. A corporation, though compelled by its charter as a common carrier to do business in a city, may be required to take out a license for doing such business, and pay a tax therefor.

Appeal from common pleas circuit court of Richland county; D. A. Townsend, Judge.

Action by the Florida Central & Peninsular Railroad Company against the city of Columbia and its treasurer. Judgment for defendants. Plaintiff appeals. Affirmed.

The complaint and the grounds of demurrer thereto are as follows:

"Complaint.

"The plaintiff above named, complaining of the above-named defendant, alleges:

"(1) That the city of Columbia is, and was at the times hereinafter named, a municipal corporation duly organized and existing under the laws of the state of South Carolina, and the defendant J. Frost Walker is, and was at the times hereinafter named, the city treasurer of the city of Columbia, duly elected and qualified.

"(2) That the plaintiff was at the times hereinafter named, and is now, a corporation duly organized and existing under the laws of the state of Florida, and is the lessee of a certain railroad line commencing at Cayce's Junction, in the county of Lexington, and extending thence to the city of Savannah, in the state of Georgia; but owns no tracks, depots, warehouses, or other structures or property in the city of Columbia.

"(3) That this plaintiff, as the lessee of said line of railroad, is engaged in operating the same to and from the city of Savannah, in the state of Georgia, to said Cayce's Junction, in the county of Lexington, state of South Carolina, and under a traffic arrangement with the Southern Railway Company runs its trains, engines, and cars into the city of Columbia over the track of said Southern Railway Company, and uses the yards, switches, etc., of the said Southern Railway Company in the city of Columbia for shifting purposes, and delivers to the agent of the Southern Railway Company freight received from points outside of the city of Columbia and outside of the state of South Carolina, within the United States, to consignees within the city of Columbia, and receives freight from consignors at the city of Columbia to consignees at points outside of the city of Columbia and within the state of South Carolina as well as without the same, and receives and trans-

fers passengers to and from the city of Columbia to points outside of the city of Columbia, both within and without the state of South Carolina; its principal business, however, being the receipt and delivery to and from the Southern Railway Company of through freight and passengers from points outside of the city of Columbia to points outside of the state of South Carolina and within the United States. And this plaintiff, by its traffic arrangement with the Southern Railway Company, as above stated, obtains the services of the agent of the said Southern Railway Company as its agent, contributing a portion of the compensation which he is entitled to receive. But this plaintiff avers that it does no business whatever wholly and exclusively within the city of Columbia, and does no business except interstate business, as aforesaid, other than such as it is compelled by the laws of the state of South Carolina, as a common carrier operating the said south-bound railroad, to do.

"(4) That by an act entitled 'An act to alter and amend an act entitled "An act to alter and amend the charter and extend the limits of the city of Columbia," approved March 2, 1871, the general assembly of the state of South Carolina conferred the power upon the mayor and aldermen of said city to require all persons, companies, and corporations engaged in any business or avocation of any kind whatever within the limits of the city of Columbia to take out a license from the mayor and aldermen of said city, who are authorized to impose a reasonable charge or tax for the conduct of the same.

"(5) That on the 22d day of December, 1896, the mayor and aldermen of the city of Columbia, in council assembled, passed an ordinance entitled 'An ordinance to regulate licenses for the year 1897,' wherein and whereby it is ordained by section 3 of said ordinance as follows: 'Sec. 3. Every person, firm, company or corporation required by the ordinances of the city of Columbia to obtain a license to engage in any trade, business or profession for which a license is required, shall, before the 15th day of January of each year, register with the city assessor and auditor—First, his or her name or style, and, in case of a firm or company, the names of the several persons constituting such firm or company, and their places of business; second, the trade, business or profession for which a license is required; third, the place where such trade, business or profession is carried on; and in the case of a dealer in goods, wares or merchandise, the amount, extent and value of business carried on,—all of which shall be given under oath. * * *

"(6) That it was further ordained by section 4 of said ordinance as follows: 'Sec. 4. If any person or persons exercise or carry on any trade, business or profession for the exercising, carrying on or doing of which a license is required by this ordinance, without

first registering and taking out such a license as in that behalf required, he, she or they, besides being liable to the payment of the license, shall be subject to a fine not to exceed \$40.00, or imprisonment in the city station house for a time not to exceed thirty days, upon conviction before the mayor or alderman acting mayor.'

"(7) That the mayor and aldermen, in council assembled, further undertook to ordain and impose, by section 8 of said ordinance, a license upon railroads, in the following words and figures: 'Railroads—steam—for business done exclusively within the city of Columbia, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, \$200.00.'

"(8) That it is further ordained by section 12 of said ordinance 'that the city auditor shall be required to summon before the mayor all persons doing business without a license, immediately after January 15th, 1897.'

"(9) That the plaintiff failed and refused to register, as it is required by section 3 of said ordinance, hereinabove set forth, deeming and claiming that said ordinance had no application, and did not include in its terms the plaintiff, and also deeming and claiming that if it was included in it, and by its terms it was attempted to subject it to pay a license, that it was invalid, and contrary to law, and that it (the plaintiff) was not liable to be assessed, taxed, or required to pay any license fee or tax whatsoever to the city of Columbia for the prosecution of its business; and it further declined and refused to pay said license at all.

"(10) That on the 26th day of January, 1897, the city assessor and auditor of the said city of Columbia caused to be served on the agent of the Southern Railway Company, so acting as agent for this plaintiff as aforesaid, a summons in words and figures following: 'Office of City Assessor and Auditor, Columbia, S. C., January 26, 1897. F. C. and P. R. R. Co.: You are hereby summoned to appear before his honor, the mayor, on the 29th inst., at 9:30 o'clock a. m., to answer the charge of doing a business without a license, in violation of the city ordinance. By order of the mayor. T. T. Talley, City Assessor and Auditor.' That this plaintiff, through and by its attorney, appeared, in response to said summons, before the mayor of the city of Columbia, and protested against its liability to pay a license tax; but the said mayor of the city of Columbia announced his decision that this plaintiff was liable to pay said license tax, and that, if the same was not paid on or before a day named,—being a few days after the appearance before council,—that an additional fine of forty dollars would be imposed upon said plaintiff for transacting any business, and that said fine would be imposed for every day business

was so conducted within the city of Columbia; whereupon this plaintiff filed its petition before the mayor and aldermen of the city of Columbia, in council assembled, setting out the character of business which it transacted as hereinbefore alleged, and submitted that it was not liable to any license tax or fee to the city of Columbia, and praying that it might be heard by council in regard thereto, which petition duly came up before the said mayor and aldermen, in council assembled, and this plaintiff, by its counsel, appeared before said body, but shortly after the matter had been considered, and was informed that the same had been referred to a committee of council with power to act, and was subsequently informed that the said petition had been rejected. This plaintiff, upon being so summoned as aforesaid, to avoid the penalties attempted to be imposed by the said mayor of the city of Columbia, and under the apprehension that said penalties would be imposed upon it and its agents, and to prevent the imposition thereof, the plaintiff paid said license fee of two hundred dollars to the city treasurer of the city of Columbia, to wit, the defendant J. Frost Walker, and at the same time filed its protest against the action of the said city authorities in said behalf, in words and figures as follows, to wit: 'Columbia, S. C., 28th January, 1897. To J. Frost Walker, Esq., Clerk and Treasurer City of Columbia, Columbia, S. C.—Dear Sir: The Florida Central and Peninsular Railroad Company having been cited to appear before the honorable mayor of the city of Columbia to show cause why it should not be dealt with for doing business in the city of Columbia without a license, would respectfully protest against its liability to pay such license; but to avoid the expense and penalties attaching thereto upon such failure, if it should be held that it is liable to the license fee imposed. It hereby pays the amount thereof, and protests against the validity of the demand. Respectfully, Wm. H. Lyles, Attorney.'

"(11) That the plaintiff submits that it does not come within the terms of said ordinance, and that it does not do any business exclusively within the city of Columbia, and is not liable to said tax; and it further submits that as a common carrier it is compelled by law to receive freight and passengers offered to it for carriage, and cannot refuse to discontinue its said business by virtue of the obligations of its charter; and by reason of its charter obligations it is in duty bound to continue to maintain and operate its said road as it is now operated and maintained, and by reason of such public duties being devolved upon it by the terms of its charter it is not liable to be taxed as and for a license by the city of Columbia.

"Wherefore the plaintiff demands judgment against the said city of Columbia and the defendant J. Frost Walker, city treasurer, for

the sum of two hundred dollars, with interest thereon from the 30th day of January, 1897, and the costs and disbursements of this action."

Grounds of Demurrer.

"The defendants above named, by their attorney, John P. Thomas, Jr., demur to the complaint herein upon the ground that it appears upon the face thereof that it does not state facts sufficient to constitute a cause of action:

"(1) In that it appears from the facts alleged therein that the mayor and aldermen of the city of Columbia were duly authorized by the general assembly of the state of South Carolina to exact of the plaintiff the payment of the license tax paid by it, and sought to be recovered in this action, and to pass the ordinance referred to in the complaint herein, providing for the imposition and collection of said license tax; and that it further appears from the facts alleged therein that a portion of the plaintiff's business is transacted entirely within the state of South Carolina and the city of Columbia, and that the plaintiff comes within the provisions of the said ordinance, and is liable for the said license tax; the same being imposed for the business done exclusively within the state of South Carolina and the city of Columbia, and not for any business done to or from points without the state, nor for any business done for the government of the United States, its officers and agents.

"(2) In that it appears from the facts alleged therein that the payment of the license tax by plaintiff was not made under such circumstances of coercion or duress as entitle it to recover the same."

C. J. C. Hutson and Wm. H. Lyles, for appellant. H. C. Patton, for respondents.

McIVER, C. J. This was an action to recover the sum of \$200, paid by plaintiff to the treasurer of the city of Columbia, under protest, as a license tax, illegally, as it is claimed, exacted of plaintiff company. The defendants interposed a demurrer to the complaint upon the ground that the complaint fails to state facts sufficient to constitute a cause of action; and, in accordance with the rule of court, specified in writing two grounds upon which the demurrer should be sustained, substantially as follows: (1) Because the facts stated in the complaint show that the city authorities of Columbia were duly authorized to impose the tax complained of; (2) because the allegations contained in the complaint do not show that the tax was paid under such circumstances of coercion or duress as entitle the plaintiff to recover the amount paid. The circuit judge, without passing upon the second ground, sustained the demurrer upon the first ground, and dismissed the complaint. From this judgment plaintiff appeals upon the several grounds set out in the record, which

substantially raise the single question whether the tax in question was lawfully imposed. The defendants have also, in accordance with the proper practice, given notice that they would ask this court to sustain the demurrer upon the second ground also. Inasmuch as the question turns solely upon the sufficiency of the allegations of the complaint, it will be proper for the reporter to set out in his report of the case a copy of the complaint, as well as a copy of the grounds upon which the demurrer is based.

We will first consider those allegations in the complaint which relate to the first ground upon which the demurrer is rested, with a view to ascertain whether such allegations show that the tax in question was lawfully imposed. These allegations are, substantially, as follows: (1) That the city of Columbia is a municipal corporation. (2) That the plaintiff is a corporation duly organized under the laws of the state of Florida, and as such is the lessee of a certain railroad, commencing at Cayce's Junction, in the county of Lexington, S. C., and extending thence to the city of Savannah, in the state of Georgia, but owns no tracks, structures, or other property in the city of Columbia. (3) That the plaintiff, as such lessee, is engaged in operating the said line of railroad between the two termini above mentioned, and under a traffic arrangement with the Southern Railway Company runs its trains into the city of Columbia over the tracks of said Southern Railway Company, using the yards, switches, and other appliances of said last-mentioned company, and delivers to and receives from the agent of said Southern Railway Company, to whose compensation the plaintiff contributes its proper proportion, freight from points outside of the city of Columbia to consignees within said city, as well as freight from consignors in the said city of Columbia to be delivered to consignees outside of said city, and also receives and transfers passengers to and from the said city to and from points outside of said city; but plaintiff avers that it does no business whatever wholly and exclusively within the city of Columbia, and does no business except interstate business other than such, as a common carrier, it is compelled to do. (4) That by the charter of the city of Columbia the general assembly of the state of South Carolina conferred upon the mayor and aldermen of said city the power to require all persons, companies, and corporations engaged in any business or avocation of any kind whatever within the limits of the city of Columbia to take out a license from the mayor and aldermen of said city, who are authorized to impose a reasonable charge or tax for the conduct of the same. (5) That on the 22d of December, 1896, the city council of Columbia passed an ordinance entitled "An ordinance to regulate licenses for the year 1897," certain sections of which are set out in the complaint, which, however, are too long to be inserted

here, but which may be seen by reference to the copy of the complaint, which will be incorporated in the report of this case. It is sufficient to say here that by one of the provisions of said ordinance every person, firm, company, or corporation required by the ordinances of said city to obtain a license to engage in any trade, business, or profession for which a license is required shall, before the 15th day of January in each year, register with the city assessor and auditor the name of the person or corporation, etc.; and by another provision of said ordinance a license tax is imposed upon various classes of persons, among others, railroad corporations, in the following language: "Railroads—steam—for business done exclusively within the city of Columbia, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, \$200.00." (6) That the plaintiff failed and refused to register as required, claiming that said ordinance had no application to, and did not include in its terms, the plaintiff company; and, even if it did, said ordinance is invalid, and contrary to law.

Taking these allegations in the complaint, thus stated in brief, to be true, it seems to us clear that the license tax in question was imposed by lawful authority; for they show that the plaintiff is a railroad corporation, doing a portion, at least, of its business within the city of Columbia, with the residents of that city; that the municipal corporation of Columbia has been authorized by the general assembly of this state to impose a license tax upon all persons, companies, or corporations engaged in any business or avocation of any kind whatever within the limits of the city of Columbia; and that such tax has been imposed by an ordinance passed by the proper authorities of said city. If, then, the legislation mentioned in the complaint, both state and municipal, be a valid exercise of the law-making power, we do not see how there can be a doubt as to the legality of the tax in question. It is not, and cannot be, denied that under the constitution of 1868 the general assembly may either itself impose a license tax (*State v. Hayne*, 4 S. C. 403), or may empower a municipal corporation to impose such a tax (*State v. Columbia*, 6 S. C. 1; *Charleston v. Oliver*, 16 S. C. 51; *In re Jager*, 29 S. C. 438, 7 S. E. 605). Nor, as we understand it, is it denied that such a power may be exercised under the present constitution. But the contention is that, at the time the ordinance imposing this tax was passed, the city authorities were not empowered to impose a license tax, because the act of 1871 (14 St. at Large, p. 569), or at least section 8 thereof, conferring such power, had been repealed, first, by the constitution of 1895, and next by the act of 1897 (22 St. at Large, p. 409). The constitution of 1895, in subdivision 1 of section 11 of article 17, expressly

declares: "That all laws in force in this state, at the time of the adoption of this constitution, not inconsistent therewith and constitutional when enacted, shall remain in full force until altered or repealed by the general assembly, or expire by their own limitation;" and in the third subdivision of the same section it is declared that "the provisions of all laws which are inconsistent with this section shall cease upon its adoption," the exception stated not being material to this inquiry. So that all laws of force at the time of the adoption of the present constitution remained in force, unless they were unconstitutional when enacted, or were inconsistent with the provisions of the constitution of 1895. Now, the provisions of section 8 of the act of 1871, above referred to, were certainly not unconstitutional when enacted, for it was expressly held otherwise in *State v. Columbia*, supra. Nor do we think there is any inconsistency between the act of 1871 and the provisions of the present constitution. On the contrary, the right to impose license taxes by a municipal corporation is expressly recognized by section 6 of article 8 of the present constitution: "The corporate authorities of cities and towns in this state shall be vested with power to assess and collect taxes for corporate purposes. * * * License taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto."

It is contended, however, that the act of 1871 is inconsistent with section 3 of article 8, which declares that "the general assembly shall restrict the powers of cities and towns to levy taxes and assessments," and it is claimed that there is no such restriction in the act of 1871. It will be observed, in the first place, that the constitution of 1868, in section 9 of article 9, contained a similar provision, and yet in *State v. Columbia*, supra, which arose and was decided under the constitution of 1868, such a provision was not found to be any obstacle to declaring the act constitutional. But, in the next place, it is a mistake to say that the act of 1871 contains no provision restricting the powers of taxation on the part of the municipal corporation, for in section 5 of that act the power to impose a tax for the support of the poor is expressly restricted, and in section 12 the power of taxation is still further restricted. And, in addition to this, the act of 1864 (12 St. at Large, p. 333), of which the act of 1871 is an amendment, and must, therefore, be read with it, in its eighth, ninth, and tenth sections imposes restrictions upon the general powers of taxation conferred upon the mayor and aldermen of the city of Columbia. It is clear, therefore, that the power conferred upon the city of Columbia to impose license taxes has not been repealed or abrogated by the present constitution.

Next, it is contended that so much of the act of 1871 as empowers the mayor and alder-

men to impose a license tax upon persons engaged in any business or avocation is repealed by the act of 1897 (22 St. at Large, p. 409). It is well known, as a matter of legislative history, that prior to the passage of that act some municipal corporations in this state were only invested with power to impose taxes upon real property, while others were empowered to impose taxes upon personal as well as real property, and the sole object of that act was to bring about uniformity in the taxation of property, as required by section 6 of article 8 of the present constitution, and not to deal in any respect with taxation imposed upon persons. The act is entitled "An act to render uniform the mode of taxation in towns and cities in accordance with section 6, article VIII., of the constitution of 1895." In its first section the requirement is that "all municipal taxes levied by cities and towns in this state shall be levied on all property, real and personal, not exempt by law," etc. The second section reads as follows: "That the clauses of the charters of any towns or cities restricting taxation in said towns to real estate only are hereby repealed." And the third section contains a general repealing clause of all acts or parts of acts inconsistent with this act. This act cannot be regarded as a repeal of any previous act empowering any municipal corporation to impose a license tax, as that would be in conflict with the provisions of the constitution above cited expressly recognizing and requiring that the corporate authorities of cities and towns shall be vested with power to impose taxes upon both persons and property,—expressly mentioning license taxes; and, besides, the whole tenor of the act shows that it was passed for the purpose of securing uniformity in the mode of taxation of property, and has no reference to the taxation of persons.

Again, it is contended that in the act of 1871, conferring the power to impose taxes on a person carrying on any business or avocation within the city of Columbia, the term "business" was used in the sense of the word "avocation," and does not authorize the imposition of such a tax upon a railroad company which does only a portion of its business within the city of Columbia. It does not seem to us that the act requires, or even justifies, any such construction. Both terms are used in the act, the language of the act being that "power is conferred" to require all persons, companies, and corporations engaged "in any business or avocation of any kind whatever within the limits of the city of Columbia" to take out a license, and pay a reasonable charge or tax therefor. If, therefore, a person or corporation is engaged in business of any kind whatever within the limits of the city, such a tax may be imposed; and the complaint shows on its face that the plaintiff is a corporation engaged in business within the limits of the city of Columbia; and the fact that it is also engaged in business of a

similar character outside the city limits cannot affect the question. It has an agent, regularly employed, in the city of Columbia, to attend to its business in that city, for the fact that such agent is also the agent of the Southern Railway Company does not forbid his being also the agent of the plaintiff company; and is doing business in the city of Columbia in the same manner, though possibly not to the same extent, as any other railroad company having a terminus in said city. Indeed, the construction contended for would lead to the conclusion that, while all persons or corporations doing business in the city of Columbia may be required to pay a license tax, a railroad company, though enjoying all the advantages of police protection and any other advantages afforded by the city government, is not so liable, for we suppose that it rarely, if ever, happens that a railroad company does all of its business within the corporate limits of any city or town. Such a construction cannot be accepted.

Reliance is also placed upon the word "exclusively," as used in the ordinance, the language being: "Railroads—steam—for business done exclusively within the city of Columbia," etc. But this manifestly does not mean that only those doing business exclusively within the corporate limits of the city are liable to the tax, but the meaning clearly is that the railroad company is taxed only for the privilege of doing such of its business as is done exclusively within the city limits, and not for the privilege of doing any of its other business.

Again, it is contended that, where the general assembly has prescribed a particular method of taxation, no other mode can be adopted; and reference is made to the several sections of the Revised Statutes providing the mode by which railroads must be taxed, which does not include a license tax. But it is very obvious that these provisions are only intended to prescribe the mode in which the value of railroad property may be ascertained for the purpose of taxation of such property, and do not in any way relate to the taxation of a railroad corporation as a person. This is shown by one of the sections (739) cited by appellant from 2 Elliott on Railroads, in which it is said: "Where the statute prescribes a specific method for assessing or *valuing the property* of railroad companies, the method prescribed excludes all others, and must be pursued. The legislative method is always exclusive. The rule is settled that, where the legislature classifies *property*, and prescribes the mode in which it shall be taxed, neither the taxing officers nor the courts can prescribe any other." We have italicized such of the language in the foregoing quotation as seems to us to point directly to the view which we take. In addition to this, in section 759 of the same volume the author in express terms recognizes the doctrine that a license tax is not a

tax upon property, for he says, "Such a tax is not a tax upon property." The position taken by counsel for appellant cannot, therefore, be sustained.

Again, it is contended that the license tax here in question was not graduated, as required by section 6 of article 8 of the present constitution. It is sufficient to say, in answer to this position, that there is no allegation in the complaint upon which such a point can be raised. This court certainly will not assume, in the absence of any allegations to that effect, that the municipal authorities of the city of Columbia have failed to observe the requirements of the constitution.

Finally, it is contended by appellant that, inasmuch as the plaintiff company is a corporation, compelled by its charter as a common carrier to do such business as it does in the city of Columbia, it cannot be required to take out a license for doing such business, and pay a tax therefor, as the imposition of such a tax is equivalent to the power to prohibit plaintiff from doing that which, by the law of the land, it is required to do. It is sufficient to say that this point is disposed of by the case of *State v. Columbia*, supra, where the point was decided adversely to the view contended for by the appellant.

We are of opinion, therefore, there was no error upon the part of the circuit judge in sustaining the demurrer upon the first ground above stated. Under this view, the question presented by the additional ground upon which defendants have given notice that they would ask this court to sustain the demurrer does not arise, and need not be considered. The judgment of this court is that the judgment of the circuit court be affirmed.

BAGLEY v. STATE.

(Supreme Court of Georgia. Feb. 28, 1898.)

Dissenting opinion.

For opinion of court, see 29 S. E. 128.

LITTLE, J. I do not propose to submit any elaborate argument in giving the reasons which impel me to dissent from the conclusions, as well as the reasoning, which my brethren have adopted in this case. The reasoning of a majority of the court is based on the proposition that the local option liquor law (embodied in section 1541 et seq. of the Political Code) being in force, and it being a general law, our constitutional provision, which forbids the enactment of a special law in any case for which provision has been made by an existing general law, makes void an act of the general assembly which prohibits and makes penal the sale of spirituous or intoxicating liquors within the limits of a designated town or city. This reasoning, in my judgment, is not sound. The local option law, of

itself, does not prohibit the sale of spirituous or intoxicating liquors, and, in a county which has not adopted the provisions of that act, it cannot be held that there is a general law prohibiting such sales; and, if it be true that there is no general law which forbids the sale, it is clearly and undeniably within the power of the general assembly to prohibit sales of liquors within any given portion of the territory of this state. It is commonly supposed that the local option law is a measure in behalf of temperance, and is aimed at the prohibition of the traffic in liquors. To give it the effect which it must have, under the ruling of a majority of the court, in this instance, at least, its effect is to authorize the sale where the legislature has forbidden it.

The prohibition or regulation of the liquor traffic is the exercise of the police power of the state, concerning which Judge Cooley, citing from a large number of authorities, declares: "By this general police power of the state, persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." Cooley, *Const. Lim.* (5th Ed.) 708. And in the case of *Beer Co. v. Massachusetts*, 97 U. S. 25, Mr. Justice Bradley, citing the case of *Boyd v. Alabama*, 94 U. S. 645, says: "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and prosperity of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi suprema lex*,' and they are to be attained and provided for by such proper means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." As to the application of this power to the traffic in liquors, Mr. Black, in his work on *Intoxicating Liquors* (section 31), citing a number of authorities, declares the law to be: "That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never for a moment been doubted. On all the grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and sale of intoxicants is included within the sphere of its legitimate operations." In speaking of the limitations of this power, Tiedeman says the legislature is clearly the department of the government which can and does exercise the police power, and consequently in the

limitations upon the legislative power are to be found the limitations of the police power. Tied. Lim. 5. So that it will be admitted that the legislature can, in the exercise of the police power of the state, prohibit the traffic in liquors within the limits of the state, or any portion thereof, and this power is only limited by some existing inhibition of the constitution. As above stated, the majority of my brethren find this inhibition to exist in the provision which forbids the enactment of a special law in any case for which provision has been made by an existing general law. A law of this state provides for the issuance of licenses, under stated terms and restrictions, to engage in the sale of intoxicating liquors. With such a law in force, the local option law (which is general in its nature) gave to the people of the various counties of this state the privilege of determining whether such license should be granted or whether sales of liquors should be prohibited in a particular county. This privilege is to be exercised by an election, whenever a sufficient number of the people of a county desire. Until this privilege is exercised, the local option law is inoperative in a particular county. It has no force or effect to prohibit the sale until adopted at an election held by the people in a county.

In my judgment, the reasoning is fallacious which leads to the conclusion that the existence of a law which gives to the people of a county the privilege of saying whether liquor shall be sold in that county, or whether it shall be prohibited, has the effect of taking from the legislature the right to the exercise of the police power in a particular county where such election has not been held, or, if held, sales of liquor are not prohibited. That act cannot go into effect until its adoption. When it has been duly adopted and put in force, it then, but not until then, constitutes the exclusive system for the regulation of liquor selling in that locality. *Rauch v. Com.*, 78 Pa. St. 490; *State v. Yewell*, 63 Md. 120; *Wheeler v. State*, 64 Miss. 462, 1 South. 632; *Robertson v. State*, 5 Tex. App. 155. It would not be accurate to say that, after the provisions of such a law had been put in force, prior laws, which are inconsistent with its terms, are repealed; but such prior laws authorizing licenses to issue are suspended by the local option law. *State v. Smith (Fla.)* 7 South. 848. And, upon the terms of the local option law ceasing to be operative in a particular county, prior laws regulating the issue of licenses are again in force. *Butler v. State*. 25 Fla. 347, 6 South. 67.

The legislature of this state, in 1895, passed an act to prohibit the sale of spirituous, alcoholic, malt, or intoxicating liquors within the corporate limits of the town of Desoto, in Sumter county. In my judgment, the general assembly had the clear right to pass this act, and its provisions should be put in force. The town of Desoto is one of the political divisions

of this state, created by the general assembly. While it is located in the county of Sumter, it is not contended that the provisions of the general local option law have ever been adopted by the people of that county, and at the time of the passage of the act sales of liquor were authorized to be made under licenses in Sumter county. This being true, the power is inherent in the general assembly to prohibit the sale in the entire county, in any portion of the county, or in any incorporated town or city within the limits of the county. And, in deference to these views, I am constrained to differ with my brethren in the conclusions which they have reached in the decision of the case.

SCOTT v. DAMERON'S ADM'R et al.¹
(Supreme Court of Appeals of Virginia. Dec. 1, 1898.)

PLEADINGS—CURED BY DECREE.

Infirmities and insufficiencies of a bill are cured and supplied by decrees entered by consent.

Appeal from circuit court, Amherst county.
Suit between Robert G. Scott and Dameron's administrator and others. From the decree, Scott appeals. Affirmed.

John H. Lewis, for appellant. J. Thompson Brown, for appellees.

KEITH, P. Taylor Berry, as administrator of George Dameron, deceased, filed a bill in chancery in the circuit court of Amherst county, against Robert A. Coghill, trustee in a deed from Dameron, to secure his creditors, Robert G. Scott and others, in which he alleges that, as administrator of George Dameron, he had sold the personal estate, and paid the proceeds over to creditors; that his testator, being much involved in official and fiduciary relations in 1871, made a deed conveying to R. A. Coghill his real estate, to secure his principal, and to indemnify his sureties as deputy treasurer of Amherst county, and that, at the time of the execution of the deed unsatisfied, docketed judgments existed against him; that, since the death of Dameron, Coghill, the trustee, had sold his real estate, the proceeds of which were insufficient to pay the debts secured, and for which Taylor Berry had obtained, in the lifetime of Dameron, a judgment against Robert G. Scott and others, who were his sureties as deputy treasurer; that, as administrator as aforesaid, he had recovered a judgment against Scott for \$2,528, with interest, and then asked the advice of the court in administering that and any other fund that might come into his hands. The court directed the settlement of the administration account of Taylor

¹ Rehearing denied March 9, 1899.

Berry, an account of the transactions of Coghill as trustee, of the liens binding the realty of George H. Dameron, and of the debts due by him as fiduciary. To this decree C. L. Scott, commissioner, responded, by an account which need not for the present be further noticed.

In May, 1894, a decree was entered by consent of parties, referring the cause to Commissioner Sackett, who was directed by consent to report what sums of money had been paid to Taylor Berry, by whom, when, and on what account,—whether on the personal judgment of Berry against Dameron and Scott, or the judgment in favor of Berry, administrator, against Dameron and Scott, or on account of the sales of the real estate of Dameron under the deed of trust to Coghill. The commissioner was further directed to report the amount due Mrs. Frances A. Dameron, and by whom the same is to be paid, and the amounts due to E. W. Scott, as trustee for Fannie J. Scott, E. M. Tinsley, and C. J. Tinsley. The commissioner promptly filed his report, which is responsive to all of these inquiries.

In September, 1893, Robert G. Scott filed a bill in the circuit court of Amherst against Taylor Berry, as administrator of George Dameron, deceased, C. J. Tinsley, and E. W. Scott, trustee, in which he recites the judgment obtained by Dameron's administrator against himself and others for \$2,528; that by reason of the death of the plaintiff's wife, in the winter of 1883-84, and the confusion afterwards, many valuable papers had been misplaced; and that, as a consequence, two receipts, of \$500 each, dated, respectively, in January and May, 1873, had not been allowed upon the trial of the common-law suit; and that Scott had since made large payments, which he sets out in detail. He prays that all proper credits may be indorsed upon the judgment, and that it may be marked "Satisfied."

Dameron's administrator, Tinsley, and E. W. Scott, answered this bill, denying plaintiff's right to the credits for two receipts, of \$500 each, and also the credit claimed in the bill of \$180.03, the amount of an order given by C. J. Tinsley to the complainant on George H. Dameron in June, 1869, and the item of \$564.37 on account of an assignment made by C. J. Tinsley in favor of R. G. Scott.

Upon the issues made in this second bill, proofs were filed, and the whole record, as it now appears, except certain depositions, was before Commissioner Sackett when he made his careful report of July 31, 1894. The depositions referred to were taken before the case was heard in the circuit court, and were read and considered by it, as is shown by its decree.

By a decree entered at the October term, 1890, it is admitted that the judgment of

Dameron's administrator against Robert G. Scott and others, for \$2,658.44, of which \$1,784.12 is principal, is an asset belonging to the estate of Edward Tinsley, deceased. By a decree rendered at the October term, 1889, it is admitted that the amounts due the trustee of Fannie J. Scott, E. M. Tinsley, and C. J. Tinsley are correctly stated in the report of Commissioner Scott, upon which the case was heard when that decree was rendered. By the report of Commissioner Sackett, the amount by which it appears that Robert G. Scott had overpaid what was due by him as the purchaser of a portion of the lands of Dameron from Coghill, trustee, was applied to the judgment against him obtained by Taylor Berry in his own right. This was as it should be, for Taylor Berry having collected, as commissioner of sale, more than was due him, and being at the same time the creditor of Scott, by whom the overpayment had been made, the difference could be settled by transferring, as a credit to Berry's personal account, the money improperly received by him as such commissioner.

When the court came to make its decree, it confirmed the report of Commissioner Scott, and ascertained the amounts due Fannie J. Scott, Edward Tinsley, and C. J. Tinsley, as set out in the report of Commissioner Sackett, which, as we have seen, is based upon an agreed decree entered at the October term, 1889, except that Scott is allowed a credit by the decree as against C. J. Tinsley of \$399.55, growing out of the assignment above mentioned. The claim for a credit of \$180.03 was, for reasons stated in the decree, properly disallowed. It appears, we think, satisfactorily from the consent decrees from time to time entered, and from the evidence in the cause, that Scott has received every credit to which he was ever entitled, except such as he has lost by laches and neglect, as to which he can have no relief. The report was prepared by a careful, experienced, and intelligent commissioner, whose findings were approved by the circuit court, and which, without going into a further discussion of the evidence, seem to us to have been warranted by the proofs.

Counsel for appellant urged with much force and ingenuity upon the court the insufficiency of the original bill filed in the case by Dameron's administrator. It is without doubt a meager and inartificial pleading; but whatever its infirmities, and however obnoxious to criticism, its vices have been cured, and its insufficiencies supplied, by decrees entered with appellant's consent.

Upon the whole case we are of opinion that the decree of the circuit court should be affirmed.

RIELY, J., absent.

McFAIL v. BARNWELL COUNTY.

NEAL v. SAME.

(Supreme Court of South Carolina. March 11, 1899.)

CHANGE OF VENUE — AFFIDAVIT — DISCRETION OF COURT—REVIEW.

1. Since Code Civ. Proc. §§ 144-147 (authorizing a change of venue when the convenience of witnesses and the ends of justice will be promoted thereby), fail to set out any requirement of the affidavit for the change, the court may grant a change though the affidavit fails to state the names of the witnesses, their particular residences, the facts to which they are expected to testify, that affiant stated these facts to his counsel, and was advised that the witnesses are material and that he cannot safely go to trial without them, the reasons for affiant's belief that the witnesses are necessary, and facts from which the court may determine their materiality.

2. Findings of the circuit judge that witnesses are material, and the granting of a change on that ground, are not reviewable.

Appeals from common pleas circuit court of Barnwell county; O. W. Buchanan, Judge.

Separate actions by William L. McFall and John Neal against Barnwell county. A change of venue was granted in each case on application of the respective plaintiffs, and defendant appeals. Dismissed.

W. H. Townsend, for appellant. John R. Bellinger, for respondents.

POPE, J. After due notice in open court, each of the plaintiffs in the two cases above stated applied to Judge Buchanan for an order changing the place of trial of each action from Barnwell county to Bamberg county. The motions were based upon the pleadings in each case, and upon affidavits which alleged that all of plaintiffs' witnesses, and, it was believed, all of defendant's witnesses, resided in Bamberg county, at a great distance from Barnwell court house; and, further, that the bridge in question was located in Bamberg county. The names of the witnesses were not given, nor was it stated what facts were proposed to be established by said witnesses. The defendant made no showing by way of affidavits, but strenuously opposed the change of the place of trial. It should have been stated before that the two cases, although separate and distinct from each other, were by consent, as far as these motions are concerned, heard together. "At the hearing of the motion, the defendant resisted the same, on the ground that the affidavit was not sufficient to authorize the court to exercise its discretion in granting the motion, in that it did not disclose the names of the witnesses, their residences, or the facts to which they were expected to testify, nor that the affiant had stated these facts to his counsel, and been advised that the witnesses were material, and that he could not safely go to trial without them. It does neither state the reasons for affiant's belief that the witnesses are important and necessary, nor any facts from which the court could determine their materiality."

32 S.E.—27

The foregoing is extracted from the "case." Judge Buchanan granted the order for the change of the place of trial from Barnwell county to Bamberg county in each case. In this order he states it thus: "The defendant objects to the affidavit on which the motion is made, because it does not state the names of the witnesses, or what they are expected to testify, or the residences of the witnesses. The motion is made on account of the convenience of the witnesses. The affidavit shows that they all reside outside of this [Barnwell] county, and all, save one, in Bamberg county, where also both plaintiffs reside; some of them at least. And they are all very much nearer to Bamberg than to Barnwell. It must necessarily be to their convenience to have the trial at Bamberg. * * *

From this order of Judge Buchanan the defendant appeals in each of the actions. The grounds of appeal are two in number, and are as follows: "(1) That his honor, the presiding judge, erred in holding the affidavit sufficient to authorize him to exercise his discretion in granting a change of venue on account of the convenience of witnesses, in that said affidavit fails to state: (a) The names of witnesses; (b) their residences; (c) the facts to which they are expected to testify; (d) that affiant had stated these facts to his counsel, and had been advised that the witnesses were material, and that he could not safely go to trial without them; (e) any reasons for affiant's belief that these witnesses are important and necessary; (f) or any facts from which the court could determine their materiality. (2) That his honor erred in holding that, necessarily, the witnesses, or some of them at least, were material, in the absence of any facts being stated to show their materiality, and in granting the motion on this ground."

So far as the first ground of appeal is concerned, relating, as it does, to what the affidavits should contain, we would remark that in *Willoughby v. Railroad Co.*, 46 S. C. 319, 24 S. E. 308, this court pointed out the fact that sections 144 to 147, inclusive, of our Code of Civil Procedure, fail to set out any requirement of an affidavit as necessary to have the place of trial changed. Section 147 authorizes the court to act in three instances: "(3) When the convenience of witnesses and the ends of justice would be promoted by the change." The circuit judge is empowered to make the change. He is to exercise his discretion. It seems that, in the absence in the affidavit of the matters set out in the first ground of appeal, his judicial discretion was satisfied. The exercise of discretion is to be by the circuit judge. Unless he errs in some matter of law, this court is powerless to interfere. No error of law is made to appear in either the first or second grounds of appeal. No appeal can be taken from his findings of fact. It is the judgment of this court that the appeal in each case be dismissed, and each action be remanded to the circuit court, to enforce Judge Buchanan's order.

STATE ex rel. CAPERS et al., Board of Education, v. DERHAM, Comptroller General.

(Supreme Court of South Carolina. March 10, 1899.)

SCHOOLS—COUNTIES—LIQUOR REVENUES—TAXES—APPORTIONMENT.

Const. art. 11, § 6, required the comptroller general, in case the annual poll tax of \$1 and the tax levied by the county board of commissioners did not equal \$3 per capita of the school children for each county, to levy an annual tax to make up the deficiency during the years 1896, 1896, and 1897. Section 12 required the net income from liquor licenses to be applied annually in aid of the last-named supplementary tax, and, if there should be any surplus, it was to be devoted to public school purposes, as the legislature should determine. The legislature determined (22 St. at Large, p. 967) that the comptroller general should pay to each county, out of the supplementary school fund arising from the sale of intoxicants, sufficient to raise the school fund of each county, including the poll tax and annual tax, to \$3 per capita, and apportion the remainder of such supplementary fund among the counties, based on the enrollment of school children. *Held* that, before any county could compel the comptroller to apportion such remainder, it must show that the fund in the treasury, sought to be apportioned, was a surplus remaining after meeting the deficiencies.

Mandamus by the state, on the relation of Ellison Capers, Jr., and another, as members of the county board of education for Richland county, against John P. Derham, as comptroller general. Petition dismissed.

John P. Thomas, Jr., for petitioners. Wm. A. Barber, Atty. Gen., for respondent.

JONES, J. This is an application in the original jurisdiction of this court for mandamus to compel the comptroller general to apportion certain supplementary school funds—\$60,000—now in the state treasury as net income from the sale of liquors under the dispensary law, and to issue his warrant in favor of the county treasurer of Richland county for \$1,700.89, the amount thereof alleged to be due said county. The point of difference between the petitioners and respondent is this: Petitioners contend that said fund must be apportioned among all the counties in proportion to the enrollment of pupils in said counties as shown by the report of the state superintendent of education for the year 1895, while respondent contends that said fund is first applicable in aid of the supplementary taxes provided for in the sixth section of article 11 of the constitution, to supply deficiencies in those counties wherein the poll tax and three mills tax do not yield an amount equal to three dollars per capita of the number of children enrolled in the public schools of each county for the scholastic year ending October 31, 1895, as appears in the report of the state superintendent of education for that year, and that it is only the surplus remaining after such application which may be apportioned among all the counties in proportion to the enrollment of pupils as shown by the report

of the state superintendent of education for the year 1895. The rule of apportionment of such funds must be as provided in the sixth and twelfth sections of article 11 of the constitution and in the joint resolution approved February 21, 1898, so far as it is consistent with said provisions of the constitution. Said sections of the constitution, which must be construed together so as to harmonize, are as follows:

"Sec. 6. * * * There shall be assessed on all taxable polls in the state between the ages of twenty-one and sixty years (excepting Confederate soldiers above the age of fifty years) an annual tax of one dollar on each poll, the proceeds of which tax shall be expended for school purposes in the several school districts in which it is collected. Whenever, during the three next ensuing fiscal years, the tax levied by the said county board of commissioners or similar officers and the poll tax shall not yield an amount equal to three dollars per capita of the number of children enrolled in the public schools of each county for the scholastic year ending the 31st day of October in the year 1895, as it appears in the report of the state superintendent of education for said scholastic year, the comptroller-general shall, for the aforesaid three next ensuing fiscal years, on the first day of each of said years, levy such an annual tax on the taxable property of the state as he may determine to be necessary to make up such deficiency, to be collected as other state taxes, and apportion the same among the counties in the state in proportion to the respective deficiencies therein. The sum so apportioned shall be paid by the state treasurer to the county treasurer of the respective counties in proportion to the respective deficiencies therein on the warrant of the comptroller-general and shall be apportioned among the school districts of the counties, and disbursed as other school funds; and from and after the 31st day of December, in the year 1898, the general assembly shall cause to be levied annually on taxable property of the state, such a tax, in addition to the said tax levy, by the said county board of commissioners, or similar officers, and the poll tax above provided, as may be necessary to keep the schools open throughout the state for such length of time in each scholastic year as the general assembly may prescribe; and said tax shall be apportioned among the counties in proportion to the deficiencies therein and disbursed as other school funds. Any school district may by the authority of the general assembly levy an additional tax for the support of its schools."

"Sec. 12. All the net income to be derived by the state from the sale or license for the sale of spirituous, malt, vinous, and intoxicating liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the state, shall be applied annually in aid of the supplementary

taxes provided for in the 6th section of this article; and if after said application, there should be a surplus, it shall be devoted to public school purposes, and apportioned as the general assembly may determine: provided, however, that the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license from the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

Joint resolution 22 St. at Large, p. 967, is as follows: "That the comptroller general is hereby authorized and directed to draw his warrants on the state treasurer in favor of the county treasurer of the different counties for the amount to which each county is entitled out of supplementary school fund arising from the net income to the state from the sale of alcoholic liquors, according to a calculation to be made by him, based on the actual collections of the poll tax and three-mill tax collected in each county, so as to raise the amount of school fund in each county, including the poll tax, the three-mill tax and said supplementary school fund, to three dollars per capita, as provided in the state constitution. And the comptroller general shall apportion the remainder of said supplementary school fund now in or which may hereafter come into the state treasury during the fiscal year 1896, among the counties of the state, in proportion to the enrollment of the counties as shown by the report of the state superintendent of education for the year 1895, and to draw his warrant therefor as above provided; and that the said supplementary school fund shall be annually apportioned and paid out in the manner herein provided."

By these two sections of the constitution it is the duty of the comptroller general to apportion the net income derived during the years 1896, 1897, and 1898 from the sales of liquors to make up deficiencies in the school fund in each county for the years 1896, 1897, and 1898, respectively, so that the school fund in each county in each of said years shall equal three dollars per capita of pupil enrollment in each county according to the enrollment of 1895. So far as the net income from the sale of liquor for the years 1896, 1897, and 1898 is concerned, the rule of apportionment fixed in the joint resolution could only operate to dispose of any surplus remaining of the net income from the sale of liquors in each of said years after application to make up deficiencies in the school fund in each of said years. It is clear, therefore, that petitioners, in order to have the fund in question apportioned as contended for by them, must show that said fund is surplus remaining after application to meet deficiencies. This showing they fail to make. It does appear that the fund in question—\$60,000—was received into the state treasury during the year 1898 some time after April 20th, on which day \$70,490.

55 of similar funds were apportioned and paid out among 24 counties of the state to make up deficiencies for the year 1896; but we are not informed whether the \$60,000 constitute the net income for 1897 or for 1898, nor are we informed whether said sum is needed to make up deficiencies in the school funds of counties for the year 1897 or 1898, nor whether said sum, or any portion thereof, is surplus after application to deficiencies, as required by the constitution. The writ of mandamus prayed for is refused, and the petition dismissed.

RAKESTRAW v. FLOYD.

(Supreme Court of South Carolina. March 6, 1899.)

LANDLORD AND TENANT—EVIDENCE—HARMLESS ERROR—MALICE—NONSUIT.

1. An agreement provided that the owner of the land should have a lien for advances, and the cropper should keep the place in repair, clear out the bottom ditches, clear off all river and ditch banks of brush, and give up possession after a certain date. *Held*, that the relation of landlord and tenant existed.

2. Error in admitting liens to show an alleged cropper was a tenant was harmless, the lease itself showing he was a tenant.

3. Failure, in action for conversion, to show malice, is not ground for nonsuit, the evidence justifying a recovery of actual damages.

4. In an action for willfully and unlawfully taking possession of cotton, and selling and converting it, a nonsuit is not justified where there was proof that defendant stopped plaintiff from selling the cotton, and afterwards, it being sold under defendant's direction, he knowingly received the proceeds of it himself.

Appeal from common pleas circuit court of Spartanburg county; W. C. Benet, Judge.

Action by Caroline Rakestraw against A. G. Floyd. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Jennings & Johnson, for appellant. H. L. Bomar, for respondent.

GARY, A. J. The plaintiff brought action against the defendant upon the following complaint: "(1) That during the year 1895 plaintiff was a tenant on a certain portion of defendant's farm, in said county and state, known as his 'Walnut Grove Place,' she having rented from one Jamison Lee, to whom defendant had rented all of his said Walnut Grove place, and who had full power to sub-rent any portion of said farm. (2) That on or about the 1st day of November, 1895, defendant willfully and unlawfully took possession of, and sold and converted to his own use, three bales of cotton, weighing, respectively, 454, 405, and 453 pounds, all of which was the lawful property of plaintiff; she having cultivated and raised the same on her said rented farm. (3) That the value of said three bales of cotton so sold was one hundred and thirteen dollars and forty-nine cents. (4) That, by reason of said willful and unlawful acts of defendant in so seizing and selling said cotton as above complained of, plaintiff was damaged

in the sum of five hundred dollars. Wherefore plaintiff demands judgment against the defendant for one hundred and thirteen and $\frac{49}{100}$ dollars, the value of said cotton, and for five hundred dollars, her damages, and for the costs of this action." The defendant answered as follows: "(1) He denies each and every allegation of said complaint. (2) He has no knowledge of Jamison Lee's arrangements with plaintiff, but he alleges that said Jamison Lee was a laborer for hire, and the entire crop raised on said land was the property of this defendant. (3) He alleges that he never had any contract, in person or by agent, with said plaintiff." The jury rendered a verdict in favor of the plaintiff for \$118.75.

The defendant appealed upon the following exceptions: "(1) Because his honor erred in admitting in evidence the lien of Jamison Lee and T. H. Fowler to A. G. Floyd, bearing date January 21, 1895, over the defendant's objection, the same being irrelevant to the issues and prejudicial to the defendant. (2) Because his honor erred in admitting in evidence, over the defendant's objection, the lien of Jamison Lee to A. G. Floyd, dated April 3, 1895, when it is respectfully submitted that said lien is irrelevant to the issues and prejudicial to the defendant. (3) Because his honor erred in refusing the motion for nonsuit, (a) because there was a total want of evidence to show any high-handed, malicious, willful disregard of the plaintiff's rights; (b) because there was no evidence that the defendant ever saw, ever took possession of, ever handled or converted to his own use, the property described in the complaint; (c) because the contract of Jamison Lee made him a laborer for hire. (4) Because his honor erred in construing Jamison Lee's contract as 'a paper which created the relation of landlord and tenant between Floyd on the one hand and Lee on the other, and did not create the relationship of master and servant or employer and laborer,' and it is respectfully submitted that it was only a laborer's contract, signed by Lee alone, and not a lease signed by Floyd, the landlord. (5) Because his honor erred in refusing to charge: 'First. That, by the terms of Jamison Lee's contract in writing, he was a laborer for hire, and the title to the crop was in Floyd. Second. If that is the contract under which Jamison Lee worked, and it was honestly and in good faith entered into, with no intention to injure third parties, then Jamison Lee had no power to so rent out the land as to give the plaintiff or any one else the title to the crops.'"

The fourth exception will be first considered. The said contract is as follows:

"State of South Carolina, County of Spartanburg. This agreement witnesseth that Jamison Lee agrees to work a two-horse farm on A. G. Floyd's Walnut Grove place in a good and husband-like manner, after A. G. Floyd's direction, in the year 1895; in which work A. G. Floyd agrees to pay Jamison Lee two-thirds of all cotton, corn, fodder, shucks, wheat, oats, and all other crops grown on

said farm, unless A. G. Floyd furnishes seed wheat and oats, when said A. G. Floyd is to pay Jamison Lee only one-half, after deducting from the part of Jamison Lee all advances of every kind made by said A. G. Floyd to the said Jamison Lee, and the said Jamison Lee hereby grants a lien on his part of the crop for all such advances. Each of the parties agree to furnish his proportion of the fertilizers used on said farm. The said Jamison Lee agrees to clean out all bottom ditches, clear off all rivers, creeks, branch, and ditch banks of brush to water's edge, and to house A. G. Floyd's part of the crop. The said Jamison Lee further agrees not to hire out any of his hands during crop time; and it is the understanding between A. G. Floyd and Jamison Lee that, if this section of this contract is violated by him, said A. G. Floyd is to make a reduction from his part of the crop at the rate of two dollars per day for each hand so hired. And it is further agreed that, if the cotton seed, corn, or other seeds for planting purposes be furnished by A. G. Floyd, then such seed is to be returned, bushel for bushel, or the value thereof, from the part of the said Jamison Lee. And it is further agreed that Jamison Lee is not to use the mule furnished by A. G. Floyd for any other purpose, except in the cultivation of the crop, and in going to and from market for supplies, and for milling purposes, and not to hire or loan the said mule to any person whatever; and it is the firm understanding between A. G. Floyd and Jamison Lee that, if the said Jamison Lee violates this section of this contract, the said Jamison Lee is to forfeit to the said A. G. Floyd one-third of his part of the crop, and to have the mule taken from his possession. And it is further agreed that, if Jamison Lee fails to cultivate or gather the crop in proper season, then A. G. Floyd may hire hands for that purpose, and deduct the amount paid for hands from his part of the crop. And it is further agreed that, when the said Jamison Lee leaves the place, he is to move no manures of any kind from the said premises. And it is further agreed that the said Jamison Lee is to give possession, at any time after the 15th of December that A. G. Floyd may require, and three day's notice will at any time be sufficient. Witness my hand and seal, this 3d day of April, 1895.

his
"Jamison X Lee.
mark

"Witness: H. H. Anderson."

The defendant in his testimony says that this instrument of writing embodies a previous verbal agreement which had been entered into between Jamison Lee and himself. In construing the above writing, his honor, Judge Benet, said: "I pronounce it a paper which created the relation of landlord and tenant between Floyd on the one hand and Lee on the other, and did not create the relationship of master and servant or employer

and laborer. I do so for several reasons: For one, it provides that advances be made by Floyd to Lee, and provides for Lee giving a lien, which the law says a laborer cannot give, upon a crop. It also provides for his keeping the place in good repair, implying that he is put in control. He is to clean out all the bottom ditches, clear off all rivers, creeks, branch, and ditch banks of brush to the water's edge. He is not being employed here as a ditcher, but that is what he is expected to do in control of the land. Then, also, another suggestive stipulation is that he (Lee) agrees not to hire out any of his hands. It is not usual for a laborer to have hands to hire. He may; one laborer may hire hands to do his work. But the intimation here, it strikes the court, is that he was a tenant, in the estimation of Floyd, requiring the assistance of hands to do the work of the farm. Then further on: 'It is further agreed that the said Jamison Lee is to give possession at any time after the 15th of December.' That implies clearly that he has been put into possession. Of what? Put into possession of the land. A laborer is not put into possession of the land; only a tenant is put into the possession of the land by a landlord. Then there is a fixed time at which he is to give possession,—15th of December,—clearly intimating a lease for a fixed period; and it is not a question, as was argued to you, that he was put in possession of the land referred to in his contract. How is it described here? 'A two-horse farm on A. G. Floyd's Walnut Grove place.' These are the leading reasons for my construction of this paper, and I charge you that it shows that Lee was put in possession of that land by Floyd as a tenant, and not as a laborer for hire. As such tenant, he could give liens on the crop; as such tenant, he could hire hands to so do his work; as such tenant, he could subrent or sublet parts of the land of which he was tenant, there being no stipulation in this paper forbidding him to rent out any part to any one else; and these various provisions that I have indicated are only consistent with the view that Lee was a tenant on A. G. Floyd's place, because they indicate such a transfer of the possession of land as is effected when a landlord puts a tenant in control of land." This court agrees with the presiding judge that the relation that existed between Jamison Lee and A. G. Floyd was that of landlord and tenant. It is true there are expressions appropriate to the creation of the relation of employer and laborer, but the real test is: Who had the right to the possession and control of the land for the period mentioned in the writing? This right was in Jamison Lee. This exception is overruled.

We will next consider the first and second exceptions. The liens mentioned in these exceptions were introduced in evidence for the purpose of showing that Lee was a tenant, and not a laborer. Independently of such testimony, it has been shown that Lee was

a tenant, so that, even if there was error, it was harmless. These exceptions are overruled.

Subdivision (a) of the third exception will now be disposed of. Even admitting that there was a total failure to introduce such testimony, the defendant was not entitled to a nonsuit, because, although the plaintiff might not have shown that she was entitled to exemplary damages, there was testimony from which the jury had the right to find that she should recover a verdict for the value of the cotton.

We next proceed to a consideration of subdivision (b). The testimony shows that the defendant stopped the plaintiff from selling the cotton, and afterwards knowingly received the proceeds from the sale thereof. There was also testimony that the cotton was sold with the knowledge, and under the direction, of the defendant.

Subdivision (c) is disposed of by what was said in considering the fourth exception.

The exceptions alleging error in refusing to charge the two requests to charge hereinbefore mentioned are also disposed of by what was said in considering the fourth exception. It is the judgment of this court that the judgment of the circuit court be affirmed.

MANUEL v. LOVELESS.

(Supreme Court of South Carolina. March 7, 1899.)

APPEAL—DISMISSAL.

Under Code Civ. Proc. § 366, providing that an appeal shall remain on the calendar until finally disposed of, but, if neither party bring it to a hearing before the second term, the court shall dismiss it, unless it is continued by a special order, it is not mandatory on the court to dismiss an appeal where neither party brings it to a hearing by the end of the second term, and no order continuing it is granted, unless it is called by the court for trial at such term.

Appeal from common pleas circuit court of Greenville county; James Aldrich, Judge.

Action between Easter Manuel and Rose F. Loveless. From a judgment of the magistrate's court there was an appeal, and from an order of the circuit judge refusing to dismiss the appeal Easter Manuel appeals. Affirmed.

Adam C. Welborn, for appellant. Blythe & Blythe, for respondent.

JONES, J. This appeal is from an order of Hon. James Aldrich, circuit judge, refusing to dismiss an appeal from a magistrate's court for want of prosecution, and continuing the case to the next term. The case had been duly docketed, but the record or original papers, having been mislaid by the clerk, could not be found in the clerk's office. So far as appears, the case was called for trial for the first time at the fourth term, and no previous order containing the appeal

had been made. Under the facts, Judge Aldrich, at the fourth term, granted the order continuing the case, allowing copies to be substituted for the original papers in case they could not be found, and refused the motion to dismiss the appeal for want of prosecution.

Appellant's contention here is that under Code Civ. Proc. § 366, and *Bell v. Pruitt*, 51 S. C. 344, 29 S. E. 5, the appeal should have been dismissed for want of prosecution. Code Civ. Proc. § 366, provides: "If a return be made the appeal may be brought to a hearing by either party. It shall be placed upon the calendar and continue thereon until finally disposed of. But if neither party bring it to a hearing before the second term, the court shall dismiss the appeal, unless it continue the same by special order for cause shown." Appellant's view is that, neither party having brought the appeal to a hearing before the end of the second term, and no special order continuing the appeal for cause having been granted at the second term, it was the mandatory duty of the circuit court to grant the motion to dismiss for want of prosecution. This would doubtless be true if the motion had been made at the second term after an opportunity for a hearing by a call of the case for trial at that term. But as an appeal properly docketed must remain on the calendar until finally disposed of by the court, and as neither party could bring it to a hearing without an opportunity for a hearing by a call of the case for trial, it would seem clear that if such an appeal is called for trial for the first time at the fourth session, while the court would have power to dismiss for want of prosecution if neither party brings the appeal to a hearing then, it is not compelled to do so, but may, as in this case, continue the appeal for cause shown. It may be that on account of the pressure of other business, or from other causes, appeals from magistrates' courts may not be called for trial by the court at the second session. In such case the appeal could not be summarily dismissed for want of prosecution at the close of the second session, because it was not brought to a hearing by either party or continued for cause shown. If so, it could not be so dismissed at any subsequent term for such failure to hear or continue for cause at the second term. Therefore, whenever the circuit court, at or after the second term, is moved to dismiss an appeal from a magistrate for want of prosecution, to justify dismissal it must appear that the case was called for trial at the second term, or some subsequent term, and that neither party after such opportunity brought it to a hearing, or had it continued for cause shown. The case of *Bell v. Pruitt*, 51 S. C. 344, 29 S. E. 5, does not militate against this view, but rather supports it. That was an appeal from a magistrate, which was continued at the second term by order of the court, for cause shown, and was

regularly called for trial at the third term; and, neither party bringing it to a hearing or having it continued for cause shown, the appeal was dismissed for want of prosecution by the circuit court, and the order of dismissal was sustained. The appeal in that case was not dismissed by the circuit court for want of prosecution at the second term, for at that term the case was duly continued for cause, but it was dismissed for want of prosecution at the third term after opportunity was afforded for a hearing by call of the case for trial. The order appealed from is affirmed.

STATE v. TYLER.

(Supreme Court of South Carolina. March 6, 1899.)

HIGHWAYS — OBSTRUCTION — PRESCRIPTION — ADVERSE USER — CHANGE IN ROAD — INSTRUCTION.

1. Where a charge told the jury that 20 years' user by the public, to constitute a highway by prescription, must not be as "matter of favor" from the landowner, but as "matter of right" in the public, and in several places stated that the user must be adverse and under claim of right, a party cannot complain that isolated expressions therein seem to convey the idea that mere user would constitute prescription, though the road ran over unclosed woodland.

2. A charge, in a prosecution for obstructing a highway, that, if the road was "substantially the same" as had been used adversely by the public for 20 years, it was a highway, did not harm accused, in not stating it must be "precisely" the same, the jury having found there was no change in the road at the place of obstruction.

Appeal from general sessions circuit court of Aiken county; R. C. Watts, Judge.

K. J. Tyler was convicted of obstructing a highway, and he appeals. Affirmed.

G. W. Croft & Son, for appellant. Henderson Bros., for the State.

JONES, J. Appellant was convicted and sentenced under an indictment charging him with obstructing a neighborhood road, alleged to have been used adversely by the public as a public road for over 20 years prior to the said obstruction. The exceptions assigning error relate solely to the judge's charge. The first, second, and third exceptions each quote an isolated sentence of the charge, and the error assigned thereto is that the jury were thereby instructed that the public could acquire the right to a neighborhood road as a public road by merely traveling over the same for 20 years, whereas the jury should have been instructed that, in order to make such a road a public road by prescription, the use thereof by the public must be under claim of right, and adverse to the rights of the landowner. That portion of the charge which contains the sentences excepted to is as follows: "The charge in the indictment is that the defendant obstructed a neighborhood road, which had been allowed to become a public

highway by prescription; that is, that it was at one time a neighborhood road, and the parties in the neighborhood of this road traveling over it traveled over it so long without getting any express permission from the owners of the land abutting the road that the public generally acquired a right to pass over that road. Now, Mr. Foreman and gentlemen, if you give permission to any one to go over your land, and he recognizes that permission, and goes over your land as a matter of grace from you, then it does not matter if he travels over your land for twenty years or more, the public generally does not acquire a right to travel over that road; but if you have a road across your land, and the neighborhood get in a habit of traveling over it, without asking permission of you, and keep that up for twenty years, and everybody that travels along over that road travels there without getting your permission, and does that for twenty years or more, then the public acquires a right to a public highway; and it does not matter whether it is worked by the public or not, if the public in that neighborhood has traveled over it adversely for twenty years or more, any obstruction to it would be violation of the law of the land. Now, if the testimony satisfies you that the public, for twenty years or more, got in the habit of traveling over this road, and generally traveled over it, and got no permission for it, and traveled over it as a matter of right, and kept that up for twenty years or more, then I charge you, as matter of law, it became dedicated to the public, and everybody has a right to travel over it; and, if the defendant obstructed a road of that sort, he is guilty of what is called a 'nuisance.' If you think this was his land, and the neighbors and public did travel over it as a matter of favor from him, and did not go over it as a matter of right, generally, then he is not guilty. But any road that is a private path to start, and the public get in the habit of traveling over it, and don't ask permission of the landowner to do it, and continue that for twenty years or more, it becomes a public highway then, and the public acquires a right to it."

While there are some expressions in the above charge which, when isolated, seem to convey the idea that a mere use by the public of a neighborhood road for 20 years, without express permission, or without asking permission, is sufficient to constitute such way a public road by prescription, yet when the whole charge is considered, as we must, it clearly appears that the jury were plainly instructed that the 20-years user by the public must be adverse and under claim of right, in order that a highway may be acquired by prescription.

The exceptions go to the first, second, and last sentences of that portion of the charge which is quoted above. The first was in reference to the charge in the indictment, and as the indictment expressly alleges the user to have been adverse, and as the jury neces-

sarily had the indictment with them, we do not think appellant was prejudiced at all. In the second sentence the judge concludes with these words: "If the public in that neighborhood had traveled over it adversely for twenty years or more, any obstruction of it would be a violation of the law of the land." The last sentence, construed in connection with what immediately precedes it, with which it is connected, shows that the judge instructed the jury that the 20-years user by the public, to constitute a highway by prescription, must not be "as matter of favor" from the landowner, but "as matter of right" in the public. The judge charged as follows: "Now, it is for you to say, under the testimony: Was this a neighborhood road to start on, and did it, after that time, become a public road, by reason of people traveling over it, adversely to the rights of the party who originally owned the land, for twenty years or more? Is that the same road, or substantially the same road? If it is the same road, or substantially the same road, and it had been used by the public twenty years or more, adversely to his claims, and without his permission, then he is guilty as alleged in the indictment. But if the parties had traveled over this road for twenty years or more, recognizing the fact that this party and those under whom he claimed allowed them to go over it as a matter of grace,—a matter of permission,—then he is not guilty. But if they have traveled over it not recognizing any right he had to it at all as the owner of the land, but claiming the right to go over it by reason of its being public property, and as a neighborhood road, treating it as a public road, and have done so for twenty years or more, then he is guilty as alleged in the indictment." He further charged: "Now, this twenty-years traveling over it adversely must be continuous, * * * must be unbroken," etc. In response to appellant's request to charge, he said: "I am requested by defendant to charge you as follows: 'First. That use alone for twenty years will not give the public the right of a roadway. Before such right can be acquired by prescription, it must appear from evidence that the public for that period used the road adversely, under claim of right.' I charge you that. 'Second. If the jury find from the evidence that the ford at Shaw's branch, where obstructed, had not been used adversely by the public for twenty years, then the public had acquired no prescriptive right to use such ford, and the defendant should not be convicted.' I charge you that. I have already substantially charged you that before."

Stated, then, briefly, the jury were instructed that a highway arises by prescription from the continuous, uninterrupted, adverse use thereof by the public, under claim of right, for 20 years. This is stating the law as favorably for appellant as he was entitled to, even if it be conceded, as com-

tended for by appellant, that said road over appellant's land runs exclusively over uninclosed woodland. *Hutto v. Tindall*, 6 Rich. Law, 396, and cases therein cited. In the case of *Sims v. Davis*, Cheves, 1, Judge Evans, speaking for the court, said: "No right of way can arise from merely riding or walking over a man's uninclosed woodland, unless there be some assertion of ownership by the claimant, or some act of the owner of the soil showing an admission that the claimant had a right. Thus, if the claimant laid out the road, and used it for twenty years, or if he worked on, enlarged, or kept it in repair, or if the owner of the soil cleared the land, and left a lane for the claimant's use, these, with acts of the like kind, would seem to amount to an assertion of a right on the one part, and an admission of it on the other." In the case of *Nash v. Peden*, 1 Speer, 21, the same judge said: "I think it is pretty well settled by the cases of *Sims v. Davis*, Cheves, 1, and *Hogg v. Gill*, 1 McMul. 329, that no prescriptive way can be established otherwise than by an adverse use of it for twenty years; and, where the way passes through forest land, the mere use, unaccompanied by any acts indicating that the party claims the use as a right, cannot give a right of way." This is the rule in reference to acquiring a private way by prescription. If it be true, as said in *Hutto v. Tindall*, 6 Rich. Law, 401, that the same character of evidence should be produced to establish a public way by prescription as a private way, the appellant cannot complain of the instruction given to the jury. Under the constitution forbidding the circuit judge to charge in respect to facts, he could not properly instruct them that such and such facts do or do not warrant the inference of adverse use. The general instruction that the use must not be permissive, but must be adverse and under claim of right, gave appellant the full benefit of the law applicable to establishing a private way by prescription. Whether the open and uninterrupted use by the public of a neighborhood road as a public road for 20 years, with the knowledge and acquiescence of the landowner, and with no assertion of opposing right by him, would warrant a presumption that the use was adverse and under claim of right, or would warrant the presumption of a dedication by the landowner, and an acceptance by the public, need not now be considered or decided; but see *State v. Sartor*, 2 Strob. 66, and *State v. Floyd*, 39 S. C. 25, 17 S. E. 505.

The next question presented is whether the circuit judge erred in charging the jury: "Is that the same road, or substantially the same road? If it is the same, or substantially the same, road, and it had been used by the public twenty years or more, adversely to his claims, and without his permission, then he is guilty as alleged in the indictment." The contention of the appellant is that there was error in the language "sub-

stantially the same road," and that the public way acquired by prescription must be confined, not substantially, but precisely, to the way used. In the case of *State v. Sartor*, 2 Strob. 63, Judge Evans charged the jury in reference to this subject that "slight changes, which do not materially affect the identity of the way, ought not to affect the right." This, we think, is the true rule, and the charge of the circuit judge in this case is in accord therewith. See authorities cited in note to *Whitesides v. Green* (Utah) 57 Am. St. Rep. 763 (s. c. 44 Pac. 1032). The case of *Gentleman v. Soule*, 32 Ill. 271, cited by appellant, sustains the same view, in this language: "Travel may slightly deviate from the thread of the road to avoid an obstruction at any point in the road, and still not change the road itself." One of the issues of fact in the case at bar was whether there had been any change in the road at the place where the obstruction was placed, and on this point the jury were instructed that "if they find from the evidence that the ford at Shaw's branch, where obstructed, had not been used adversely by the public for twenty years, then the public had acquired no prescriptive right to use the ford, and the defendant should not be convicted." Whatever, therefore, may have been the deviations in the road leading to the ford, the jury have found that there was no change at the particular place of obstruction. The exceptions are overruled, and the judgment of the circuit court affirmed.

STATE v. BULLOCK.

(Supreme Court of South Carolina. March 6, 1899.)

FORGERY—WITNESS PAY CERTIFICATES—STATUTES—CONSTRUCTION—INDICTMENT—SUFFICIENCY—NECESSITY OF AFFIDAVIT—APPEAL.

1. 1 Rev. St. 1893, § 677, provides that witness fees shall be paid by county treasurers on presentation of certificates signed by the presiding judge and countersigned by the clerk. Section 691 provides that no account shall be audited and ordered paid by the county board of commissioners, for any fees, unless accompanied with an affidavit by the person presenting it that it is correct. *Held*, that it is not required that certificates for witness fees be supported by affidavit before they can be paid by the treasurer.

2. 1 Rev. St. 1893, § 677, provides that witness fees shall be paid by county treasurers on presentation of certificates signed by the presiding judge and countersigned by the clerk, or be received by them in payment of county taxes, when duly approved by the county supervisor. *Held*, that such certificates need not be approved by the county supervisor, unless they are presented in payment of county taxes.

3. An indictment charging accused with executing a witness pay certificate with intent to defraud the county by forging the name of the presiding judge is sufficient, though it is not alleged that there was any real or simulated indorsement or assignment by the payee, since it is not necessary that such instrument of writing be complete in all of its parts, to make the accused liable to the charge of forgery.

4. An indictment charging accused with forging a witness pay certificate, which he signed as clerk of the court, is not invalid because it does not allege that he was such clerk, where he is not indicted as clerk, or for forging the name of the clerk.

5. 2 Rev. St. 1893, § 295, providing that whoever shall be guilty of publishing as true any false writing, or instrument of writing, shall be guilty of forgery, is sufficiently broad to cover the forgery of a witness pay certificate.

6. An objection to an indictment charging the forgery of a witness pay certificate, that the writing set forth is not in the form prescribed by statute, is untenable, since the statute prescribes no form for such certificates.

7. Where an indictment charges an accused with forging a witness pay certificate, an objection that the writing set forth is void because the statute makes no provision and prescribes no form for such certificates cannot be sustained, where the indictment gives effect to the law governing witness pay certificates.

8. The court of general sessions has jurisdiction to try a cause, though the proceeding was not commenced by affidavit and warrant, since the prosecuting officer may, of his own motion, present a bill to the grand jury without the presentation of an affidavit charging the offense.

9. A question that was not passed on by the trial court, where the case for appeal contains no statement of facts on which to base it, cannot be considered.

Appeal from general sessions circuit court of Abbeville county; W. C. Benet, Judge.

W. R. Bullock was indicted for forgery. From an order discharging him, the state appeals. Reversed.

M. F. Ansel, for the State. E. G. Graydon and Frank B. Gary, for respondent.

POPE, J. The respondent was tried at June term, 1898, at Abbeville, for the crime of forgery. Upon a demurrer to the indictment by the defendant, who is now here as respondent, Judge Benet ordered the indictment quashed. The state appeals from such order. In order that we may refer to the indictment, it is thought best to reproduce it, and it is as follows:

"The State of South Carolina, County of Abbeville. At a court of general sessions begun and holden in and for the county of Abbeville, in the state of South Carolina, at Abbeville Court House, in the county and state aforesaid, on the third Monday of January in the year of our Lord one thousand eight hundred and ninety-eight, the jurors of and for the county aforesaid, in the state aforesaid, upon their oath present that W. R. Bullock, late of the county and state aforesaid, on the first day of November in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at Abbeville Court House, in the county and state aforesaid, did falsely make, forge, and counterfeit, cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting, a certain writing, and instrument of writing, commonly called a 'witness pay certificate,' of the tenor as follows; that is to say:

"No. 443. The State of South Carolina,

Abbeville County. I, W. R. Bullock, C. C. P. & G. S. for Abbeville county, S. C., do certify that Emma Tinch attended as a material witness for the state five days at September court, 1897, and traveled twenty miles, and is entitled to two dollars and fifty cents (\$2.50). W. R. Bullock, Clerk.

"I certify that the above services were rendered. O. W. Buchanan, Presiding Judge.'—with intent to defraud Frank Nickles and Abbeville county, against the form of the statute in such case made and provided, and against the peace and dignity of the same state aforesaid.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. R. Bullock on the first day of November in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at Abbeville Court House, in the county of Abbeville and state aforesaid, having in his possession a certain writing and instrument of writing, commonly called a 'witness pay certificate,' of the tenor as follows; that is to say:

"No. 443. The State of South Carolina, Abbeville County. I, W. R. Bullock, C. C. P. & G. S. for Abbeville county, S. C., do certify that Emma Tinch attended as a material witness for the state five days at September court, 1897, and traveled twenty miles, and is entitled to two dollars and fifty cents (\$2.50). W. R. Bullock, Clerk.

"I certify that the above services were rendered. O. W. Buchanan, Presiding Judge.'—did falsely make, forge, and counterfeit, cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting the same, by then and there writing, signing, and forging the name of O. W. Buchanan to said pay certificate, above the words 'Presiding Judge,' with intent to defraud Frank Nickles and Abbeville county, against the form of the statute in such case made and provided, and against the peace and dignity of the same state aforesaid.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. R. Bullock on the first day of November in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at Abbeville Court House, in the county of Abbeville and state aforesaid, did willfully utter and publish as true a certain false, forged, and counterfeited writing, and instrument of writing, commonly called a 'witness pay certificate,' of the tenor as follows; that is to say:

"No. 443. The State of South Carolina, Abbeville County. I, W. R. Bullock, C. C. P. & G. S. for Abbeville county, S. C., do certify that Emma Tinch attended as a material witness for the state five days at September court, 1897, and traveled twenty miles, and is entitled to two dollars and fifty cents (\$2.50). W. R. Bullock, Clerk.

"I certify that the above services were rendered. O. W. Buchanan, Presiding Judge.'—he, the said W. R. Bullock, then and there

well knowing the same to be forged, with intent to defraud Frank Nickles and Abbeville county, against the form of the statute in such case made and provided, and against the peace and dignity of the same state aforesaid.

"J. A. Mooney, Acting Solicitor."

The order passed by Judge Benet was as follows: "A motion was made before me to quash the indictment in the above-stated case on several grounds. After hearing argument of counsel for defendant, and of the solicitor for the state, I am satisfied that the indictment ought to be quashed, and the objection thereto by way of demurrer sustained, on the following grounds: (1) Because it does not appear that any affidavit was filed proving the claim of witness for fees; (2) because the said certificate set out in the indictment did not purport to have been approved by the county supervisor; (3) because it does not appear to have been any real or simulated indorsement or assignment by the payee. Without these prerequisites the county treasurer would not have had any right to pay the said certificate. It was therefore incomplete and void as a pay certificate, and could not deceive anybody. It was not such a paper or instrument of writing as could be the subject of forgery. It was necessary to allege in the indictment that the defendant was, at the time the certificate was alleged to have been forged, clerk of the court, but I hold that this defect might be carried by amendment. It is therefore ordered and adjudged that the said indictment be quashed, and the proceedings dismissed, and that the said W. R. Bullock be discharged from his recognizance, and be allowed to go hence without day, so far as the above-stated charge is concerned. June 17, 1898."

The following are the grounds of appeal: "(1) Because his honor erred in holding that, 'because it does not appear that an affidavit was filed proving the claim of the witness for fees,' therefore the paper alleged to be forged was not such a paper as was the subject of forgery, and that, therefore, the indictment should be quashed. (2) Because the circuit judge erred in holding, 'because the said certificate set out in the indictment did not purport to have been approved by the supervisor,' and that, therefore, the paper charged to be a forgery was not the subject of forgery. (3) Because the circuit judge erred in holding, 'because there does not appear to have been any real or simulated indorsement or assignment by the payee,' and that, therefore, the paper charged to be a forgery was not such a paper as was the subject of forgery, and that the indictment should therefore be quashed. (4) Because the circuit judge erred in quashing the indictment herein, the said paper or certificate alleged to have been forged being such a paper as was the subject of forgery. M. F. Ansel."

The respondent duly gave notice that at the hearing of the appeal taken by the state he would ask the supreme court to sustain the order made by Judge Benet on the following

grounds: "(1) Because at the time the act to define and punish the crime of forgery was passed no such certificate as that set out in the indictment had been provided for by law, and therefore the said act defining and punishing forgery could not be held to include a paper which had no legal existence at the time of the passage of the said act, but was provided for by a subsequent statute. (2) Because the certificate set out in the indictment is not in the form prescribed by the statute, and would for that reason, if properly signed and certified, have been null and void. (3) Because the statute makes no provision and prescribes no form for a witness ticket, and therefore such ticket would be null and void, even if properly signed. (4) Because the court of general sessions has not jurisdiction to try a criminal case, especially one like that before the court, unless the proceeding has been commenced in the regular way by affidavit and warrant issued by a magistrate, unless there was some special reason for taking a different course; and no such reason has been shown, or even claimed, to exist in this case. (5) Because the indictment is fatally defective in not alleging that the defendant was clerk of the court."

We will first pass upon the grounds of appeal presented by the state:

First, it is objected that the circuit judge was in error in holding that the indictment was faulty because it did not appear that the witness pay certificate set out therein was supported by the affidavit of the witness for whose services, as such, the certificate was issued. It seems to us that the circuit judge was in error in this holding. It will be admitted that the legislature of the state was empowered to prescribe how the services of a witness in the court of general sessions should be authenticated, and as to the mode prescribed for its payment, but it is contended that the language used in the section of the law governing in such cases should be aided by another section of the law regarding claims against the county. To make our meaning clear, we should state the sections (1 Rev. St. 1898) as they read:

"Sec. 676. Each county shall pay: (1) The fees of the grand and petit jurors while in attendance upon the circuit court. (2) Witnesses' fees in the state cases for actual attendance upon the circuit courts as provided by law. (3) Fees of physicians and surgeons testifying as experts before a coroner's jury or the circuit court. (4) Fees of sheriffs and clerks of court as provided by law. (5) Fees of county coroners allowed by law. (6) Fees or salaries of trial justices and constables. (7) The compensation of auditors, treasurers and county supervisors as provided by law.

"Sec. 677. That the fees allowed jurors, constables and witnesses shall be paid by the treasurer of the counties, on the presentation to them of certificates signed by the presiding judge and countersigned by the clerk of the court, or be received by him in the payment:

of all county taxes when duly approved by the county supervisor."

Section 678 provides that the accounts of coroners, sheriffs, and supervisors, and physician's or surgeon's fees for post mortems, shall be approved by the county board. Sections 690 and 691 provide for the payment of the fees, in criminal cases, of clerks of court, trial justices, and other officers, which shall be approved by the board of county commissioners. But it is important to reproduce the exact language of section 691, which is as follows: "Sec. 691. No account shall be audited and ordered to be paid by the county board of commissioners for any labor performed, fees, services, disbursements, or any other matter, unless it shall be made out in items and accompanied with an affidavit attached thereto, and made by the person or officer presenting or claiming the same, that the said items are correct, and that the labor, fees, disbursements, services or other matter charged therein have been in fact done, made, rendered or are due, and that no part of the same has been paid or satisfied. * * *"

The circuit judge has held that notwithstanding the language of section 677, above quoted,—“the fees allowed jurors, constables and witnesses shall be paid by the treasurer of the counties, on the presentation to them of certificates signed by the presiding judge and countersigned by the clerk of the court, * * *”—still, before the county treasurer can pay such claims just quoted, such claims must be supported by the affidavit of the officer or individuals holding and presenting the same, as pointed out in section 691, which we have also quoted. As before stated, we think the circuit judge is in error in this construction of the law. Clearly, the purpose of the legislature was to provide a speedy mode for the settlement of the fees of jurors, constables, and witnesses in state cases; and they deemed that inasmuch as the services of jurors, constables, and witnesses were rendered within the view of the presiding judge and clerk of court, no better mode could be had, in establishing their services, than by the certificate of such presiding judge, countersigned by the clerk of court, under the acts passed by the legislature from time to time in providing for a speedy settlement of the services of jurors and witnesses, so that those persons might not be subjected to any delay in receiving their compensation for such enforced services rendered by them to the state. In addition to all these views of this act, it seems to us that the legislature has negated the view of the circuit judge by other actions. We have reproduced the section preceding 677, to wit, section 676, which enumerates certain services and offices each county shall pay; and it will be seen that the sections succeeding section 677 provide specifically for the approval of the claims of each and every one of these, except jurors, constables, and witnesses in state cases, by the county board of commissioners.

The second ground of appeal alleges error in the order of the circuit judge because he held that the witness pay certificate was not approved by the county supervisor of Abbeyville county. This conclusion of the judge is, no doubt, based upon the last provision of section 677. The section, as a whole, reads thus: “Sec. 677. That the fees allowed jurors, constables and witnesses shall be paid by the treasurer of the counties, on the presentation to them of certificates signed by the presiding judge and countersigned by the clerk of the court, or be received by him in the payment of all county taxes when duly approved by the county supervisor.” We think the true view of this section is this: That jurors, constables, and witnesses may receive the cash in payment of their respective claims, or that they may use such claims in the payment by them of taxes due by them to the county. If they desire the cash from the county treasurer, they must have their claims certified to the presiding judge, with the clerk of court countersigning the same. If they desire to pay their county taxes with such claims, it is provided the county supervisor shall approve the same. While, of course, any legislative construction of this section may not be conclusive of this matter, yet it ought to have some bearing upon the matter. We find in 22 St. at Large, pp. 737, 738, an act amending section 693, 1 Rev. St. 1893, which provides that all claims not presented in five years shall be barred, and in so providing this language is used: “And no claim audited and allowed by the county board of commissioners or clerk of the court for fees of witnesses and jurors shall be paid by county treasurer unless the same is presented to him for payment in five years,” etc. This act was approved 21st day of February, 1898. The respondent, in this connection, suggests that the construction should not be influenced by the punctuation mark of the comma which precedes the words, “or to be received by him in the payment of all county taxes when duly approved by the county supervisor.” While we lay no stress upon the punctuation in question, it is a fact that it occurs in the section, and, in our view is properly there.

The third exception of appellant suggests error in the circuit judge in holding that because there does not appear to have been any real or simulated indorsement or assignment of the payee of the witness certificate set out in the indictment, the paper alleged to have been forged was not the subject of forgery. By recurring to the statutes adopted in this state in the years 1736-37 (3 St. at Large, p. 468), 1801 (5 St. at Large, p. 397), and 1845 (11 St. at Large, p. 366), it will be found that the last act was simplified by adopting language in defining forgery which was broad and comprehensive enough to include any species of forgery, without repeating the many classes enumerated in the first and second of said acts. When the laws of the state were codified in the years 1872, 1882, and

1803, the phraseology of the act of year 1745 was retained. So that now, in this state, the crime of forgery, so far as the statute law is involved, may be stated in this language: "Whoever shall be convicted of falsely making, forging or counterfeiting, or causing or procuring to be falsely made, forged or counterfeited, or of willingly acting or assisting in the false making, forging or counterfeiting of any writing or any instrument of writing, or of uttering or publishing as true any false, forged or counterfeited writing or instrument of writing, or of falsely making, forging or counterfeiting, altering, changing, defacing or erasing, or causing or procuring to be falsely made, forged, counterfeited, altered, changed, defaced or erased, any record or plat of land, or of willingly acting or assisting in any of the premises, with an intention to defraud any person, shall be guilty of forgery. * * *" 2 Rev. St. 1893, p. 362, § 295. Id. p. 363, § 296, relates to counterfeiting coins of gold or silver, and need not be reproduced. Thus, it is seen that to falsely make, etc., a writing, or paper of writing, or to utter and publish the same, with the intent to defraud some person, is the language in this statute with which we have to deal in determining whether the circuit judge is in error as here complained. We have already set out in this opinion the alleged paper writing, or writing, commonly called a "witness pay certificate," with the forgery of which the defendant is charged. The name of the payee in said paper writing is Emma Tinch, but it is not alleged in said indictment that said Emma Tinch, either by actual or simulated indorsement, assigned or transferred the same. It will be noticed, also, that in the indictment it is not alleged that the defendant forged the same with intent to defraud Emma Tinch, but it is alleged that he forged the same to defraud Frank Nickles and Abbeville county. As is well said in 9 Enc. Pl. & Prac. p. 550, in speaking of an indictment for forgery: "There are three essential elements in the crime of forgery, viz.: First, a writing apparently valid; second, a fraudulent intent on the part of the accused; and, third, the falsity of the writing, or the fact that the name signed thereto is fictitious,—all of which elements must be alleged and proved." This instrument alleged to have been forged is commonly called a "witness pay certificate," for such is the allegation of fact alleged in the indictment, which allegation of fact in the matter of demurrer must be accepted as true. When we look at section 677, 1 Rev. St., which we have already quoted, it will be seen that the services of a state's witness, so far as the fees allowed by law therefor, must be evidenced by the certificate signed by the presiding judge, and countersigned by the clerk of the court. This paper writing, by its tenor, shows it was signed in the name of O. W. Buchanan as presiding judge, and is countersigned by the

defendant as clerk of the court. These facts, in the light of this demurrer, must be accepted as verities. And, as we have hereinbefore held, such a paper writing, when so signed by the presiding judge and the clerk of the court, imports a liability on the part of Abbeville county to pay the sum therein enumerated. It seems, therefore, that the first element exists. The second requires a fraudulent intent on the part of the accused. The indictment charges that the defendant made this paper writing with a fraudulent intent, to wit, to defraud Frank Nickles and Abbeville county. Chief Justice Rutledge, speaking for the court in the case of *State v. Washington*, 1 Bay, 152, said: "The only point on which we agree with the prisoner's counsel is that, to make forgery felony under this act, it must be done with intention to defraud. It surely must. It is the essence of the crime." The indictment charges that the paper writing was forged, as it appears in the first count; and in the second count it is alleged that the name of the presiding judge was forged. It seems to us that the indictment contains the second element. Now, as to the third element, viz. the falsity of the instrument: The indictment in the first count charges generally that the paper writing is a forgery; but in the second count it is specially charged that it is a forgery because the name of O. W. Buchanan, as presiding judge, was forged. "The name signed thereto is fictitious." We do not agree with the circuit judge that the instrument of writing had to be complete in all of its parts, in order to have made the defendant liable to the charge of forgery. We should always remember, in considering the sufficiency of the allegations of an indictment for forgery, that the essence of the alleged crime is the intent of the defendant to defraud. It would be straining after mercy, if a defendant who had done all he could to make an instrument in writing, such as a witness pay certificate, appear to be valid as a claim against Abbeville county, by forging the name of the presiding judge thereto, should be allowed to defeat an indictment therefor simply because all the steps which had to be taken by a holder thereof in order to perfect the fraud should not appear to be set forth in the indictment. The case of *State v. Jones*, 1 McM. 230, supports this view. In the case cited, Jones, the defendant, offered to his landlord a check on the Bank of Charleston for \$32, signed by T. Tupper, and payable to Jones as bearer. His landlord, Mr. Harrison, declined to take it. Subsequently the check was found in the trunk of the accused. On trial he was found guilty of forgery, although he had never collected the money on the check, or presented it to the bank for payment. In 9 Enc. Pl. & Prac., at page 561, it is said: "It is not necessary to state how the instrument could have been used for the purpose of fraud. It is enough if it appears from the character of the instrument,

together with the provisions of the statute, that it might have been so used in connection with other facts, real or simulated, either then existing, or with which it was to be afterwards connected." And in a note on page 562 of the same work it is said: "When the instrument is one shown to have legal effect, it is not necessary that it should be shown to be a perfect one." So, too, in the case of *State v. Washington*, supra, it was held that when the defendant forged a receipt for certain interest on the back of state indents, when in fact he had not been paid any such interest, a conviction therefor for forgery should be, and was, supported. The circuit judge did not sustain the demurrer because of the failure to allege that the defendant was clerk of court, because he said an amendment charging such fact could have remedied the defect. Lest the state might feel called upon to amend the indictment in this particular when the case goes back, we will remark that we see no necessity for this being done. The instrument in writing alleged to have been forged is set out in the indictment in words and figures, and in this copy of the instrument in question the name of the clerk of the court appears. This fact is not controverted by the demurrer, but, in addition to all this, the defendant, Bullock, is not indicted as clerk of court, or for forging the name of such clerk, and we see no reason why the office held by the defendant should be set forth. The indictment might as well be required to have set out in it any other office the defendant might happen to hold.

Having passed upon the grounds of appeal presented by the state, we will now pass upon the suggestions of the respondent why the judgment of the circuit judge should be affirmed:

(1) We cannot agree that because a pay certificate for a witness was not in existence when the common law, the act of 1836-37, the act of 1801, the act of 1845, the Revised Statutes of 1872, the General Statutes of 1882, and the Revised Statutes of 1893, set forth the paper writing or writings of which one might be charged with forgery, the forging of this witness pay certificate was not in the contemplation of the law governing forgery. The truth of the whole matter is that the wisdom of the legislature of this state in avoiding the enumeration of the different papers which might be forged, and in using the words "writings or paper writings," is abundantly manifest. These words are sufficiently broad and comprehensive to cover any paper writing or writings.

(2) The paper writing in the indictment is not in the form prescribed by the statute (so says the respondent) and would for that reason be void. We do not think so. There is no form actually prescribed in the statutes of the state for a witness pay certificate. All that is required, as before remarked, is that the presiding judge shall certify to the

services, and the clerk countersign the certificate. This has been done, in effect, in this case.

(3) The paper writing set out in the indictment (so says the respondent) is void because the statute makes no provision and prescribes no form; therefore such ticket would be null and void. We cannot agree to this suggestion of the respondent. The indictment set out in words and figures the paper writing with the forgery of which the defendant (respondent) is charged. It refers to this paper writing as "commonly called a witness pay certificate." This fact is admitted by the demurrer. But, above all, the indictment gives effect to the provisions of the law relating to and governing witness pay certificates.

(4) The respondent suggests that the court of general sessions had no jurisdiction to try the case, because no warrant and affidavit appeared. We cannot allow this suggestion to have any weight with us. The circuit judge passed upon no such question, and the "Cause for Appeal" contains no statement of facts upon which to base it. Independently of this, however, the recent case of *State v. Bowman*, 43 S. C. 108, 20 S. E. 1010, is authority for our position. We have allowed the respondent to review that case, but we are forced to conclude that *State v. Bowman*, supra, was correctly decided, and it is now reaffirmed.

(5) We have already passed upon this suggestion.

It is the judgment of this court that the judgment of the circuit court quashing the indictment herein be reversed, and that the action be remanded to the circuit court for trial.

MCGAHAN et al. v. LOCKETT et al.

(Supreme Court of South Carolina. March 11, 1899.)

INSURANCE POLICY—ASSIGNMENT OF PROCEEDS—
DRAFTS ON ASSIGNEE—REVOCATION.

Where a debtor assigned to a creditor his insurance under a fire policy, in trust to pay his debt, and to hold the balance subject to his order, orders made in good faith and for value are binding, though they are not accepted, and are countermanded before the insurance is received.

Appeal from common pleas circuit court of Charleston county; O. W. Buchanan, Judge.

Action of interpleader by T. R. McGahan & Co. against Lockett, Vaughan & Co. and others. A demurrer to the answer of defendant J. O. Griffin was overruled, and the other defendants appeal. Reversed.

Smythe, Lee & Frost, Bulist & Bulist, and Mordecai & Gadsden, for appellants. Bates & Simms, for respondent J. O. Griffin.

POPE, J. There is a single question presented by this appeal: Was the circuit judge in error in overruling the demurrer of defend-

ants to the answer of their co-defendant J. O. Griffin because it failed to state facts sufficient to constitute a defense? To apprehend the contention a brief recital of the facts set up in the pleadings will be necessary. The complaint set forth, substantially, that one J. O. Griffin had a policy for \$2,400 on his stock of goods at Ulmar, S. C., which were destroyed by fire, and, being indebted to the firm of T. R. McGahan & Co. for \$724.77, he assigned such policy to said firm upon the trust that the proceeds of said policy should be applied, first, to the payment of said sum of \$724.77, and the balance thereof should be held by said McGahan & Co. subject to the order of said Griffin; that there remained in the hands of McGahan & Co., of said proceeds, after the payment of their debt, the sum of \$1,475.23; that the said J. O. Griffin drew orders in writing on said McGahan & Co., to be paid out of said proceeds of the insurance policy when collected, in favor of Lockett, Vaughan & Co., A. Ehrlich & Bro., M. Drake & Son, Edmund T. Brown Company, Brown-Evans Company, F. W. Wagener & Co., Drake-Inness-Green Shoe Company, and Marshall, Wescoat & Co.; that these orders were each presented to McGahan & Co., but were not accepted by them in writing; that subsequent to making the aforesaid drafts or orders, and before McGahan & Co. had collected the proceeds of the fire insurance policy, the said J. O. Griffin countermanded the payment of said drafts, and notified McGahan & Co. not to pay the same; that the parties who held the aforesaid drafts drawn by J. O. Griffin on McGahan & Co. began action against said McGahan & Co. to collect their respective drafts drawn by J. O. Griffin; that McGahan & Co., as plaintiffs, now bring this action against said J. O. Griffin and all of the holders of drafts drawn by J. O. Griffin upon said McGahan & Co., as defendants, to restrain their actions against said McGahan & Co., and that the defendants be required to interplead together concerning their respective claims to said \$1,475.23; and that some party be appointed to hold said fund pending such litigation. The answers of the defendants except Griffin set up their claims as bona fide holders for value of their respective drafts. The defendant J. O. Griffin answered as follows: "First, that he admits the allegations set forth and contained in the complaint, but alleges that he is entitled to the said sum of \$1,475.23, and that the plaintiff should have paid the same over to him when the same was demanded; the said orders or drafts having never been accepted, and having been countermanded before the said fund came into the hands of the plaintiffs" (McGahan & Co.). The following is a copy of the draft drawn by J. O. Griffin upon McGahan & Co. in favor of Lockett, Vaughan & Co. (the other drafts are similar in form): "\$109.34. Ulmar, S. C., January 23, 1897. Messrs. T. R. McGahan & Co., Charleston, S. C.: Please pay to Messrs.

Lockett, Vaughan & Co., of Winston, N. C. one hundred and nine ²⁴/₁₀₀ dollars, out of my insurance policy that is assigned to you. J. O. Griffin." Judge Buchanan, who heard the demurrer on the 28th April, 1898, passed a short order, dismissing and overruling the demurrer, without assigning any reasons therefor. No other questions are involved in this appeal except the appeal from said order overruling the demurrer. The following are the grounds of appeal: "(1) Because it is respectfully submitted that his honor erred in not holding that the drafts referred to in the pleading were valid assignments of the fund in question, and could not have been recalled or countermanded by the defendant J. O. Griffin without good cause, which cause should have been alleged in the answer, so as to be duly proved in the case. (2) Because his honor erred in not sustaining the demurrer to the answer of J. O. Griffin, in that such answer failed to show any right in said Griffin to countermand or recall the said drafts." We think the grounds of appeal are well taken. The principles set forth in the cases of *Fogarties v. Bank*, 12 Rich. Law, 518, *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 19 S. E. 502, and *Knobeloch v. Bank*, 43 S. C. 242, 21 S. E. 13, are practically decisive of this question. When the respondent J. O. Griffin, placed in the hands of McGahan & Co. this sum of \$1,475.23, to be paid out by them on his order, and he gave drafts to his co-defendants upon said McGahan & Co., to be paid out of this fund of \$1,475.23, which was the proceeds in their hands of his insurance policy, it was beyond his power, except for fraud, or want of value, or similar grounds, to prevent the holders for value of his drafts recovering the same from McGahan & Co. It was just the same as if J. O. Griffin had deposited to his own credit the sum of \$1,475.23 in some bank, and had given his co-defendants checks upon said bank. As was said by Mr. Justice Johnson in the case of *Fogarties v. Bank*, supra: "This case [*Weston v. Barker*, 12 Johns. 276] stands upon a principle that, when fully understood and appreciated, is sufficient for the case before us; and it is this: that when one, in consideration of money to come into his hands, promises to disburse that money as he shall be ordered by him from whom he receives it, he thereby creates a contract negotiable in its very nature, which puts him in privity with whomsoever in the world he may be ordered to make payment to, so that the promise is, according to the law merchant, made to that person, and he is bound by his promises to pay him." The quotation from the opinion in the case of *Weston v. Barker*, supra, as found on page 529 of *Fogarties v. Bank*, supra, is squarely to the same effect. The answer demurred to because the facts alleged therein are not sufficient to constitute a defense sets up no reason why J. O. Griffin denied any legal effect to the drafts drawn by him in favor of his co-defendants on Mc-

Gahan & Co. to be paid out of the fund realized from his insurance policy which he had assigned to said McGahan & Co., except that such drafts had not been accepted in writing by said McGahan & Co. before he notified them not to pay. The drawee, in his answer, does not deny he drew the drafts for value, but simply because he has changed his mind the fund must not be paid to the holders of his drafts. The moment the holders of these drafts notified McGahan & Co. of their drafts, it was in law an appropriation by J. O. Griffin of so much of the money of his in the hands, or to come into the hands, of T. R. McGahan & Co. as would be necessary to pay such drafts. The circuit judge was in error. It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court with directions to sustain said demurrer to the answer of J. O. Griffin.

SLOAN et al. v. PELZER et al.

(Supreme Court of South Carolina. March 7, 1899.)

CONTRACTS—CONSIDERATION—EQUITABLE ISSUES—MISTAKE—TRIAL—JURY—EVIDENCE—NONSUIT—WITNESSES—ESTOPPEL—ATTORNEY AND CLIENT—APPEAL—DISCRETION—EXCEPTIONS—HARMLESS ERROR.

1. Defendant denied that a contract sued on was the agreement entered into, and alleged that the oral agreement was reduced to writing in his absence, and that he signed it without reading, on the faith and assurance that it correctly embodied the agreement reached. *Held*, that this did not raise an equitable issue triable by the court.

2. Permitting a witness to be asked, to test his memory, whether he had not signed a bond in another suit, and then denied it, was not an abuse of the court's discretion; the motive of the witness not being impugned.

3. Where one party is put on the stand as a witness for the other, he may be questioned as to any material issue in the case.

4. Where a witness, having testified that he had wired his firm's attorney at defendant's request and on the firm's authority, was asked the terms of the telegram defendant had asked him to send, it was proper for him, by reference to the telegram, to refresh his memory as to its contents, though the telegram itself was not admitted.

5. To prove that a party to a contract knew its contents and was bound by it, evidence was competent that several months after its execution he directed a telegram to the other party, to the effect that it bound himself and the others who signed it to make good the account referred to therein.

6. Owing to a contention as to whether a claim was secured by a contract, one of the parties refused to assign, according to its terms, a bid made by him in pursuance of it, but finally assigned the bid on the assurance of the other party that he would make good his claim. *Held*, that the latter became estopped to dispute the claim.

7. Where an attorney, refusing to assign certain bids because a contract to secure his clients' claim had not been carried out, withdrew his refusal on receipt of a telegram from his clients, his testimony that he assigned the bids because he was informed by his clients that they were satisfied was not incompetent,

as relating to transactions between attorney and client.

8. An exception that the court erred in holding that there was any competent evidence that a contract alleged in the complaint existed is too general.

9. Error in excluding a letter was harmless, where the witness testified to its contents.

10. Permitting a witness to return and reiterate his former testimony after hearing it contradicted is within the court's discretion.

11. Exceptions assailing the reasons given by the court for a ruling will not be considered, the question on review being whether the ruling was correct.

12. Under rule 18 of the circuit court, requiring the grounds for nonsuit to be stated in the motion therefor, grounds not so stated will not be considered.

13. A ground of nonsuit, that the "written instrument sued on" imposes no obligation on defendant to make good plaintiff's claim, is not tenable, where the action was also based on an additional parol agreement supplementing the written agreement, and there was some testimony tending to show the obligation.

14. Where parties about to buy in parcels of land at judicial sale were anxious that the aggregate should not exceed a certain sum, and a lienor's attorney insisted that one tract should realize sufficient to pay his client's lien, there was sufficient consideration for a contract by the purchasers to guaranty the lienor's deficiency if he should agree to the amount to be bid.

15. The rule that the construction of a writing is for the court was not violated where the court charged that the jury was to determine from the evidence showing the parol portion of the contract what its additional terms were.

16. Where the question whether parties to a contract bound themselves jointly or severally could be ascertained only from the parol portion of the contract, it was for the jury.

17. Where two or more jointly contract with another, a mistake of one of them does not relieve any of the joint contractors, as against the other party, from performance, the element of mutuality being wanting.

18. While the unwritten part of a contract only partly in writing may be proved by parol, it cannot thus be shown that the real contract was different from the written portion, except in a suit to rescind.

19. Exceptions to requested instructions by number, not showing what the instructions were, do not bring them before the court for consideration.

20. Where one negligently or inadvertently signed a contract without reading it, and the other party thereto released security on the strength of it, the former is estopped to avail himself of a mistake as to its terms.

21. Refusal to charge requests will not be reviewed where the "case" fails to show that they were submitted to the trial court as set out in the exceptions.

22. A finding that co-obligors were never liable on the obligation is not a "release" therefrom discharging the other obligors.

23. Where neither the "case" nor exceptions show that a motion non obstante veredicto was made, such a judgment cannot be granted on appeal.

Appeal from common pleas circuit court of York county; J. C. Klugh, Judge.

Action by J. B. E. Sloan & Son against F. J. Pelzer, W. A. Courtenay, and others. There was a judgment for plaintiffs, and defendant Courtenay appeals. Affirmed.

The following is the answer of the defendant William A. Courtenay:

"The defendant William A. Courtenay, answering the complaint herein, by Le Roy F.

Youmans, his attorney, alleges: (1) That he denies that, under the decrees mentioned in the second paragraph of the complaint, the plaintiffs had the lien therein alleged. (2) That he did sign for himself and F. J. Pelzer a written paper on July 5, 1892, but that he did so under the following circumstances: That he, for himself and said Pelzer, agreed verbally with C. E. Spencer, his co-defendants, and others interested, that the said Spencer should bid off for the defendants the tracts to be sold under said decrees, for \$30,000, and assign this bid under their direction; that after discussion as to what valuation should, in said bid, be fixed on the several tracts (a matter in which he and Pelzer were not interested, provided the aggregate valuations did not exceed \$30,000), it was agreed that Henrietta C. Davie was to take the Home tract at \$3,500; that, as to the valuation to be fixed in said bid as to the Water-Power tract, said Spencer, after making some calculations as to the amount which would protect the claims of his clients, the plaintiffs, for whom he acted, said that \$13,500, more or less, would protect them; that, upon this, defendant objecting to this indefiniteness of amount, and insisting that it should be made definite, said Spencer said that this sum would be in \$100 of the exact amount of the plaintiffs' claim, and that this valuation was assented to; that said Spencer was to put this agreement in writing, at which time defendant was called away; that upon his return, being called upon by said Spencer to sign this agreement in writing, this defendant expressed his dislike to signing the paper without reading it, but never doubting that the written paper was the said agreement put in writing, and on the faith, confidence, and assurance that it was, which he had every reason to believe, and no reason whatever to doubt, and being in great haste to catch the railroad train, which was about to leave, he did sign for himself and said Pelzer the said paper so presented to him by the said Spencer, who at the same time assured him that he (Spencer) would send a copy of said paper to himself and said Pelzer, each, to Charleston by the first mail. (3) That he never would have signed said paper, but on the faith, confidence, and assurance that what it contained was the said verbal agreement, and that he never intended to enter into any such agreement as the paper he signed is alleged to be, or to sign any paper such as the paper he signed is alleged to be, or having the effect such paper is alleged to have. (4) This defendant denies that he and his co-defendants signed any paper by which they obligated themselves to make good the claims of plaintiffs set forth in the complaint, and denies that they were the parties to make said claims good, and demands production of the said paper. (5) That this defendant never heard at the time anything of any claim of Jones and Robertson being assigned to plaintiffs, which they were to make good, or, indeed, of

any such claim at all,—the same not having even been mentioned in his hearing,—and first heard of it and plaintiffs' claim in suit long afterwards, from said Spencer, to his great surprise. (6) That he denies ever having incurred any liability in connection with said sale, save as he has heretofore set out, and alleges that he has fully discharged the same, and, from the time of being first informed of the liability alleged, has always repudiated it. (7) This defendant does not know what may have taken place between the other parties in interest in the premises during his absence above mentioned, but denies that he ever agreed, verbally or in writing, to make good the claims of plaintiffs,—an agreement which he avers would be entirely inconsistent with the verbal agreement made, which has been carried into execution, and would, besides, be void for want of any consideration moving to him. Wherefore this defendant demands that the complaint be dismissed, at least as to him. Le Roy F. Youmans, Attorney for W. A. Courtenay."

The following is the judge's charge:

"Mr. Foreman and Gentlemen of the Jury: This is an action by J. B. E. Sloan & Son against Francis J. Pelzer, William A. Courtenay, John R. London, Thomas C. Robertson, and Allen Jones, in which the plaintiffs seek to recover from these defendants an amount of money which they allege is due to them upon a contract which they also allege that these defendants entered into, whereby they bound themselves to pay a sum of money to the plaintiffs. The defendants all admit that they did sign some paper. The three defendants, answering in one answer (Messrs. London, Robertson, and Jones), say,—the purport of which they don't attempt to set forth in their answer,—but they claim that they have paid all the liability which accrued to them upon such paper, upon such agreement. The defendant William A. Courtenay also answers, and admits that he, for himself and Mr. Pelzer, entered into an agreement; and he alleges that he has paid so much liability as has been brought upon him in consequence of his signing that paper for himself and his co-defendant Pelzer. He furthermore alleges that the agreement which is set forth in the complaint, and which the plaintiffs insist upon, is not the agreement which he entered into, and, if the writing which was signed represents the contract as relied upon by the plaintiffs, that he is not bound by that writing, because of his having signed it under a misapprehension as to the facts,—as to the contents of the instrument. Now, the matter is principally one for you to determine,—first of all, whether there was a contract between the plaintiffs and the defendants, and, if so, what were the terms of the contract, and whether or not those terms have been complied with. The evidence of the contract is partly a written instrument, which is produced, and which, it is claimed, is not the complete contract, and partly oral

testimony given in court, and from which the jury is expected, and from which it is your duty, to supply such parts of the contract as do not appear in the written instrument. The plaintiffs, in announcing their position through their counsel, claim that the written instrument contains the entire contract, except as to the amount—the sum of money—which they claim these parties agreed to pay. I think that, Mr. Hart, is the position which was taken by the plaintiffs. I would be glad to be corrected, if I am stating incorrectly the position of the plaintiffs.

“Mr. Hart: We rely more especially on the contract as stated in the complaint. We find from Mr. Wilson's argument, for example, that he claims that that contract doesn't say how they would be bound,—jointly or otherwise,—and we may have to go to the testimony for that. We rely on the contract as set up in the complaint, and such proof as we have offered to establish it.

“The Court (continuing): The contract is set up in the complaint, Mr. Foreman and gentlemen of the jury. After reciting the considerations which moved the plaintiffs here, on the one part, which was that their claim against the real estate to be sold at that time be made fully good, and, on the part of the other parties to this suit, in order that they might purchase the Water-Power tract at a price which they considered its value, and not beyond its value, it goes on to recite so much of this written instrument as the plaintiffs claim constitutes a part of the contract upon which this suit is brought, which is that the bid upon this property was to be taken in the name of Mr. Spencer, and held by him, and assigned by him, under the direction of these five defendants, subject to the right of these plaintiffs, Sloan & Son, to have their claims made good. The language of the paper is ‘that their claim be made good, and also the claim of Jones and Robertson, assigned to the said Sloan & Son this day.’ So they held two claims which are mentioned in the contract, and which the contract embraces, and which they had a right to have made good. And the complaint goes on to recite that the parties having the said directions as to the transfer or assignment of the bid, and the parties to make said claims good being the defendants herein (the five defendants whom I have named), and the parties whose claims were to be made good being the plaintiffs here, and being the claims that have been referred to,—the two claims which the plaintiffs held on that day. Now, Mr. Foreman and gentlemen, from the contract itself you are to determine— I mean, from the instrument of writing itself you are to determine so much of the contract as is set forth in it, and from the oral testimony you are to determine what was the amount which these defendants became liable for, and the manner in which they became so liable; that is, whether jointly (each one guarantying the whole

amount) or severally (each one to pay only one-fifth of the whole amount). Now, a contract, any contract, this contract, if it comes up to the legal definition of a contract, must be an agreement entered into by all the parties to it, mutually binding them, upon a valuable consideration, to do or not to do some thing specified in the contract; and, in any contract, the principal question to be inquired after and to be ascertained is the subject-matter,—the thing which is agreed to be done or not to be done. Now, in this undertaking, these parties bound themselves to become liable, to make good,—somebody bound themselves, or the terms of this paper are that somebody was, to make good to Sloan & Son their claims. The terms of the contract itself don't ascertain who are to make those claims good. The jury must determine from the written paper— I have used the word ‘contract’ interchangeably with the ‘written instrument.’ The written instrument doesn't show who the parties are to make those claims good. It is indefinite on that point. Now, the contention of the plaintiffs is that these defendants are the parties who are to make good the claim. If you look only to the written instrument, I charge you that you can't so find, because the instrument itself is open to more than one construction upon that point. It is not explicit, and that fact can only be arrived at by the construction of the contract. It is open to more than one construction,—the written instrument is,—and therefore it is not definite and certain; and you couldn't ascertain the liability of these parties upon that one point from the writing, unless the writing was definite and certain as to that matter.

“Now, the defendant Courtenay relies upon the allegation that he was misled in affixing his name to this instrument. The law upon that matter, Mr. Foreman and gentlemen, is that where two parties deal at arm's length, where there is no relation of trust or confidence between the parties, but they are simply engaged in some business transaction between each other, their interests being each for himself, or ‘adverse,’ as the expression is, and one of them affixes his name to a contract without any deception on the part of the other,—no fraud,—he is bound by it. Each party deals with his eyes open; and, if he allows himself to be mistaken, it is his own fault, not the fault of the party with whom he deals, and he is therefore bound, although he may honestly misunderstand the contract. But if there is a relation of trust, if the one party prepares the writing at the request and under the instructions of the other, and the other party is misled into signing a paper, trusting to the other party to prepare the paper, reposing confidence in his skill, in his good faith in the transaction, and that other party abuses the confidence thus reposed, prepares a different paper from what he was instructed, and from what the other party intrusted him to prepare, and

the other party is induced to sign that paper, believing it to be something else from what it was, different from what he instructed that it should be, he is not bound by his signature, because the signature was obtained unfairly, and in good conscience he couldn't be held liable. Now, you are called upon to determine whether this is a joint liability, or whether each man only bound himself, upon entering into this agreement, to see that these claims were made good, if you conclude that they were the parties who were to make the claims good. Where one authorizes another to act for him in a matter, and the other party acts within the scope of his instructions, he binds the party who so authorizes him to whatever he is authorized to do. If he entered into the contract, he is bound by the contract which his agent makes. But where all the parties are together, and each one acting for himself,—where there is no relation of agency,—then the contract which they enter into is made by each man for himself; and, unless it be necessarily a joint contract from the very subject of the contract itself, then each one is only severally liable. If two or more men make a note promising to pay a sum of money, and each one of those two men signed that note, they bind themselves jointly, unless the terms of the note itself make it plain that they are only severally or jointly and severally liable. But where men enter into some agreement which, from the very nature of the agreement, or from the very subject-matter of the agreement, doesn't constitute each man liable for the whole, but each one, from the intention of the parties, only assumes his own portion of the liability, he is only bound for that portion of the liability which he voluntarily assumes. Now, Mr. Foreman and gentlemen, that is the case, the law of the case, in so far as the court sees that it can aid you by legal principles in arriving at a conclusion in this matter.

"Counsel on both sides have submitted certain propositions of law which they request the court to charge you as applicable to the case, and, in so far as they are applicable, I will read them to you, and charge them.

"These are the plaintiffs' requests to charge: '(1) If the jury believe that the defendant Courtenay knew that the plaintiffs had declined to consent to the assignment of bid until both their claims referred to in the written paper of July 5, 1892, should be made good, and that said paper actually provided for both claims, and that he admitted to plaintiffs that the paper had provided for both claims, and that without such admission the plaintiffs would not have consented to the transfer of the bid, and that the contract has been made out otherwise, then the said defendant is estopped to deny that at the signing he did not understand that both claims were provided for.' I charge you that proposition. The second request to charge is refused, being made with reference to the purchase.

This suit is not against these parties as purchasers, but rather as guarantors of the claim. The third request is also refused. The fourth request is refused, because, with reference to the fourth request, the court confesses that it doesn't understand the bearing which the proposition laid down there has to the facts of the case, referring to the fact of the defendant having parted with the title. I don't see that there is anything in the case upon which that would have any bearing. '(5) A mere mistake must be mutual between the two contracting parties, and, if one only of the parties of the one part—when more than one—makes a mistake, it does not entitle any of the parties of his part to be relieved of the contract as against the other party.' That is true, if the obligation is a joint obligation, and in that sense I so charge you. '(6) That, if the jury find that the agreement was reduced to writing only in part, it was competent to prove the remainder thereof by parol testimony; but it was not competent by parol testimony to prove that the real contract was different from so much thereof as had been reduced to writing, except in a direct proceeding, having for its object the rescission of the supposed contract, and the restoration of the original status of the parties to the alleged agreement.' I charge you that. '(7) If Courtenay signed the agreement negligently or inadvertently, and if Sloan & Son, without knowledge of Courtenay's misunderstanding of the agreement, followed its terms, and released their security against Jones and Robertson, or any other party in interest in the land to be sold, and accepted the agreement as prepared in lieu of their security, then Courtenay could not avail himself of his own mistake.' I charge you that.

"The defendant's requests to charge, in so far as the court considers them applicable, are as follows: '(1) That the real contract of the parties has not been truly reduced to writing makes it unconscientious to enforce the contract in its written form, and is a defensive equity, potent to defeat a suit therefor.' I charge you that, as in substance I have already charged you. '(2) The court will not compel a man specifically to perform a contract which he never intended to enter into, or which he would not have entered into had its true effects been understood.' Subject to the charge which I have already given you as to parties each one dealing for himself, and adversely or opposed to each other's interest. I charge you that. '(3) Where there is apparently a valid written agreement, while in fact, by reason of a mistake of one or all the parties, either no agreement at all has been actually made, since the minds of the parties have failed to meet upon the same matters, or else the written agreement is different in its terms from that which was intended, such written agreement cannot be enforced.' I charge you that. '(4) The execution of a written agreement may be successfully resisted by parol evidence of fraud, accident, surprise.

or mistake, not only as collateral to and independent of the written agreement, but in contradiction of it, as where, from any of these causes, the written agreement does not contain the real terms upon which the parties have agreed, by a party who signs in ignorance of the alteration; and this whether the alteration was made innocently or not.' I charge you that. '(5) The misrepresentation as to the terms of a written instrument sufficient to invalidate it need not be express, but may be implied from the conduct of a party in undertaking to pen the instrument, and then presenting it for execution as if prepared in conformity with the mutual design,'—that is, where one party is intrusted, where confidence is reposed and made at the request of another, a party prepares the instrument; but, where the party is dealing at arm's length, the mere fact of one of them writing the instrument which contains the agreement would not of itself be sufficient to sustain the charge that he misled the other party by what he had written; and, subject to that modification and to the general charge which has already been given you, I charge you that. '(6) When the terms of a written instrument are ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the court may upon that sole ground refuse to enforce the agreement.' I charge you that, as I have already substantially charged you. The seventh proposition is refused. The eighth proposition is declined. The ninth is that the court charge the law as to what a contract is, and how one is bound thereby. The court has already charged that. The tenth is a charge known as the 'Statute of Frauds.' The statute of frauds, Mr. Foreman and gentlemen, so far as it has any application in this case, is to the effect that no agreement on the part of one person to stand or guaranty or to pay the debt of another is binding, unless the agreement is reduced to writing, or some note or memorandum of the agreement is reduced to writing, and signed by the party who so guaranties or undertakes to pay it, and who is sought to be charged. Now, the contract in this case has been partly reduced to writing, and, unless the jury can find from the writing that these defendants did assume to pay the debt of another, the claims of Sloan & Son (both their original claim and that assigned them by Jones and Robertson) were claims against some other parties, not against these defendants; and unless the jury are satisfied that these defendants did enter into a written promise to pay these two claims, or to make them good,—to pay such part of it as might not be paid out of the fund,—then the statute of frauds would apply, and any agreement other than the written agreement, or an agreement of which the memorandum was written and signed, would be void. I take it that is what counsel desires, in asking that charge with reference to the statute of frauds.

"The defendants present an additional request: 'That the written instrument on which this action is brought does not impose an obligation upon the purchasers to make good the claims of Sloan & Son, and the claim transferred that day to Sloan & Son by Jones and Robertson.' It does not, except by construction, and, as the court has already charged you, the writing is susceptible of more than one construction on that matter; and therefore the court charges you this proposition: that it does not specifically and definitely fix the obligation upon these defendants. And, as a necessary inference from that charge, the additional proposition is added, that it didn't impose such an obligation upon Courtenay. I charge you that, also.

"Now, Mr. Foreman and gentlemen, as you have already been charged, you are to ascertain, first of all, whether there is an agreement, what that agreement is, what liabilities it imposes, if any at all, upon these defendants; whether or not the defendants have met the liability so imposed, and, if not, then what is the additional liability upon them for which these plaintiffs are entitled to your verdict. If you conclude that the plaintiffs are entitled to recover, it is admitted that the amount which they could recover, that the greatest amount, under the facts as they exist at the time of this trial, would be the sum of \$261 and some cents,—seven cents, I think,—with interest from the 3d day of November, 1892, at the rate of seven per cent. per annum. So, if you conclude that the plaintiffs are entitled to recover, then your verdict will be, 'We find for the plaintiffs' so many dollars (whatever amount you shall ascertain that sum to be, including the interest on it), and write the amount in words, not in figures, Mr. Foreman. If you conclude that the plaintiffs are not entitled to recover, then your verdict will be, 'We find for the defendant.' Write the verdict on the complaint, Mr. Foreman, and sign your name to it, writing the word 'Foreman' after it.

"Mr. Youmans: I am obliged to ask your honor to charge on this point: If the jury find that this defense of Courtenay individually, relying upon the written agreement not containing the verbal agreement as made by him, they should find in his favor.

"Mr. Wilson: I shall also ask your honor that you will instruct the jury that, if they conclude that this was an individual agreement that each man pay one-fifth, they might find against Courtenay and in favor of my clients.

"The Court: The defendant Courtenay, as you have caught from the testimony in the case, as well as the argument, claims that he is not bound by this contract, for reasons which have been stated; and, if you should conclude that he is not bound, it would be competent for you, while you found in his favor, still to find a verdict for the amount against his co-defendants, under the view of this transaction which the court takes, and upon which I

have already charged you. On the other hand, if you conclude that his special defense that he was misled, or that this was not the agreement which he made, isn't sustained, but that he is bound for one-fifth of the amount, then it would be competent for you to find a verdict against him for that amount, it being conceded that one-fifth of the whole portion of this liability remains unpaid now, and that he is the only party who has not paid. It would be competent for you to find a verdict against him for that amount, and in favor of the other defendants in the case, and the verdict would be: 'We find for the plaintiffs against the defendant William A. Courtenay' so many dollars. Or, if you conclude that he was not bound, if you find a verdict against the other defendants, and not against him, your verdict would be: 'We find against these other defendants' (naming them) so many dollars. 'We find for the plaintiffs [so many dollars] against the other defendants' (whoever your verdict was against). You will take the record, Mr. Foreman and gentlemen. Write the verdict on the complaint.

"The Foreman: I wish your honor would instruct us again on the form of the verdict.

"The Court: Gentlemen of the Jury: The foreman desires that the court instruct him more explicitly as to the form of the verdict. The court has already charged you that it is competent to find a verdict against Courtenay, and in favor of the other defendants, excluding them, or it is competent for you to find a verdict excluding Mr. Courtenay, and against all the other defendants. Now, if you should conclude that the plaintiffs are entitled to recover, and recover against all five of these parties, your verdict will be, 'We find for the plaintiffs' (so many dollars). If you conclude that they are entitled to recover from Mr. Courtenay, and not from the others, you would say, 'We find for the plaintiffs [so many dollars] against Wm. A. Courtenay.' If you conclude that they are entitled to recover against the other defendants, and not against Wm. A. Courtenay, you would say, 'We find for the plaintiffs [so many dollars] against Francis J. Pelzer, John R. London, T. C. Robertson, and Allen Jones.' If you conclude that the plaintiffs are not entitled to recover at all, your verdict will be, 'We find for the defendants.' You will write the verdict on the complaint, Mr. Foreman, as I have already instructed you."

The following are the exceptions of appellant:

"(1) To his honor's refusal of the motion to transfer the cause from calendar 1 to calendar 2. (2) And of the motion that the cause be tried by the court. (3) And of the motion that the equitable defense of Courtenay be tried by the court. (4) To his honor's holdings (a) that by the agreement sued on, the subject of the action, the plaintiffs were not to compete in the bidding, provided their claim was made good for the full amount; (b) that there was a promise by somebody

(whoever made the promise) to see that the claim of plaintiffs was paid; (c) that said promise was a money demand; (d) that the defendant Courtenay did not set up an equitable defense; (e) that the defense set up by Courtenay, and claimed to be an equitable one, was similar to the defenses met with every day in suits upon a money demand,—of failure of consideration, or facts rendering the contract void; (f) that the cause naturally and by common practice and de jure was triable by a jury, and was properly on calendar 1; (g) that neither the cause, nor any portion of it, nor any issue in it, was triable by the court, or removable to calendar 2. (5) That his honor erred in holding competent, over objection made by counsel of defendant Courtenay, plaintiffs' questions to the witness Courtenay, whom plaintiffs had put upon the stand to testify, 'Didn't you sign a bond in the McCrady case, and say that you had never signed such a bond?' and afterwards deny that you had signed it?' 'Did you sign a bond, and afterwards say you had not signed it?' 'State whether or not you said that you had signed a bond, or whether you said that you had not.' (6) That his honor erred in ruling that the defendant Courtenay had, while the plaintiffs' testimony in chief was being taken, already given his testimony in behalf of his own defense. (7) And in ruling that it was competent for plaintiffs to reply to this testimony by showing that Courtenay did at some other time understand the agreement. (8) And in ruling that it was competent to prove by the witness Tucker that the defendant Courtenay made a declaration, months after the execution of the written agreement, that he then knew of it, and knew of its contents. (9) And in allowing the witness Tucker to testify, by refreshing his memory from the evidence (documentary evidence), that defendant Courtenay asked witness, months after the execution of the written agreement, that a telegram be sent Spencer, to the effect that the paper Spencer then held bound himself, and others who signed it, to make good the account of J. E. B. Sloan & Son. (10) And in allowing the same witness to testify that this account was for the indebtedness of Jones and Robertson to plaintiffs. (11) And in allowing the witness Spencer to testify, against objection, when he withdrew his refusal to make the assignment, to make the transfer of the bid, and what caused him to do it, and allowing the answer thereto which the witness gave. (12) And in allowing the witness to testify that he received a satisfactory answer from his clients, Sloan & Son. (13) And in ruling that this testimony was not as to transactions between witness and his clients. (14) To his honor's overruling the motion for nonsuit. (15) To his honor's ruling that the meaning of the written agreement is that somebody was to make good the claims of plaintiffs. (16) To his honor's ruling that the question as to who was to make good the claims of

plaintiffs is a question which must be submitted to the jury. (17) To his honor's deciding a question of fact that evidently without the water power the defendants did not care for the other land. (18) To his honor's deciding that the contract, the alleged contract, if it be a contract, is based upon a sufficient consideration. (19) Because his honor, while correctly holding that the transaction of 5th July, 1892, the subject of the suit, and on which it is brought, did not have the mutuality necessary to constitute this into a contract, erred in holding that there was other evidence tending to show that subsequently, months after this, the minds of the parties came together. (20) That his honor erred in holding that, however slight that evidence might be, it is a question which must be determined by the jury, and not by the court. (21) That his honor erred in holding that, under that view, the matter must be submitted to the jury upon the evidence which had been offered. (22) That his honor erred in receiving the evidence stated in exceptions 19 and 20. (23) That his honor erred in holding that there was any competent evidence tending to show that the contract which is alleged in the complaint existed. (24) That having decided that the transaction of July 5, 1892, imposed no obligation upon the defendants to make good the claims of plaintiffs, his honor erred in not granting a nonsuit. (25) That his honor erred in not receiving in evidence the letter of Pelzer to Courtenay, October 9, 1897. (26) That his honor erred in allowing the witnesses Tucker and Sloan to repeat, against objection, when plaintiffs were examining in reply, after defendants' testimony had closed, the testimony which they had given while plaintiffs were examining their witnesses in chief. (27) That his honor erred in charging the jury: (a) That the matter was principally one for them to determine. (b) And that they must determine whether there was a contract between plaintiffs and defendants. (c) And, if there was a contract, what were its terms. (d) And that the jury must supply such parts of the contract as do not appear in the written instrument. (e) And that the language of the paper was that 'the claim of plaintiffs be made good,' etc., whereas its language is, 'subject to their right that their claim be made good,' etc. (f) And that the jury was to determine from the oral testimony what was the amount which these defendants became liable for, and the manner in which they so became liable; that is, whether jointly (each one guarantying the whole amount) or severally (each one to pay only one-fifth of that amount). (g) And that this contract, if it comes up to the legal definition of a contract, must, etc. (h) And that in this undertaking these parties bound themselves to become liable to make good. Somebody bound themselves, or the terms of this paper are that somebody was to make good to Sloan & Son their claims. (i) And that 'the terms of the contract itself don't ascertain

who are to make those claims good. The jury must determine, from the written paper. I have used the word "contract" interchangeably with the "written instrument." The written instrument don't show who the parties are to make these claims good. It is indefinite on that point. Now, the contention of the plaintiffs is that these defendants are the parties who are to make good the claim. If you look only to the written instrument, I charge you that you can't so find, because the instrument itself is open to more than one construction upon that point. It is not explicit, and that fact can only be arrived at by the construction of the contract. It is open to more than one construction,—the written instrument is,—and therefore it is not definite and certain; and you couldn't ascertain the liability of these parties upon that one point from the writing, unless the writing was definite and certain as to that matter.' (j) And that the jury was called upon to ascertain whether this is a joint liability, or whether each man only bound himself, upon entering into this agreement, to see that these claims were made good, 'if you conclude that they were the parties who were to make the claims good.' (k) And that the fifth request of plaintiffs is true, if the obligation is a joint obligation, to wit: 'A mere mistake must be mutual between the two contracting parties, and, if one only of the parties of the one part,—when more than one makes a mistake,—it does not entitle any of the parties of his part to be relieved of the contract as against the other party.' (l) And in charging plaintiffs' sixth request: 'That, if the jury find that the agreement was reduced to writing only in part, it was competent to prove the remainder thereof by parol testimony; but it was not competent by parol testimony to prove that the real contract was different from so much thereof as had been reduced to writing, except in a direct proceeding, having for its object the rescission of the supposed contract, and the restoration of original status of the parties to the alleged agreement.' (m) In charging plaintiffs' first request. (n) In charging plaintiffs' seventh request. (28) That his honor erred in refusing to charge: (a) Defendant Courtenay's seventh request: 'One is not chargeable with negligence for not using that excess of care which refuses to take anything on trust that is susceptible of verification. Such a principle would impede the transaction of business, which a reasonable confidence promotes.' (b) And defendant Courtenay's eighth request: 'The negligence which will preclude a party from avoiding a written instrument to which his signature is affixed, on the ground of fraud, accident, mistake, or surprise, must amount to the violation of a positive legal duty.' (29) That his honor erred in reiterating to the jury in his charge that they were to ascertain, first of all, whether there was any agreement, what that agreement is, what liabilities it imposes, if any at all, upon the defendants.

(30) That his honor erred in charging the jury that it was competent for them to find a verdict against Courtenay alone, and in favor of the other defendants. (31) That in this action against five defendants, as bound jointly only by a joint obligation, a verdict against the defendant Courtenay alone is illegal, and cannot be permitted to stand. (32) That the judgment is illegal, and cannot be permitted to stand, for these reasons, in addition to those set forth above: (a) That, the judge not having decided upon the equitable defense set up by the defendant Courtenay, no judgment can be lawfully entered up against him. (b) That, the complaint charging only a joint liability against the five defendants, a judgment cannot be lawfully entered against the defendant Courtenay alone. (c) That, the four other defendants having been released, the defendant Courtenay is also released."

Le Roy F. Youmans, for appellants. Witherspoon & Spencer and Geo. W. S. Hart, for respondents.

McIVER, C. J. The plaintiffs bring this action to recover from the defendants a specified amount, claimed to be due under a contract, a part of which is in writing, supplemented by certain parol testimony set out in the "case." The written instrument relied on as a part of said contract reads as follows:

"Chester, S. C., 5th July, 1892. Re Mary F. McCrady vs. Allen Jones et al. With the consent and at the request of all the counsel in this cause, I, the undersigned, agree to bid off the lands as follows: (1) The Water-Power tract, 544 acres, at \$13,578. (2) The balance of the lands, less the House tract, of 562 acres (to be sold together), at \$12,922. These two bids to be assigned under the direction of F. J. Pelzer, W. A. Courtenay, J. R. London, T. C. Robertson, and Allen Jones, the same being made for their benefit, but subject to the right of J. B. E. Sloan & Son that their claim be made good, and also that of Jones and Robertson, assigned to the said Sloan & Son this day. (3) The House tract, of 562 acres, No. 14 on plat, at \$3,500. This bid to be assigned to Mrs. Henrietta C. Davie, the same being made for her benefit. It being understood and agreed by and between all parties that, if any of said lands should be run up above the said figures, the surplus is to go to the party or parties for whose benefit the bids are made. [Signed] C. E. Spencer.

"We consent. [Signed] Edward McCrady, Jr. T. W. Bacot, Attorney Mrs. Henrietta C. Davie. C. E. Spencer. W. B. Wilson, Jr. William A. Courtenay, and for F. J. Pelzer. Jno. R. London. T. C. Robertson. Allen Jones."

The parol evidence relied on to supplement the agreement evidenced by the written instrument above copied was as to what occurred at a conference of the parties, which will hereinafter be more particularly referred to, which was held on the day of sale,

and just before the sale, culminating in the signing of the said written instrument. The land was sold on the 5th of July, 1892, and bid off by Mr. Spencer, in accordance with the terms of the written instrument above set forth. Matters remained in this condition until the 3d of November, 1892, when Mr. Spencer, as the attorney of Sloan & Son, received from the clerk of the court, who had made the sale, one-fifth of the net proceeds of the sale of the Water-Power tract, and applied the same to the two claims mentioned in the written instrument aforesaid, held by him as attorney for Sloan & Son, leaving a balance due on said claims amounting at that date to \$1,305.35. Subsequently, and before the commencement of the action, the defendants London, Robertson, and Jones each paid to Spencer one-fifth of said balance, leaving a balance of \$522.14; and this action was brought to recover that balance, with interest thereon from 3d of November, 1892. But subsequent to the commencement of this action Mr. Pelzer paid up one half of said balance, and judgment was in fact claimed only for the other half, to wit, the sum of \$261.07, with interest from the 3d of November, 1892. On the 28th of November, 1892, Mr. Spencer wrote appellant, stating that he had received from the clerk of the court one-fifth of the net proceeds of the sale of the Water-Power tract, which left a deficiency due on the claims of Sloan & Son of \$1,305.35, and asking him for payment of one-fifth of said deficiency, and also one-fifth for Pelzer. Some correspondence ensued between them, in which appellant denied any liability for said sum, but expressed a willingness to pay one-fifth of the deficiency mentioned in the conference on the day of sale,—some one or two hundred dollars,—and inclosed his check to cover both his and Mr. Pelzer's portion of such deficiency, which, however, Mr. Spencer declined to use, as it was sent with an accompanying denial of any further liability. The position taken by appellant is fully and clearly stated in his answer, and, as that answer will be incorporated in the report of this case, we need not undertake to state it here, further than to say that the appellant contends that in the verbal agreement, which he supposed was set out in the written instrument, which he signed without reading it, the agreement was that the defendants would make up any deficiency in the larger claim held by Sloan & Son (the only one of which he had heard), if one-fifth of the net proceeds of the sale would not be sufficient to pay the claim, provided such deficiency would not amount to more than \$100, and that he never did agree to pay anything on the claim of Jones and Robertson, which was assigned to plaintiffs on the day of sale, as he knew nothing about it, and had never heard of it until after this controversy arose. Subsequently, Mr. Spencer, by the written directions of the defendants, assigned his bid to the appellant,

to whom the clerk made titles. This Mr. Spencer says he did because he had heard from plaintiffs that they were satisfied that he should do so, which probably refers to a telegram sent by Sloan & Son to Spencer, which will be hereinafter more particularly referred to. The appellant persisting in his refusal to comply with the contract, as alleged by plaintiffs, upon the ground that he had never entered into any such contract, this action was commenced on the 30th of September, 1897, and came on for trial before his honor, Judge Klugh, and a jury, at spring term, 1898. After the pleadings were read, counsel for appellant moved to transfer the case from calendar 1 to calendar 2, upon the ground that the answer of appellant set up an equitable defense, properly triable by the court, and not by the jury. This motion was refused, to which exceptions were duly taken. The plaintiffs then proceeded to offer testimony in support of their claim, and at the close of their testimony counsel for defendants moved for a nonsuit upon the grounds "(1) that the written instrument sued upon imposes no obligation upon the purchasers to make good the claims of Sloan & Son; (2) that there is no testimony whatever showing any consideration whatever of the purchasers for assuming such obligation; (3) that there is no sufficient evidence afforded of the plaintiffs' case, as made, to warrant the issues being referred to the jury." The motion for a nonsuit was refused, and the defendants proceeded to offer their testimony, and at the close of all the testimony the circuit judge charged the jury as set out in the "case," who returned a verdict in the following form: "We find for the plaintiffs, against William A. Courtenay, three hundred and sixty dollars and 57/100," being the said sum of \$261.07, with interest from the 3d of November, 1892, upon which verdict judgment was entered against Mr. Courtenay alone; and from this judgment he appeals, upon the 32 exceptions set out in the record. For a full understanding of this case as made by this appeal, the reporter will set out in his report of the case a copy of Mr. Courtenay's answer, a copy of the judge's charge, and a copy of the exceptions.

The exceptions are numerous, some of them divided into several subdivisions, and, instead of considering them serialim, we propose to consider the several questions which we understand these exceptions are intended to raise. These questions may be stated, in a general way, as follows: (1) Whether there was error in holding that the case was properly triable by a jury; (2) whether there was error in any of the rulings as to the admissibility of testimony; (3) whether there was error in refusing the motion for a nonsuit; (4) whether there was any error in the charge to the jury, or in refusal to charge certain requests; (5) whether there was error in entering judgment against Courtenay alone.

Before proceeding to consider these ques-

tions, it may be well to give some account of the transaction out of which this controversy arose. While there is a direct conflict in the testimony as to some of the facts, there are others about which there seems to be no dispute. The lands referred to in the written instrument set out in this opinion were ordered to be sold at public outcry by the clerk of the court of common pleas for Chester county (see *McCrary v. Jones*, 36 S. C. 167, 15 S. E. 430); the Water-Power tract to be sold separately, and the remainder of said land to be sold in such parcels "as may be most conducive to the interests of the parties entitled." Accordingly the clerk had the lands, outside of the Water-Power tract and the Home tract, divided into a number of smaller tracts. Before the day of sale a syndicate composed of the five persons named as defendants in this case was formed for the purpose of buying the property at a price not exceeding the sum of \$30,000, with a view to developing the water power. On the day of sale (5th of July, 1892) all of the members of this syndicate, except Mr. Pelzer, who was represented by Mr. Courtenay, together with Mr. Spencer, who represented the plaintiffs, as creditors of one of the parties interested in the lands, Mr. Wilson, who represented certain other creditors, Mr. Bacot, who represented Mrs. Henrietta C. Davie, and Mr. McCrary, who, as we understand it, represented his wife's interests in the land, met at Chester C. H., where the sale was to be made, and had a conference as to how the sale should be conducted. At that conference it appeared that Mrs. Henrietta C. Davie desired to purchase the Home tract, and that the syndicate above mentioned wanted the Water-Power tract and lands adjoining, other than the Home tract. But as the syndicate were only willing to buy the whole property at a price not exceeding \$30,000, and as Mrs. Davie wanted to buy the Home tract, and as Mr. Spencer was desirous that the Water-Power tract should bring an amount sufficient to pay the claim of plaintiffs, which he represented, and which, as he claimed, was secured by a lien upon a one-fifth interest in that tract, it became necessary to determine what amounts should be bid for the Water-Power tract, the Home tract, and the other lands; the aggregate of these bids being limited to the sum of \$30,000. After very considerable conference, the amounts of these several bids were agreed upon, as stated in the written instrument; but, as Mr. Spencer did not then know the precise amount of the claim of the plaintiffs, he insisted that provision should be made to secure any deficiency that would arise in case the one-fifth of the proceeds of the sale of the Water-Power tract should prove insufficient to satisfy the plaintiffs' claim. Just here there is a direct conflict of testimony, the plaintiffs insisting that the arrangement was that if any such deficiency should arise in the claim of the plaintiffs, including the claim of Jones and Robertson, which had that

morning been assigned to plaintiffs, the defendants would make the same good, while the appellant insists that his understanding was that the defendants should only make good the deficiency to the extent of \$100, the amount that Mr. Spencer estimated that such deficiency would be. These terms being thus agreed upon, as was supposed, Mr. Spencer undertook to embody the same in writing. The appellant, being called off, left the room where the conference took place. The written instrument above copied was prepared in his absence, and upon his return, being in a hurry to catch the train, he, without reading the paper, signed the same for himself and Mr. Pelzer.

We will next proceed to consider the several questions presented by the exceptions, as stated above:

First, was there any error on the part of the circuit judge in holding that this was a case properly triable by a jury?—the contention of the appellant being that in his answer he sets up an equitable defense, which should be passed upon by the court, and not by a jury. We do not think that the answer sets up an equitable defense. There is no claim that the written instrument relied upon by plaintiffs should be reformed, nor is there any claim that the contract as set out by plaintiffs should be rescinded. It is nothing but a simple denial that the contract as set up by plaintiffs is the contract into which appellant entered; and this raises a legal, and not an equitable, issue. The exceptions raising the first question are overruled.

The second question must be considered in subdivisions, as it relates to several rulings by the circuit judge.

(a) It appears that Mr. Courtenay was put upon the stand as a witness by plaintiffs, and during his examination he was asked by plaintiffs, with the avowed object of testing the accuracy of his memory, this question: "Didn't you sign a bond in this McCrady case, and say that you had never signed such a bond?" Objection was interposed by appellant's counsel on the ground of irrelevancy, and the objection was overruled. In all questions as to the irrelevancy of testimony, large discretion must necessarily be vested in the circuit judge, from the very nature of the case; and it must be a very clear case of error harmful to the party interposing the objection which would justify interference by this court. In this case it is very obvious from the testimony that the differences between these parties arose entirely from misunderstanding and difference in recollection, and not from any improper motives. In other words, there was an honest difference between these parties, and hence it does not seem to us to have been irrelevant to test the memory of each. At all events, we see no error of law in overruling the objection. Exception 5 must be overruled. Exception 6, relating to the same matter, cannot be sustained. While it is true that Mr. Courtenay was put upon the stand as plain-

tiffs' witness, that did not deprive either party of the right to ask him any question as to any material issue in the case; and it is unquestionably true that Mr. Courtenay had (as he had a right to do) testified fully as to what occurred in the conference.

(b) Exceptions 7, 8, 9, and 10 seem to relate to certain objections interposed by appellant during the examination of the witness Tucker. This witness was examined for the purpose of showing that some time in October, 1892, a telegram was sent by Sloan & Son to their attorney, Mr. Spencer, at the instance of appellant. This was objected to upon the ground that the contract sued upon having been made on the 5th of July, 1892, what occurred in October following could throw no light upon such contract. The court ruled that the telegram referred to was not competent evidence. The witness was then asked whether Mr. Courtenay instructed him to send the telegram over the signature of Sloan & Son to Mr. Spencer, to which the witness replied, without objection, "Yes, sir." The witness was then asked what Mr. Courtenay told him to put in the telegram. After some colloquy between the court and counsel, the court ruled that, if the witness could state what Mr. Courtenay directed him to put in the telegram, he might state that as a declaration made by Courtenay in reference to the matter in issue, and that the fact that such declaration was made after the making of the alleged contract would not render such declaration incompetent. The witness then proceeded to state that while it is very difficult, after a lapse of six years, to remember every word of a conversation, he clearly recollected that Capt. Courtenay came into the office on the 24th day of October, 1892, adding that he refreshed his memory "from the evidence,—documentary evidence,"—whereupon counsel for appellant objected to his refreshing his memory, saying that he understood the ruling of the court to be that the witness could state what he remembered, to which the court assented; and the witness was directed to proceed to state what he remembered, and testified that appellant requested him to send the telegram, which was to the effect that the paper that Mr. Spencer then had bound himself and others who signed it to make good the account of J. B. E. Sloan & Son. Two points in relation to these objections to the testimony of Mr. Tucker seem to be made by exceptions 7, 8, and 9, one of which is that the circuit judge erred in ruling that the witness might refresh his recollection by referring to the copy of the telegram referred to, but we do not understand that he made any such ruling. On the contrary, he ruled that the telegram itself was incompetent, but that the witness might state from his own memory. If he could, what were the contents of the telegram which he says he sent to Spencer, over the signature of Sloan & Son, at the request of Courtenay. But, if such had been the ruling, we are not prepared to say there would have

been any error in it. The witness having testified that he had sent a telegram to Spencer, at the request of Courtenay, to which he had signed the name of J. B. E. Sloan & Son by the authority of one of the members of that firm, when asked what were the terms of the telegram which Mr. Courtenay had instructed him to send, we see no reason why he should not be permitted to refresh his memory as to the words used in the telegram, after he had testified that he had sent it in accordance with the direction of Mr. Courtenay. The other point of objection is that this matter, which occurred months after the contract sued upon was entered into, was incompetent to show what were the terms of such contract. It seems to us that the testimony was competent in more than one respect. It was competent, as the circuit judge held, as an admission or declaration by appellant as to the terms of the contract. And it is also admissible on the ground of estoppel. There is no doubt of the fact that there was a controversy between Spencer and Courtenay as to the terms of the contract; the former contending that he was not bound to assign the bids which he had made until the claim of Sloan & Son, including the claim of Jones and Robertson, which had been assigned to them on the morning of the sale, was made good, while the latter contended that the said claim of Jones and Robertson was not contemplated in, or provided for in, the contract. If, therefore, Spencer assigned the bids upon any assurance that the claim of Sloan & Son, including that assigned to them by Jones and Robertson, would be made good by the defendants, then they would be estopped from disputing the claim made by Spencer; and surely any testimony tending to show that such assurance had been given by Mr. Courtenay (the only one of the defendants who seemed to be disputing Mr. Spencer's position) would be competent upon the ground of estoppel, if not competent upon any other ground. Exception 10, included in this subdivision, imputing error in allowing the witness Tucker to testify that the claim of Jones and Robertson was included in the account referred to in the telegram, cannot be sustained. In the first place, the witness did not so testify. This witness was examined three times,—before John C. Mehrtens, notary public, on the 9th of April, 1898, which we suppose was before the trial; at the trial; and again in reply. On the last occasion no reference whatever was made to the claim of Jones and Robertson. When he was examined in chief as a witness for plaintiffs, he simply stated: "My connection with the office [referring to the office of Sloan & Son] had brought to my attention that Jones and Robertson were indebted to J. B. E. Sloan & Son, and I knew a settlement was attempted to be made from the sale of the Landsford property, but I was not familiar with the details." And to this testimony no objection whatsoever was interposed. When examined before Mr. Mehrtens as notary public, all that he said in

reference to the claim of Jones and Robertson was substantially the same as that quoted from his testimony in chief at the trial, and this was said in response to appellant's first cross interrogatory, and said without objection. It is obvious, therefore, that exception 10 must be overruled.

(c) Exceptions 11, 12, and 13 relate to objections to the testimony of Mr. Spencer as to the time when, and the reason why, he withdrew his refusal to assign the bids which he had made for the defendants. The testimony shows that Spencer had refused to assign these bids because the appellant had taken the position that, according to his understanding of the agreement, he was under no obligation to pay anything more than he had already paid, but when he was informed by his clients, through the telegram above referred to, that they were satisfied, the ground of his objection was removed, and he assigned the bids. How this testimony can be regarded as incompetent, we are at a loss to perceive. These exceptions are overruled.

(d) Exceptions 19, 20, 21, and 22 are disposed of by what has already been said; and exception 23 is too general to require any consideration.

(e) Exception 25, imputing error in excluding the letter of Pelzer to Courtenay, of 9th October, 1897, cannot be sustained. We do not find any letter of that date mentioned in the "case," except that such a letter was offered in reply, and ruled inadmissible, because it was not in reply, which was clearly right, as it was not in reply to any evidence offered by plaintiffs. Of course, when it was first offered to prove the contents of such letters, the letter itself was the best evidence of what it contained; and, besides, its contents were brought out without objection, as Mr. Courtenay was permitted to state a conversation he had with Mr. Pelzer, giving his reasons for paying up.

(f) Exception 26, imputing error in allowing the witnesses Tucker and Sloan to be examined in reply for the purpose of reiterating what they had said in their testimony in chief, cannot be sustained. These witnesses, having testified as to what occurred when the telegram above referred to was sent, were contradicted by Mr. Courtenay, when he was put on the stand as a witness for the defense, in several particulars,—notably, as to his having requested the telegram to be sent; and these witnesses (Tucker and Sloan) were examined in reply, and asked whether, after hearing Courtenay's testimony, they still adhered to their previous testimony, and they both said they did. In this we see no error of law. The conduct of a trial must necessarily, to a large extent, be left to the circuit judge, and the course which he takes will not be interfered with by this court, unless some error of law is committed. It may be that a witness for the plaintiff has made some statement which, after hearing it contradicted by a witness for the defense, he would desire

to correct or explain; and so, on the contrary, the witness, after hearing his statement contradicted, might desire to reiterate his statement, notwithstanding such contradiction, and we see no error of law in permitting him to do so.

The third general question is as to whether there was error in refusing the motion for a nonsuit. Exceptions 14 to 21, inclusive, and 23 and 24, seem to relate to this matter. We do not propose to consider these exceptions in detail, for the reason that some of them simply assail the reasons given by the circuit judge for refusing the motion; and, even if some or all of his reasons are not well founded, that would not affect the question, as the question for this court to determine is whether the ruling of the circuit judge is erroneous, and not whether the reasons which he gave for his ruling are sound. Besides, rule 18 of the circuit court requires that a motion for a nonsuit must be reduced to writing, "stating the grounds of the motion," and these grounds are what the circuit court is called upon to consider, and that is what this court is required to review. That rule was complied with in this case, and the motion for a nonsuit was based upon three grounds, which are hereinabove set out in *hæc verba*. The first of these grounds is that "the written instrument sued upon" imposes no obligation upon the defendants to make good the claims of plaintiffs. But we do not understand that the action is based alone upon the written instrument, but upon that instrument supplemented by the parol evidence as to what passed between the parties at the conference which preceded the signing of that instrument. While, therefore, it is true that the written instrument does not, in terms, show who were to make good the claims held by plaintiffs, and, in addition to this, does not show the amount of such claims, yet the plaintiffs rely upon the parol evidence above referred to, for the purpose of supplying these additional terms of the contract sued upon, which do not appear in the written instrument. The question, therefore, as to what would be the proper construction of the written instrument, if it stood alone, is not before us, as parol evidence was received, without objection, for the purpose of supplementing the terms of the written instrument. We do not think that the first ground upon which the motion for a nonsuit was based is tenable, as there was clearly some testimony tending to show who were the parties who agreed to make good the claims of plaintiffs, and the amount necessary for that purpose. Whether such testimony was sufficient to establish these facts was a question solely for the jury, and their determination as to that matter this court has no jurisdiction to review. The second ground is that there was no evidence whatever showing any consideration for the defendants assuming any obligation to make good the claims of the plaintiffs. We cannot adopt that view. There certainly was testimony tending to show

that the defendants desired to purchase the property at a price not exceeding the sum of \$30,000; that the main object of the purchase was to obtain the Water-Power tract, and such adjoining lands as might be necessary or desirable, at least, for the purpose of developing the water power; that Mr. Spencer, as the attorney of plaintiffs, held claims secured by a lien upon a one-fifth interest in the Water-Power tract, which, under the order of sale, was required to be sold separately; that Spencer insisted that the Water-Power tract should bring an amount sufficient to pay the claims which he held; that Mrs. Henrietta C. Davis desired to buy the Home tract; that, in order to attain the ends desired by the several parties, it was necessary to fix upon the amounts to be bid for the several pieces of property, in order that they should not exceed in the whole the amount which defendants were willing to give for the whole property; that accordingly the amounts to be bid were fixed upon as stated in the written instrument, but that Mr. Spencer, not knowing precisely the amount necessary to satisfy the claims which he represented, was unwilling to agree to the amount to be bid for the Water-Power tract, unless defendants would agree to make good any deficiency in the payment of the claims held by him; and that such agreement was made. If these facts were established (and that was a question exclusively for the jury), then there was a sufficient consideration to support the contract sued upon. We do not think, therefore, that the motion for a nonsuit could be sustained on the second ground. The third ground is disposed of by what has already been said. The exceptions, therefore, to the refusal of the motion for nonsuit, are overruled.

The fourth general question, as to whether there was error in the charge to the jury, or in the refusal to charge certain requests, will next be considered. The exceptions as to this matter are 27 to 30, both inclusive. The first of these exceptions is subdivided into quite a number of exceptions, which will not be considered in detail, as some of them are practically repetitions of others, some are mere statements of extracts made from the charge, without pointing to any specific error of law therein, and others are taken under a misconception of the charge. Indeed, we have found it very difficult to ascertain what are the specific errors of law imputed to the charge. We are therefore compelled to confine our attention to what we suppose to be the points of law wherein it is charged that the circuit judge has erred. The first of these is that the circuit judge should have construed the written instrument, and not left its construction to the jury. While there is no doubt that the rule of law is that an instrument in writing must be construed by the judge, and not by the jury, we do not see that this rule has been violated in this case. The circuit judge did construe the written instrument, and instructed the jury that, in and of itself, it was

not sufficient to show the contract sued upon. But, inasmuch as the written instrument did not even purport to contain all of the terms of the contract, parol evidence was relied upon to show what were the other terms of the contract not specified in the written instrument, and from that evidence the jury were instructed to determine what were these additional terms of the contract. The next point made, as we understand it, is that the judge erred in instructing the jury that they were to determine from the evidence whether the defendants bound themselves jointly or severally, as it was called, to pay any deficiency that might appear; that is, whether each of the defendants agreed to pay the whole of such deficiency, or only a one-fifth part thereof. It being manifest that there was nothing in the written instrument to indicate what was the measure of the liability of each, that matter could only be ascertained from the parol evidence, which was, of course, for the jury. The next point made is that there was error in charging plaintiffs' fifth request, which is set out in the charge, as well as in the appellant's exceptions, which was to the effect that where two or more persons jointly, as parties of the one part, enter into a contract with another, a mere mistake of only one of the parties contracting jointly would not relieve any of the parties on his part from the performance of the contract, as against the other contracting parties. In this there was no error, for the reason that the essential element of mutuality would be wanting. Our next inquiry is whether there was any error in charging plaintiffs' sixth request, which is set out in the charge as well as in the exceptions. We see no error here, as the proposition there charged is in accordance with the well-settled rule that the terms of a written contract cannot be varied, explained, or contradicted by parol evidence, unless there is a direct proceeding for the reformation or rescission of the contract; and this is not such a proceeding. The next point made is that there was error in charging plaintiffs' first and seventh requests. The exception in which this point is made is not in such form as would require this court to consider it, inasmuch as it does not appear in the exception what those requests were; but, as they are set out in the judge's charge, we will waive the objection as to want of form, and consider these requests. The first request simply sets forth one of the well-settled principles of the law of estoppel, and there was no error in so charging. If Mr. Spencer was induced to change his position, by assigning the bid, upon the representation made by Mr. Courtenay that both of the claims mentioned in the written instrument would be made good, appellant would, of course, be estopped from afterwards disputing such representation. Of course, whether such a representation was made, and whether Spencer acted upon it, were questions of fact, exclusively for the jury, which we have no jurisdiction to consider, and therefore are not

at liberty to express any opinion as to such question. The seventh request rests upon a similar principle. If the appellant negligently or inadvertently signed the written instrument without reading it, and plaintiffs were thereby induced to release their security for the claim which they held against Jones and Robertson, and accepted in lieu thereof the written instrument in the terms in which it read, it is clear, upon the same principle of estoppel, that the appellant could not afterwards avail himself of a mistake as to what were the terms of the written instrument, caused by his own neglect to read the paper. The twenty-eighth exception, complaining of error in refusing to charge appellant's seventh and eighth requests, cannot be considered, under the well-settled rule of this court. The "case" does not show that these requests, as set out in this exception, ever were submitted to the circuit judge. See *Lites v. Addison*, 27 S. C. 229, 230, 3 S. E. 214, where the reason for the rule is thus stated: "While the 'case,' as submitted by the appellant, is open to amendment as well by counsel for respondent as by the circuit judge, when it is submitted to him for settlement, the exceptions of appellant cannot be so amended. Hence, when facts are incorrectly stated, or requests to charge are not properly represented, in the 'case,' such errors may be corrected by amendment; but, when they are found only in the exceptions, they are beyond the reach of amendment, and therefore cannot be regarded by this court." See, to same effect, *Stackhouse v. Wheeler*, 17 S. C. 105; *State v. Coleman*, 17 S. C. 473; *McPherson v. McPherson*, 21 S. C. 261; *State v. Jenkins*, 21 S. C. 596. While, therefore, we do not mean to intimate that the requests to charge upon which exception 28 is based are incorrectly represented, yet this well-settled rule must be applied, especially where, as in this case, its protection has been invoked. We may add, however, *ex gratia*, that we do not think this exception could be sustained, even if properly before us. The twenty-ninth exception is practically disposed of by what has already been said. Exceptions 30 and 31, relating to the question whether, in this action, a verdict against appellant alone could be sustained, have likewise been disposed of by what has been said as to the question of whether the defendants contracted each for the whole amount of the deficiency, or only for his one-fifth part thereof. The determination of that question depended upon the view which the jury might take of the parol evidence, as the written instrument threw no light upon that question, as to which the jury were properly instructed.

It only remains to consider exception 32, which is divided into three subdivisions. The first, based upon the proposition that the appellant set up an equitable defense, is disposed of by what has already been said in considering the first general question in the case. The second, which is but a repetition of the proposition that a judgment could not be en-

tered against appellant alone, has already been disposed of. The third is that, the other four defendants having been released, appellant is also released. If the other four defendants were never liable for appellant's one-fifth part of the deficiency, as the jury seem to have found, then it could not be said that the other four defendants were released from a liability which they never incurred.

Some question seems to have been made in the court below as to the statute of frauds; and appellant, by his tenth request, desired a charge upon that subject, which was complied with, and, as we understand it, such charge was satisfactory to appellant. At all events, we do not find in the exceptions any complaint made as to that part of the judge's charge, and hence there is nothing for us to decide as to that matter.

A point is made in the argument that the appellant was entitled to judgment non obstante veredicto. But no such motion was made before the circuit judge, so far as the "case" shows, and there is no exception raising any such point. It is not, therefore, properly before us. We may add, however, that, even if the point was properly before us, it could not be sustained, under the case of *Bowdre v. Hampton*, 6 Rich. Law, 208, quoted in the very recent case of *Barnes v. Rodgers* (S. C.) 31 S. E. 885. The judgment of this court is that the judgment of the circuit court be affirmed.

BADHAM v. BRABHAM.

(Supreme Court of South Carolina. March 20, 1899.)

PLEADING—FRIVOLOUS ANSWER—WAIVER—APPEAL—EXCEPTIONS—SUFFICIENCY—JUDGE AT CHAMBERS—POWERS—REPLEVIN—COUNTERCLAIM.

1. A demurrer—filed before issues are adjudicated—to an answer as not stating facts sufficient to constitute a defense does not militate against plaintiff's right under Code, § 268, to move to strike out the answer as frivolous.

2. An exception alleging that the court erred in holding that an answer was frivolous will not be considered, where it fails to specify in what particulars the court erred.

3. After striking an answer as being frivolous, under Code, § 268, the judge cannot, in chambers, render a judgment by default.

4. A counterclaim cannot be filed in an action under the Code to recover specific chattels, where there are no exceptional circumstances entitling defendant to equitable relief.

5. An answer in one paragraph admitting "all the allegations of the said complaint save those or such as are hereafter denied," and then setting up a defense merely of an affirmative nature, does not deny any of the allegations of the complaint.

6. A seller of chattels does not waive his right to the possession thereof by extending the time of payment of the price, in the absence of an agreement that the right of property was to remain in the buyer during the extension.

Appeal from common pleas circuit court of Barnwell county; R. C. Watts, Judge.

Action by V. C. Badham against H. C. Brabham. Judgment for plaintiff, and defendant appeals. Modified.

James E. Davis, for appellant. Bellinger. Townsend & O'Bannon, for respondent.

GARY, A. J. The appeal herein is from an order of his honor, Judge Watts, which is as follows: "The above-entitled cause coming on to be heard before me, as presiding judge in the Second circuit, at my chambers, in Bamberg, S. C., on a motion by plaintiff for judgment on the answer as frivolous, under section 268 of the Code of Civil Procedure: After hearing the complaint, answer, and notice of the motion read, Mr. G. Duncan Bellinger, of counsel for the plaintiff, in support of the motion, and Jas. E. Davis, counsel for the defendant, in opposition thereto, I hold that the answer is frivolous. The complaint alleges that the plaintiff is the owner of certain specific personal property therein described, of the aggregate value of \$650, in the possession of the defendant, who detains same, and refuses to deliver it to the plaintiff, although he has made a demand for such delivery; stating a cause of action for claim and delivery of specific personal property, under the Code. The answer admits the allegations of the complaint, and attempts to set up certain breaches of covenant or agreement in reference to the sale of certain personal property by plaintiff to defendant, at what price is not stated; also, part payment for such machinery, and an extension of time for the payment of the balance; a taking of said property from the possession of plaintiff under these proceedings of claim and delivery, to his damage in the sum of \$2,000, as an affirmative defense,—and for counterclaim denies each and every other allegation in the complaint. The allegations in the complaint having been admitted, it is only necessary to refer to the cases of *Williams v. Irby*, 15 S. C. 461; *Talbott v. Padgett*, 30 S. C. 167, 168, 8 S. E. 845; *Manufacturing Co. v. Smith*, 40 S. C. 529, 19 S. E. 134; and *Finley v. Cudd*, 42 S. C. 121, 20 S. E. 32,—to see that the answer fails to deny any allegations of the complaint as a defense, or to state any new matter which could avail defendant as an affirmative defense or counterclaim in this action. It presents no issues which can be determined in this action, and is therefore frivolous. *Tharin v. Seabrook*, 6 S. C. 118; *Machine Co. v. Hill*, 3 S. E. 82, 27 S. C. 164; *Grayson v. Harris*, 37 S. C. 607, 16 S. E. 154. It is therefore ordered and adjudged that the answer of the defendant herein be, and hereby is, overruled, as frivolous, and that the plaintiff, V. C. Badham, have judgment thereon against H. C. Brabham, the defendant, for the possession of the property described in the complaint, or six hundred and fifty dollars, the value thereof, in case delivery cannot be had."

The exceptions allege error on the part of the circuit judge in the following particulars: "(1) That his honor, Judge Watts, had no jurisdiction, the issue having already been joined by service of the written demurrer to the defendant's answer, and the said demurrer not

having been adjudicated. (2) That Judge Watts erred in holding that the answer was frivolous. (3) That he also erred in holding that the property described in the plaintiff's complaint was of the alleged value of six hundred and fifty dollars, whereas the plaintiff demands judgment for the possession of said property, or six hundred and fifty dollars, the value thereof, the two hundred and fifty dollars damages,—there being no proof before him subject to cross-examination, or notice to defendant by way of affidavit; and hence his honor erred in adjudging defendant's property to be the property of the plaintiff, or six hundred and fifty dollars, the value thereof. (4) Because his honor erred in holding that damages could not be set up in an action for claim and delivery, and in misconstruing the cases of *Williams v. Irby*, 15 S. C. 461, and *Talbott v. Padgett*, 30 S. C. 167, 8 S. E. 845. (5) That his honor erred in holding that the answer failed to deny any of the allegations in the complaint that could be determined in this action, either by way of an affirmative defense or counterclaim. (6) The court erred in holding the answer frivolous, and overruling the same, and allowing plaintiff judgment for the possession of the property described in the complaint, or six hundred and fifty dollars, the value thereof, in case a delivery cannot be had, whereas it is respectfully submitted that said property has been taken from the defendant, advertised, sold, and the proceeds retained by said plaintiff. (7) The court erred in striking out said answer as frivolous because the allegations of same show conclusively, outside of any facts, that the defendant paid plaintiff one hundred and three dollars, outside of the consideration or purchase money, to extend the time of payment on new contract."

1. At the time the plaintiff served the notice of motion mentioned in the order aforesaid, he interposed a demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense, for the reasons therein stated. Section 268 of the Code is as follows: "If a demurrer, answer, or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly." The statute does not provide at what stage of the proceedings the motion shall be made, except upon a previous notice of five days. The plaintiff had the right to demur to the answer on the ground that it did not state facts sufficient to constitute a defense at any time before the issues were adjudicated, and the fact that he interposed this demurrer at the time mentioned in no way militated against his right to make the motion to strike out the answer as frivolous. The first exception is therefore overruled.

2. The second exception fails to specify in what particulars the circuit judge erred. It will be seen, however, in considering the other exceptions, that it cannot be sustained.

3. As hereinbefore stated, the motion was made before his honor at chambers. The only power which he could then exercise was to adjudge whether the answer was frivolous. After the answer was struck out, the plaintiff had the right to a judgment by default, but this could only be taken in open court. In the case of *Turner v. Foreman*, 47 S. C. 31, 24 S. E. 969, it was decided that a circuit judge, at chambers, did not have the power to set aside a judgment; and, for reasons fully as cogent, he cannot render a judgment at chambers. Such a practice would lead to endless confusion. The third exception is sustained.

4. The question raised by the fourth exception has several times been considered by this court, and the conclusion of the presiding judge is fully sustained by the authorities which he cited. In the case of *Music House v. Hornsby*, 45 S. C. 111, 22 S. E. 781, Mr. Justice Pope, who delivered the opinion of the court, quotes with approval the following language from *Pomeroy's Code Remedies* (section 767): "It would seem that, in an action to recover possession of specific chattels, no counterclaim is possible, unless, perhaps, equitable relief may be demanded under some exceptional circumstances." In that case the plaintiffs brought an action for claim and delivery of an organ, and the defendant was allowed to set up as a defense that the plaintiffs had practiced fraud on her in the sale of the instrument. But there are no exceptional circumstances in this case entitling the defendant to equitable relief. The fourth exception is overruled.

5. The fifth exception fails to point out what allegations in the complaint are denied by the answer, but, waiving this objection, the exception cannot be sustained. The first paragraph of the answer is as follows, "That he admits all the allegations of the said complaint, save those or such as are hereinafter denied," and the only defenses relied upon are of an affirmative nature.

6. The sixth exception is disposed of by what was said in considering the other exceptions.

7. There is nothing in the "case" showing that the right of property was to remain in the defendant during the extension of time alleged in the answer, and we fail to see what relevancy the alleged extension of time of payment has in determining the plaintiff's right to the possession of the property in an action for claim and delivery. The seventh exception is overruled. The judgment of the circuit court is modified in the particulars hereinbefore mentioned.

JOYE v. SOUTH CAROLINA MUT. INS. CO.
(Supreme Court of South Carolina. March 14, 1899.)

MUTUAL INSURANCE—WAIVER OF CONDITIONS—ADJUSTMENT—PROMISE TO PAY.

1. An insurer does not waive a condition of a policy by adjusting the loss after insured has stipulated in his proof of loss that such adjustment shall not be considered a waiver of any of insurer's rights.

2. A mutual fire insurance company does not waive a right to claim a forfeiture for insured's failure to pay assessments before the loss by writing that the loss would be paid, where a subsequent letter is sent, denying all liability, before there was any change in insured's condition after receipt of the first letter.

Appeal from common pleas circuit court of Sumter county; Ernest Gary, Judge.

Action by Lina E. Joye against the South Carolina Mutual Insurance Company on an insurance policy. From an order for nonsuit, plaintiff appeals. Affirmed.

Purdy & Reynolds, for appellant. Joseph A. McCullough and Haynsworth & Haynsworth, for respondent.

POPE, J. After the plaintiff had offered her testimony, the defendant moved the court to grant a nonsuit. The circuit judge granted the motion upon the ground that the testimony showed that the contract sued on at the time of the loss was suspended for nonpayment of assessments, and furnished no cause of action against the defendant. The plaintiff now appeals from such order for nonsuit on the following grounds, to wit: (1) In that such order deprived the plaintiff of the right to show waiver or estoppel on the part of the defendant to make the objection that the policy sued on had been suspended for nonpayment of assessments. (2) In that the plaintiff was, by such order, denied the right to show waiver or estoppel on the part of the defendant of its right to insist on claiming that policy either was suspended or forfeited; and, the waiver being a question of fact for the jury, there was error in not allowing the plaintiff to show waiver if she could. (3) In that it appeared that there was not only testimony tending to show waiver, but that there were acts of the defendant showing a complete waiver of suspension and forfeiture, such as (a) adjusting the loss; (b) promising, on April 22, 1897, by letter, to pay the loss,—all with full knowledge of the alleged suspension, and these were questions of fact which should have been submitted to the jury.

The cause of action set out by plaintiff was the duty owed to her by the defendant, a mutual insurance company, to pay a policy issued by said company to protect a stock of goods, owned by the plaintiff, from fire, to the amount of \$1,000, which said stock of goods was destroyed by fire on the night of the 13th March, 1897, and which loss, after demand and proof of loss, defendant refused to pay. We have examined the case with

great care, for, while a contract for insurance is nothing but a contract between parties in its last analysis, still it involves very nice care in giving a proper construction because of stipulations outside of the paper embodying in general terms such contract. Here, for instance, the policy of the company makes reference to by-laws and the application of the insured for such insurance as a part of the contract of insurance, although such by-laws and application are not recited in terms in the policy; hence, in order to determine what the contract between the parties actually may be, reference of necessity must be had to those papers. As to the title given by law to the defendant, it is what is known as a mutual insurance company, to distinguish it from what are known as the old line or stock insurance companies. Of course, one of the features of the former is that persons whose lives or property are insured by it are members of the insurance company, with a liability to contribute for membership therein, and a plan of assessments upon the members to cover expenses and losses. Now, what is the particular contract here in question? It is that the plaintiff agreed in her application for insurance to be bound by the by-laws which the defendant was, by its charter, authorized to prescribe. The very policy issued sets out "that the amount of loss is to be determined as per charter and by-laws of this company." By the written application of the plaintiff for membership and insurance she stipulates: "It is agreed that there is no contract of insurance until the application is accepted, and the policy or certificate is issued, subject to the conditions and stipulations therein contained." The second section of the charter of the company (see act approved December 22, 1894) is in these words: "* * * Such insurance to be against loss by fire, wind, or lightning, upon such terms as may be fixed by the by-laws of said corporation." Section 7 of the by-laws makes it the duty of the secretary to notify policy holders of assessments. Section 11 provides that losses shall be paid by pro rata assessments. Section 14 provides that property insured shall be liable to assessments until the policy is canceled. Section 19 is in these words: "All assessments must be paid within 30 days after written notice is mailed. If not paid, the policy shall be suspended, and be liable to assessment until canceled. Suspended policies may be reinstated without extra cost by assured paying back assessments: provided the property be in the same condition as when suspended." Now, in the case at bar the plaintiff herself introduced testimony showing that two assessments were unpaid, to wit, one issued in December, 1896, and one issued on 27th January, 1897; that the secretary of the association notified her that her policy was suspended for failure to pay assessments on the 27th day of February, 1897; that her property was destroyed by fire on the 13th March, 1898; and that she did not

forward the money for the assessments past due until after the fire. So that, by her own testimony, she showed that she had violated her contract, which violation, by the terms of said contract, vitiated her policy. But she attempted to show a waiver by reason of her loss having been adjusted by an officer of the company, overlooking the fact that she has stipulated in her proof of loss that "the furnishing of this blank to assured, or making up proofs by adjuster for company, is not to be considered as a waiver of any rights of the company." Again, it was suggested that the president of the company, by his letter to her, dated April 22, 1898, had stated her claim would be paid, and thereby there was a waiver of the right to regard her policy as vitiated by her own act of failing to pay the assessments before the loss by fire. It is quite true, such a letter was written, but it was followed by one some time afterwards, denying all liability. There was no proof that any change in the condition of plaintiff had been the result of the first letter of the president. The result of our reflections upon the matters set out in the brief covered by the three exceptions is that we are unable to see any reversible error in the order for nonsuit. It is the judgment of this court that the judgment of the circuit court be affirmed.

GREGG et al. v. McMILLAN et al.

(Supreme Court of South Carolina. March 14, 1899.)

WILLS—DEVISED LAND CONVEYED AND REACQUIRED.

Under 12 St. at Large, p. 597, sustaining a devise though the land had been conveyed and reacquired by the testator between the date of his will and his death; and Civ. St. p. 687, § 1908, making a will or clause thereof irrevocable except by some other will or by destruction, etc.; and under statutes subjecting after-acquired property to a will,—a devisee takes though the testator, after making his will, had conveyed to her the land devised, and then taken it back in exchange for other land.

Appeal from common pleas circuit court of Marion county; W. C. Benet, Judge.

Action by Elizabeth C. Gregg and W. C. Gregg against S. E. McMillan and M. I. McMillan, as executor and executrix of the will of W. C. McMillan, deceased. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Johnson & Johnson and W. J. Montgomery, for appellants. Ferd. D. Bryant, for respondents.

POPE, J. The contention underlying this appeal is bottomed upon a demurrer by the plaintiffs to the answer of the defendants (wherein it was set up that certain facts operated as a revocation of the second clause of the last will and testament of W. C. McMillan, deceased, which devised a certain tract of land of 98 acres to the plaintiffs), because it

did not state facts sufficient to constitute a defense to plaintiffs' cause of action. Judge Benet sustained the demurrer to the answer. From this judgment, the defendants now appeal on three grounds, as follows, to wit: First, because his honor, Judge Benet, erred in holding that the conveyances made by Elizabeth G. Gregg and W. C. McMillan, respectively, did not operate as a partial revocation of the will of W. C. McMillan; second, because his honor, W. C. Benet, erred in sustaining the demurrer to the amended answer of M. I. McMillan; third, because his honor, W. C. Benet, erred in deciding the ninety-eight acres of land passed under the will of W. C. McMillan, executed in 1876.

The complaint alleged that W. C. McMillan departed this life, testate, in the year 1889, and that the defendants have qualified as executors of his will; that the said will, by its second clause, devised a tract of land of 98 acres to the plaintiffs, but that the defendants retain possession of said lands so devised, with the rents and profits. The amended answer of defendants admits the death and testacy of W. C. McMillan, and that they have assumed the duties of their office as executors, and that, by the terms of the second clause of the will of their testator, the 98 acres of land was devised to the plaintiffs; but they deny that such devise was operative at the death of their testator, because they say that the will of their testator bore date in the year 1876, and they say that in the year 1878 their testator conveyed said 98 acres of land to the plaintiff Elizabeth G. Gregg, and that she occupied the same until the year 1882, at which time, having been deserted by her husband, who bore away with him their only child (the co-plaintiff W. C. Gregg), the said Elizabeth G. Gregg, by importunings the most earnest, procured her brother W. C. McMillan to exchange the 98 acres of land owned by her for the Potter house, in Marion (town), which exchange was consummated by a deed from Elizabeth G. Gregg to W. C. McMillan of the 98-acre tract, and a deed from W. C. McMillan to Elizabeth G. Gregg for the Potter house and lot in the town of Marion (consideration was the same in each of said deeds); that each of the said William C. and Elizabeth G. entered into the exclusive possession of the lands covered by the deeds to them respectively; and the defendants allege that the transactions amounted to a revocation of the second clause of said will of W. C. McMillan. It will be observed that the grounds of appeal all radiate from one center,—and that, the alleged cancellation or revocation of the second clause of W. C. McMillan's will.

This matter of the revocation of wills, by either a change of the property itself, or the change in the relation of the testator to such property during the period of time embraced between the date of the will and the death of the testator, is very admirably discussed in the opinion of Mr. Justice McIver in *Allen v. Allen*, 13 S. C., at page 525 et seq. Dur-

ing that consideration of these matters he said: "It would seem that, upon the same principles, devises of real estate ought likewise to be adeemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisee with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate, and, in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator, and disturb that disposition of his property which he thought was proper and just to his descendants; for, while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given effect when it is in conflict with the rules of law. A devise of real estate, cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until it is revoked or altered in the manner prescribed by law." Our act of assembly passed in the year 1858 (see 12 St. at Large, p. 597) set at rest any question as to the effect of the sale of land by the testator, and reacquiring the same between the date of his will and his death, by declaring that the devise of such land should be in full operation. It seems to us that section 1903 of our Civil Statutes, at page 687, has a controlling effect here. The language of that section is: "No will or testament, in writing, of any real or personal property, or any clause thereof, shall be revocable but by some other will or codicil in writing, or other writing declaring the same, attested and subscribed by three witnesses as aforesaid, or by destroying or obliterating the same by the testator himself, or some other person in his presence, and by his directions and consent." Inasmuch as, under our statutes, real estate acquired after the date of the will shall be subject to the devises in the will, the devise to the plaintiff is sustained; and, having seen that the devise of land must stand until revoked or altered in the manner prescribed by law, the allegations of fact in the answer are not sufficient to constitute a defense, and hence it was not error on the part of Judge Benet to sustain the same. It is the judgment of this court that the judgment of the circuit court be affirmed, and the action be remanded to the circuit court to enforce this judgment.

ANDERSON v. YOUNG.

(Supreme Court of South Carolina. March 16, 1899.)

INDENTURE OF APPRENTICESHIP—SIGNATURE OF APPRENTICE—PARENT AND CHILD—RIGHT OF CUSTODY—ASSIGNMENT—PUBLIC POLICY.

1. Rev. St. 1893, § 2206, requiring a magistrate to certify on an indenture of apprentice-

ship the approbation of parent or guardian, impliedly requires the apprentice's signature to the indenture.

2. A father's right to the custody of his minor child may be subordinated to the best interests of the child.

3. An indenture of apprenticeship that is void as against the apprentice for a want of his signature thereto, required by Rev. St. 1893, § 2206, may be binding on the apprentice's parent as a common-law contract to assign the services of his child, and to place him in the assignee's custody.

4. Such a contract is not void against public policy, if it is not prejudicial to the child's welfare.

5. A year after a father of children seven and eight years old had contracted to place them in the custody of the husband of their mother's sister, who took excellent care of them, he made application for habeas corpus to obtain custody of the children. He was nearly blind, and had no home for the children, and no means to support them. Their mother was living apart from him, and desired to have the children stay where they were. *Held*, that the application should be denied.

Appeal from common pleas circuit court of Laurens county; D. A. Townsend, Judge.

Petition for habeas corpus by Sim Anderson against John Young. Judgment for defendant, and petitioner appeals. Affirmed.

W. R. Richey, for appellant. Ball & Simkins, for respondent.

JONES, J. Appellant appeals from an order of Judge Townsend refusing his petition for a writ of habeas corpus to obtain the custody of his minor children, one a girl about eight years old, and the other a boy about seven years old. The return of respondent to the writ was as follows: "That he holds in custody and detains the bodies of Mattie Anderson and Sim Anderson, Jr., by reason of the following facts: Sim Anderson, Sr., the father of the two infants, Mattie Anderson and Sim Anderson, Jr., came to live with respondent, John Young, the latter part of December last, bringing with him the two said infants, one six and the other seven years of age, and they continued on there during the year 1898. Sim Anderson was at the time almost totally blind, and, although his eyesight improved some, his general health was all along very poor, and he was utterly unable to properly take care of the said infants; and his wife, Nelcy Anderson, who lived on another place, applied to him to be allowed to take the children, and care for them. This Sim Anderson refused to do, but, after consulting together, they agreed between themselves as a wise settlement of the matter to bind the children to me. Sim Anderson came to me, and proposed the plan. I finally consented, provided Nelcy, the mother, was willing. He assured me she was, and afterwards I saw her, and she gave her consent. We all then went to Magistrate W. M. McMillan, and explained the matter to him. He drew the instrument of writing binding over the children to me, which he explained fully to us all, and which we, the said Sim Anderson, Nelcy Anderson, and myself, then and there signed. This in-

denture is herewith exhibited, marked 'A.' This respondent then entered upon his performances of said indenture, and has since carried out towards the said children all the obligations therein required of him. And this respondent is satisfied that the welfare of the children is much better subserved by matters remaining as they are than giving the custody of the children to the said Sim Anderson, who is utterly unable to care for them." The alleged indenture was dated August 19, 1898, was executed under seal by the said father and mother of the children and by John Young, the respondent, and was attested as signed, sealed, and delivered in the presence of W. M. McMillan, as magistrate, under his seal. The instrument, among other things, recited that the father and mother, of their own free will and accord, put their son and daughter apprentice under John Young to learn to be farmers, and, after the manner of apprentices, to serve him for 14 years, or until they became of age; containing stipulations as to the service and conduct of their said children, one such stipulation being that they shall not absent themselves from said John Young's services, day or night, without leave. On his part John Young covenanted to teach and to provide for said apprentices for said term. All parties bound themselves "for the true performance of all and singular the covenants and agreement aforesaid." The instrument was not signed by the said children, and, so far as appears, they were not present at the execution; and there was no certificate upon the same by the magistrate beyond his attestation as a witness, as follows: "W. M. McMillan [L. S.] Magistrate L. C. S. C.," under the words, "Signed, sealed, and delivered in the presence of." The circuit judge held that the indenture set up in the return, to which petitioner is a party, is binding upon him, and, there being nothing to show improper treatment of the infants on the part of John Young, respondent be refused the petition. Appellant assigns error (1) in holding that the indenture is binding upon him, (2) in holding that the instrument is an indenture, (3) in refusing his petition, (4) in not holding that he was entitled to the custody of his children.

The act of 1740 concerning masters and apprentices (3 St. at Large, p. 544) expressly provided that the intending apprentice "shall execute such indenture in the presence and with the approbation of his or her father, mother or guardian," etc., and under this act it has been decided that the indenture will be void as to the apprentice unless he is a party to it. *Welborn v. Little*, 1 Nott & McC. 263; *Austin v. McCluney*, 5 Strob. 104. Indentures of apprentices are now regulated by sections 2072, 2073, et seq., Gen. St. 1882, now appearing as sections 2206, 2208, et seq., Rev. St. 1893. In these sections the language above quoted from the old act of 1740 is not to be found. In section 2072, Gen. St. 1882, it is provided as follows: "It shall, and may be lawful, to and for any person or persons with-

in this state to take one or more apprentice or apprentices indented according to the directions of this chapter," etc. It is nowhere provided in said chapter how apprentices shall be indented except in section 2073, appearing as section 2206, Rev. St. 1893, which provides as follows: "It shall be the duty of any trial justice to whom application is made by a person desiring to become the master or mistress of any infant to be bound to service by indenture according to law, to certify under his hand and seal upon such indenture the presence and approbation of the father, mother or guardian of such infant at the time it was executed, * * * which indenture or indentures, so executed and certified as aforesaid, shall be good and effectual, to all intents and purposes, as if such apprentice had been of full age, and by indenture of covenant had bound him or herself; or otherwise shall be void and of none effect." Notwithstanding the absence of the language quoted from the act of 1740, we hold that by necessary implication the apprentice must execute the instrument, otherwise it will be void as to such apprentice as an indenture of apprenticeship under the statute, however unreasonable this may appear when applied to infants which have not attained years of discretion. There is no doubt that the rule generally held is that the apprentice, to be bound, must execute the indenture, unless the statute expressly provide a different mode of execution in behalf of the infant. Having reached the conclusion that the alleged indenture is void as to the infant apprentices because they are not parties to it, we need not consider whether, when the parents have actually executed the instrument themselves, and bound themselves to its stipulations in the presence of the magistrate, and the magistrate has signed the instrument as a witness under his title and seal, it is not a compliance with the requirement as to the magistrate's certificate as to their presence and approbation. But it does not follow, because the indenture is void as to the infants, that petitioner is therefore entitled to the custody of his children. There is no doubt that ordinarily, and *prima facie*, the father, as natural guardian, is entitled to the custody of his minor children; but this right is not absolute, as his property right in a chattel would be. His right of custody may be subordinated to the real interests of his child. While, then, a court is in duty bound to relieve an infant from illegal restraint, yet, in awarding custody, it will exercise a wise discretion, looking to the real welfare of the child as the principal consideration. This is the rule in this state, and generally in this country. *Ex parte Schumpert*, 6 Rich. Law, 346; *Ex parte Williams*, 11 Rich. Law, 459; 17 Am. & Eng. Enc. Law, p. 368.

As the office of the writ of habeas corpus is to release from illegal restraint, the first inquiry here is whether the petitioner's children are illegally restrained by the respondent. Respondent asserts that his custody of

the children is lawful by virtue of the indenture with the father and mother placing them with him as apprentices. Conceding that the instrument is void as to the minors as an indenture of apprenticeship under the statute for want of compliance with statutory regulations, the question remains whether the instrument is so void as to make respondent's custody illegal as against the father who executed it. In *Eubanks v. Peak*, 2 Bailey, 409, Judge O'Neill expressed the opinion that a mother, during the minority of her son, was entitled to his services; and, if she chose to place him with another, and to contract that he should serve that other until he was of the age of 21 years, and that for his services the defendant should remunerate him by schooling, and the delivery of property, it was a valid contract, which inured to the benefit of the plaintiff, and on which he could maintain that action. In the later case of *Austin v. McCluney*, 5 Strob. 106, the court held that, while the indenture under the act of 1740 was of no force as against the minor, who was not a party to it, it was nevertheless binding at common law against the parties thereto, and such a contract was not contrary to public policy. In this last case the court cited *Day v. Everett*, 7 Mass. 147, as sustaining an indenture not executed in accordance with the statute as good at common law, as the father might lawfully assign the services of his child during his minority, and during the life of the father. A parent cannot, at common law, irrevocably divest himself of his trust and duty to care for and train his children, and surrender their care and custody to another, merely for his own comfort or pecuniary gain; but he may lawfully place his children in the custody of another, and assign their services during minority for their own welfare,—as to learn some useful trade or occupation,—in which case a court is not bound to restore the children to the parent's custody unless it appears that the real welfare of the children require it. We think reason and authority warrant us in stating as the law that the custody of a minor by virtue of a fair agreement with the parent, not prejudicial to the welfare of the minor, is not unlawful or against public policy, and is not such illegal restraint as a court must relieve at the will or caprice of the parent. *Hurd, Hab. Corp.* 537; *Clark v. Bayer*, 32 Ohio St. 299; *Chapsky v. Wood*, 28 Kan. 660; *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. 91; *Green v. Campbell* (W. Va.) 14 S. E. 212. See, also, note in *Brooke v. Logan* (Ind. Sup.) 2 Am. St. Rep. 184 (s. c. 13 N. E. 660), and note in *Enders v. Enders* (Pa. Sup.) 27 Lawy. Rep. Ann. 56 (s. c. 30 Atl. 129). In this case, while the father is seeking to revoke his agreement, and regain the custody of the children, the mother, who, for some reason, is not living with the father, insists that the children should remain with respondent, who is the husband of her sister, or, if not, that they be given to her, as petitioner is unable to properly care for them. It does not appear

that petitioner has a home for them, or any means whatever. There was evidence before the circuit judge tending to show that petitioner was crippled and partially blind, and wholly unable to support himself and the children. On the other hand, there was evidence that respondent was faithfully carrying out his agreement to care for the children, and there was no showing whatever of any ill or improper treatment of them by respondent, and it was not questioned that respondent was a man "far beyond ordinary for respectability, virtue, and general well-doing," "a man of good disposition, and well able and qualified to care for and train the children." The exceptions are overruled, and the order refusing the petition is affirmed.

SCOTT et al. v. MOSELY et al.
(Supreme Court of South Carolina. March 14. 1899.)

HOMESTEAD—HEAD OF FAMILY.

The exemption of a homestead to the head of a family, allowed by the constitution, applies to one who devotes his entire earnings and rents from real estate to the support of himself and widowed mother.

Appeal from common pleas circuit court of Laurens county; W. C. Benet, Judge.

Action by Charles S. Scott and John D. Noble, trading as Scott & Noble, against Algie M. Mosely and James R. Mosely, trading as Mosely Bros. On the issuance of an execution under a judgment against the defendant James R. Mosely, he petitioned that a homestead be laid off to him. On the return of commissioners setting a homestead apart to him, the judgment creditors excepted thereto. The return was set aside, and defendants appeal. Reversed.

W. R. Richey, for appellants. W. H. Martin and F. P. McGowan, for respondents.

POPE, J. It seems that in the above-entitled action judgment was recovered against the defendant James R. Mosely for the sum of \$158.93 on the 26th day of July, 1894; but no execution was issued thereunder until the 6th day of November, 1895, and lodged with the sheriff on the 7th day of November, 1895, but no levy was ever made. On the 9th day of November, 1895, the defendant James R. Mosely filed his petition with the sheriff of Laurens county, demanding that a homestead in land and an exemption of personal property be laid off to him out of any property he might own. According to the rules of law, three commissioners were appointed to carry out said petition. The creditors named one of said commissioners. Under their hands and seals the said commissioners returned that they could find no personal property owned by said James R. Mosely, and that they had set apart to him as his homestead 100 acres of land, valued at \$800. The creditors duly excepted to said return. A hearing was

had of such exceptions before his honor, Judge Benet, at the April, 1898, extra term of the court of common pleas for Laurens. Such hearing was based upon the pleadings, return, exceptions thereto, and testimony taken in open court. On the 21st April, 1898, Judge Benet filed the following order: "On hearing the exceptions filed by plaintiffs to the return of the appraisers setting off a homestead in land to the defendant James R. Mosely, the testimony, and argument of counsel, I conclude that the said James R. Mosely, petitioner, was not at the time of the recovery of the judgment against him in the above-stated action the head of a family, and he is therefore not entitled to homestead, as against the plaintiffs' judgment; and it is ordered that the exceptions to the return of said appraisers be sustained, and that said return be, and the same is hereby, set aside as null and void." The grounds of appeal, in substance, allege error in this order: First, because the petitioner was the head of a family when judgment was obtained; second, because the petitioner was the head of a family when the cause relating to homestead was heard by the court.

This being a law case, we cannot review findings of fact, but must confine ourselves to errors of law. We regard the case as presenting no questions of fact arising between the contesting parties, but as presenting two questions of law, based on testimony.

We think the petitioner was entitled to be regarded as the head of a family, consisting of his widowed mother and afflicted brother, at the time the judgment was obtained, in 1894. W. L. Gray, Esq., testified to the fact that the entire salary of Mr. Mosely, as a clerk for Gray & Sullivan, was devoted to the support of himself and his mother; that the petitioner used his rents for the same purpose. This, it seems to us, fulfilled the requirements of our constitution, which, in tenderness to misfortune, allows an exemption of property to one as the head of a family, freed from the claims of creditors. While a husband is the head of a family, a son who takes care of and protects a widowed mother may also be the head of a family of which such mother is a member. *Moyer v. Drummond*, 32 S. C. 167, 10 S. E. 952, is authority for the position that such testimony presents a question of law. This ground of appeal is well taken.

Having concluded that the circuit judge was in error in holding, as he did, that Mosely, the petitioner, was not entitled to be regarded as the head of a family at the time of the recovery of plaintiffs' judgment, it becomes unnecessary to pass upon the second ground of appeal. It follows, therefore, that the order appealed from must be reversed. It is the judgment of this court that the order appealed from be reversed, and that the proceeding be remanded to the circuit court, with directions that such court shall confirm the return of the commissioners in homestead.

RAWLES et al. v. JOHNS.

SAME v. NEWMAN.

(Supreme Court of South Carolina. March 20, 1899.)

EJECTMENT—EVIDENCE—INSTRUCTIONS—APPEAL—
EXCEPTIONS—SUFFICIENCY—TRUSTS—CON-
STRUCTION—TERMINATION.

1. Where plaintiff and defendant claim title to land from a married woman as a common source, it is not error to fail to charge that plaintiff must prove acquisition of title from the common source by a good and legal title, where an instrument in evidence is construed to be a valid conveyance of the land from such woman to plaintiff.

2. An exception alleging error in the refusal of a certain instruction will not be considered, where it fails to point out any error in such refusal.

3. A deed conveyed lands in trust for the use of one G. and his children. In the event of his leaving no children, the premises would revert to other parties. G. at the time was not married, but he married thereafter. Held that, after the marriage of G. and the birth of children, the uses were vested, under the statute, so that G. held such lands during his natural life with remainder in fee simple vested in his children.

Appeals from common pleas circuit court of Aiken county; Ernest Gary, Judge.

Separate actions by Eva P. Rawles and others against C. H. Johns and Richard Newman. Judgment for plaintiffs in both actions, and defendants appeal. Affirmed.

G. W. Croft & Son, for appellants. Henderson Bros., for respondents.

POPE, J. The two above-named cases were heard together in the circuit court and in this court. In the first, 10 acres of land were sued for; and in the second, 20 acres of land were sued for. All of the circumstances surrounding each case were the same. Verdicts were rendered in favor of the plaintiffs in each case, and after judgment each defendant has appealed, on precisely the same grounds. So, therefore, in disposing of these grounds of appeal, we will understand that our remarks cover both appeals. There are no contested facts here. All that is involved is the application of the law to a given state of facts.

Under the will of John Burgess, in the year 1829, his daughter, Elizabeth S. Burgess, came into possession, as devisee in fee simple, of two considerable tracts of land. She first intermarried with one Wiley Glover, and as the fruit of that marriage were their children, Wiley C. Glover, Durant Glover, Victoria Glover, Elizabeth A. Holley (wife of Charles Holley), and Martha Lamar (wife of Barney D. Lamar). Wiley Glover having died, in the year 1848 she intermarried with one A. A. Clark; but before doing so she entered into a marriage settlement, wherein Clark was to have the use of her real and personal estate during his life; if Clark should die first, then all of said property should become absolutely vested in the said Elizabeth S.; if Elizabeth S. died before Clark, then her

disposition of all such property by deed or will should be valid, but, in default of a deed or will, to her children. It seems that A. A. Clark died before Elizabeth S., his wife, and that Elizabeth S. Clark died in 1868. But in the year 1859 the said A. A. Clark and Elizabeth S. Clark, his wife, conveyed, of the lands belonging to the estate of Elizabeth S. Clark, which had been devised by her under the said will of her father, John Burgess, 240 acres "unto Charles Holley, his heirs and assigns, forever, in trust to and for the sole and separate use, benefit, and behoof of Wiley C. Glover and his lawful children; but, in the event of his leaving no lawful child or children, said premises to revert back to the estate of his father, Wiley Glover, deceased. Nothing herein contained, however, shall be so construed as to deprive the said Wiley C. Glover of the free use and enjoyment of the said premises as a homestead during his natural life; nor shall such construction be placed on anything herein as will make said premises liable for, or subject to, any debt, contract, or liability of the said Wiley C. Glover that may at this time exist, or that may be hereafter created,"—with a full warranty by the grantors. The consideration of this deed was nominal, being for \$5. The said Wiley C. Glover was not married at the time of the execution of the deed, but he did marry in the year 1867, and the seven children of that marriage were Eva P. Rawles, who in the year 1897 was 27 years old; Virgil Glover, 23 years; St. Julian, 19 years; Elizabeth, 17 years; Wade, 15 years; Louis, 12 years; and Henry, 8 years old. The said Wiley C. Glover, as a part of the said 240 acres of land, sold and conveyed, as of fee simple, the 10 acres now held by the defendant C. H. Johns, on May 6, 1869, for full value. The said Wiley C. Glover, as a part of the said 240 acres of land, sold and conveyed, as of fee simple, for full value, the 20 acres now held by the defendant Richard Newman, on 27th September, 1867. The said Wiley C. Glover died on the 1st day of May, 1896. On the 10th day of January, 1897, these plaintiffs, the children of Wiley C. Glover, commenced these two actions to recover the 10 acres from defendant Johns and the 20 acres from the defendant Newman. The jury found in favor of the plaintiffs in each case, and now the appeal is taken on the following grounds (the first, second, and seventh grounds of appeal were abandoned at the hearing in this court): "(3) That while it is true that, when the plaintiffs and defendants claim from a common source, it is not necessary to trace titles back beyond the common source; but when the evidence shows, as in this case, that the common source was a married woman, then it was necessary for the plaintiffs to prove that they had acquired title from the common source by a good and legal title, and the presiding judge erred in not so charging the jury. (4) Because his honor, the presiding judge, erred in refusing to charge

the defendants' first request. (5) Because his honor, the presiding judge, erred in refusing to charge the defendants' second request. (6) Because his honor, the presiding judge, erred in refusing to charge the defendants' third request." "(8) Because his honor, the presiding judge, erred in refusing to charge the defendants' fifth request. (9) Because his honor, the presiding judge, erred in refusing to charge the defendants' sixth request. (10) The presiding judge charged the jury that there could be no adverse holding against the plaintiff until after the death of Wiley C. Glover. It is submitted that such charge is erroneous, for the legal title was in Charles Holley, the trustee, and if the defendants held the land adversely for ten years against him, even though such period was during the lifetime of Wiley C. Glover, it would give good title to defendants, and bar any claim which the plaintiffs might subsequently set up." We will now proceed to pass upon the exceptions in their numerical order:

(3) The circuit judge was required to construe the paper writing signed by A. A. Clark and Elizabeth, his wife, in the year 1859, whereby the 240 acres of land were conveyed to Charles Holley in trust for Wiley C. Glover and his children, and he did so in this manner: He held that Charles Holley held the title as trustee until after issue born to Wiley C. Glover, and that after that event the uses were vested by our statute, so that the said Wiley C. Glover held said lands for and during his natural life, and that the remainder in fee simple was vested in the children of the said Wiley C. Glover; that Wiley C. Glover could only convey his life estate in said lands; that each defendant traced back his title to the 10 acres and 20 acres, respectively, to the life tenant, Wiley C. Glover. It was admitted that the life tenant died May 1, 1896. It seems to us that the circuit judge has construed the above paper writing to be a valid deed of conveyance, and, having done so, we cannot see how he could have been expected to go further, and charge, as the appellants seem to indicate in this exception, that the plaintiffs were required to establish that they held by a good and valid title. The judge had already so held. Unquestionably, the appellants are correct in the proposition of law which requires a plaintiff to establish his connection with the common source of title by a valid deed. Simply that the plaintiff claims through a certain common source of title will not do. He must establish such claim. As before remarked, the circuit judge held that the paper purporting to be a deed from A. A. Clark and Elizabeth S., his wife, was a valid deed.

We must decline to pass upon exceptions 4, 5, 6, 8, and 9, because they fail to point out any error in the judge's refusal to make the requests there indicated.

Exception 10: We do not discover any error in the charge of the circuit judge, as pointed out in this exception. Very clearly, if Wiley C. Glover only had a life estate, with a re-

mainder in the lands in question in his children, and he only died on May 1, 1896, there could be no adverse holding in the grantees of the life tenant until after the falling in of the life estate. If the plaintiffs had permitted the grantees of the life tenant to have completed the statutory period of adverse holding, beginning on May 1, 1896, the defendants would have succeeded. But these two actions were commenced in a few months after the death of the life tenant. Of course, all this is based upon the statute having vested the use so that the trustee no longer held the title after the birth of children to Wiley C. Glover. Possibly, if this trustee had allowed adverse occupancy and notorious and adverse claim of title to these lands by other persons, his cestui que trust would have suffered. But, as before stated, the trustee, Charles Holley, did not hold the title to these lands, and hence, under the admitted facts of this case, there was no adverse holding by any one against these plaintiffs.

It is useless for the court to express regret that persons who have paid full value for lands should lose their lands, but the law is open to all men, and, when notice is furnished by a registration of deeds, prudence requires vigilance. It is the judgment of this court that the judgment of the circuit court in each of the above-entitled actions be affirmed, and a remittitur will be issued from this court in each of said actions so as to preserve the harmony of the proceedings in the circuit court.

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McCOMB v. McCOMB et al.
(Supreme Court of Appeals of Virginia. March 9, 1899.)

WILLS—CONSTRUCTION—VESTED REMAINDER.

A testator devised personalty to his daughter for life, providing that on her death it should "pass and belong absolutely to [her children], and to their respective children, and to the descendants or descendant of any that may have died leaving issue; such to take what its deceased parent would have taken, if alive." *Held*, that the remainder vested at the testator's death.

Appeal from circuit court, Louisa county.

Suit between one McComb and one McComb and others, construing the will of John Hunter, deceased. From a decree in favor of the latter, the former appeals. *Affirmed*.

John Hunter, Jr., for appellant. R. L. Gordon, Jr., and Jackson Guy, for appellees.

BUCHANAN, J. John Hunter bequeathed certain property to his daughter Mrs. Quarles for life, with remainder to her children. The question involved on this appeal is the time when that remainder vested,—whether at the death of the testator, or not until the death of their mother, the life tenant.

The clause of the will in question is as follows:

"I will and bequeath that the balance of

my estate, of every kind and description, not already disposed of by this will, and the proceeds of the sales of the lands just above directed to be sold by my executors, be divided into six equal parts, after the payment of all my just debts; and I give and bequeath said parts as follows:

"One-sixth to Ellen V. Quarles, one-sixth to Isabella P. Chiles, one-sixth to Juliana Norris, one-sixth to Alice M. Chandler, during their respective lives, one-sixth to John Hunter, Jr., and the remaining sixth part to the children of my deceased daughter, Sarah G. Kent, living at the time of my death, and to the descendants or descendant of any that may have died leaving issue; such to take what its deceased parent would have taken, if alive.

"At the respective death of my four daughters first above named, to wit, Ellen V. Quarles, Isabella P. Chiles, Juliana Norris, and Alice M. Chandler, I will and bequeath that what each shall receive under this provision of my will shall pass and belong absolutely to their respective children, and to the descendants or descendant of any that may have died leaving issue,—such to take what its deceased parent would have taken, if alive; and my will is that the Richmond city bonds hereinbefore given to my said four daughters last named shall pass and be disposed of in precisely the same way as has just been provided in reference to what my said four daughters will receive under this residuary clause of my will."

The settled rule of interpretation in this state is that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated by the will. *Crews' Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. 811; *Stanley v. Stanley's Adm'r*, 92 Va. 534, 24 S. E. 229; *Cheatham v. Gower*, 94 Va., at page 386, 26 S. E. 854. There is nothing in the language of the clause quoted, when read alone, or in connection with the other provisions of the will, which shows any special intention that the remainder given should vest at the death of the life tenant. On the contrary, it appears to us that a different intention is manifest. The will shows that it was written by, or with the advice of, some one skilled in the law or in the use of legal terms. In prior clauses of the will, the testator, after giving to his daughters Mrs. Chiles and Mrs. Chandler, respectively, certain property for life, gives the remainder at the death of the life tenants to their "children then living, and to the descendants or descendant of any that may have died leaving issue; such to take what its parent would have taken, if alive, * * *"—thus manifesting his intention that the remainder should not vest until the death of the life tenant.

In the devise to Mrs. Chiles the testator gives a tract of land to her "for and during her natural life, and at her death said tract

of land is to pass and belong in fee simple to her children then living. * * *

In the bequest under consideration the language giving the remainder is, "I will and bequeath that what each [life tenant] shall receive under this provision of my will shall pass and belong absolutely to their respective children. * * *

The language by which the testator disposed of the remainder in each case is substantially the same, except that in the latter the words "then living" are omitted, and the word "absolutely" is substituted for the term "in fee simple." It is evident why the word "absolutely" was substituted for the term "in fee simple." The former is the word by which the largest estate in personal property is best expressed, and the latter is the usual and technical term for a like estate in real property.

But no reasonable explanation has been or can be given why the words "then living" were omitted in the bequest, except that it was intended that the remainder should vest at the death of the testator, and not at the death of the life tenants. It cannot be presumed that the testator did not know of their legal effect, in fixing the time when the remainders should vest. They were as necessary in the one as in the other, if his intention was that the remainders in both should vest at the life tenant's death.

We are of opinion that the children of Mrs. Quarles took a vested remainder in the property bequeathed to her by the clause of the will under consideration. The circuit court having so held, its decree must be affirmed.

CARDWELL, J., absent.

KELLAR et al. v. STONE, Clerk and Registrar.

WALKER v. SAME.

(Supreme Court of Appeals of Virginia. Jan. 26, 1899.)

ELECTIONS—REGISTRATION BOOKS—MANDAMUS.

A writ of mandamus will issue to the custodian of the registration books to compel him to allow petitioner to see the poll books in his possession, under Code, § 84, providing that the registration books shall be at all times open to public inspection, and section 132, providing that the poll book, being lodged with the clerk, shall remain "for the use of persons who may choose to inspect" it.

Petitions of J. B. Kellar and A. R. Hickman and of James A. Walker against James A. Stone, clerk and registrar, for a writ of mandamus.

L. L. Lewis, for petitioners. B. B. Munford, for respondent.

CARDWELL, J. In each of these cases the petition is for a mandamus to compel the respondent, as registrar and custodian of the registration books of Bristol precinct, in the county of Washington, either to furnish peti-

tioners copies of the registration book in his custody, or to permit the petitioners to make copies of the same, under his supervision.

What was said by this court in *Gleaves v. Terry*, 93 Va. 491, 25 S. E. 552, with reference to the record of the proceedings of the electoral board of Wythe county, as to which secrecy was not enjoined by law, applies as well to the registration books in the custody of the respondent in these cases.

Section 84 of the Code provides that the registration books shall be kept and preserved by the registrar, and that they "shall at all times be open to public inspection." This right has not been denied to petitioners; and the law not imposing upon the registrar, expressly or by fair implication, the duty of making copies when demanded, and failing to provide compensation to him for such work, and not requiring him to allow copies to be made, a mandamus cannot issue, in accordance with the prayer of the petitioners, directing the respondent to make copies of the registration books in his custody, or to permit petitioners to do so at their own expense.

The petition of James A. Walker, however, represents that on the 22d day of November, 1898, he applied to the respondent, James A. Stone, registrar of Bristol precinct, and also clerk of the corporation court of the city of Bristol, and as such by law the custodian of the poll book of said precinct at the election of members of congress from Virginia held on the 8th day of November, 1898, to permit petitioner to examine said poll book, but was told by respondent that the books were sealed up, and could not be inspected by him; that petitioner stated to respondent that his object in examining the poll book was to get information necessary to petitioner in preparing his notice of contest for a seat in the Fifty-Sixth congress of the United States from the Ninth congressional district of Virginia, composed in part of the city of Bristol, but that the respondent flatly refused petitioner to see the poll books in his custody, saying that they were sealed up, and petitioner would not be allowed to see the outside of them, etc. These allegations are only denied by respondent in a general way, and the proof is that petitioner was denied the privilege of inspecting the poll book of Bristol precinct used at the election held on November 8, 1898.

Section 132 of the Code of Virginia provides, among other things, that the poll books, after being lodged with the clerk, shall remain "for the use of persons who may choose to inspect" them.

Section 3086 of the Code confers upon this court jurisdiction to issue writs of mandamus in all cases "in which it may be necessary to prevent a failure of justice in which a mandamus may issue according to the principles of the common law."

At common law the writ of mandamus will be issued, directed to any person or corporation or inferior court, "requiring them to do some particular thing, therein specified, which ap-

pertains to their office or duty." 3 Bl. Comm. 110.

Under the provision of section 132 of the Code, it was clearly the right of the petitioner, on the 22d of November, 1898, when he applied to the respondent for the poll books of Bristol precinct, to be permitted to inspect them, and, this right having been denied by the respondent, a mandamus must issue, requiring respondent to permit petitioner, James A. Walker, to inspect these poll books and to take therefrom, at and within a reasonable time, in the presence of the respondent, memoranda or notes, such as are proper to be made according to the views expressed by this court in the case of *Gleaves v. Terry*, supra, as to the record of the proceedings of the electoral board of the several counties, etc., as to which secrecy is not enjoined by law.

HARRIS v. JONES et al., Commissioners.
(Supreme Court of Appeals of Virginia. Jan. 26, 1899.)

CREDITORS' SUIT—DECREE OF SALE—ENTRY IN VACATION.

1. Where, under a general creditors' suit, a decree was entered for the sale of defendant's lands, and it was subsequently suggested that there were other liens than those audited, a decree referring the cause to a master commissioner for a further accounting should have suspended the decree of sale.

2. Under Code, § 3427, as amended by Act Jan. 27, 1896, the court cannot enter a decree in vacation confirming the report of liens in a creditors' suit, and disposing of the cause on the merits, except by consent of parties, though Code, § 3426, as amended by the same act, provides for interlocutory decrees in vacation.

Appeal from circuit court, Rappahannock county.

Bill by one Harris against Jones and others, commissioners. Decree for defendants. Plaintiff appeals. Reversed.

H. G. Moffett, for appellant. E. T. Jones and H. R. & J. G. Pollard, for appellees.

HARRISON, J. In the cause of Hackley against Harris, a general creditors' suit, a decree was entered at the November term, 1896, directing a sale of the land of the defendant, Harris, by commissioners appointed for the purpose. Subsequently, at the May term, 1897, and before the land had been advertised for sale, it being suggested that there were other liens than those audited, a decree was entered referring the cause to a master commissioner for a further account of liens. This last-mentioned order should, in terms, have suspended the decree of sale. Without a formal suspension of that decree, however, the order of reference ought to have been sufficient to stay any action by the commissioners of sale until the account was taken, for no doctrine is better settled than that which declares it to be error to decree a sale of land to satisfy incumbrances before those incumbrances and their respective priorities have

been ascertained. Regardless, however, of the decree for a further account, the commissioners proceeded to advertise the property for sale. Thereupon the appellant, landowner, obtained an injunction to stop the sale until the account was taken. On September 9, 1897, an order was entered in vacation, refusing to dissolve the injunction, and directing the injunction suit to be heard with the creditors' suit. The report of liens was subsequently filed, and on October 2, 1897, upon motion of the commissioners of sale, a decree was entered in vacation, confirming the report of liens, dissolving the injunction, and directing the commissioners to execute the decree of sale entered at the November term, 1896. This was error. The judge had no power or authority to enter a decree in vacation confirming the report of liens, except by consent of parties, as provided in section 3427 of the Code, as amended by act approved January 27, 1896. It is not claimed that this decree was entered by consent of parties, but section 3426 of the Code, as amended by act approved January 27, 1896, is relied on as authority for the court's action.

That section provides for entering interlocutory decrees in vacation, but only such interlocutory decrees as are preparatory to hearing the cause on the merits. A decree confirming a report of liens disposes of the cause on the merits, and cannot be entered in vacation, except by consent of parties, as provided in section 3427. It being error to confirm the report of liens in vacation, it was also error to dissolve the injunction, for no sale could be made until the report of liens had been confirmed.

For these reasons, the decree appealed from must be reversed, and set aside, and the cause remanded for further proceedings.

Reversed.

BUCHANAN and CARDWELL, JJ., absent.

COHEN et al. v. BELLENOT.
(Supreme Court of Appeals of Virginia. Jan. 26, 1899.)

PROCEEDINGS IN ERROR—REVIEW—NUISANCE—DAMAGES—DEFECTIVE SEWER—FAILURE TO REPAIR—CONTINUOUS NUISANCE.

1. Where there have been two trials, and the verdict on the first trial for plaintiff was set aside as not sustained by the evidence, and on the second trial verdict was rendered for plaintiff, on proceedings in error under Code, § 3484, as amended by Act March 3, 1892 (Acts 1891-92, p. 962), the appellate court must look first to the proceedings on the first trial; and, if the court erred in setting aside that verdict, it must annul all proceedings subsequent thereto, and enter judgment thereon.

2. Under Code, § 3484, as amended by Act March 3, 1892 (Acts 1891-92, p. 962), the court, on proceedings in error from a judgment rendered on a second trial, in determining whether the lower court erred in setting aside the first verdict, must look to the evidence as the trial court ought to have looked to it, and not as on a demurrer to the evidence.

3. In an action to recover for an alleged nui-

sance, where plaintiff sues in her own right as trustee of the property, and not as an occupant, she cannot recover damages resulting to her as an occupant by reason of offensive odors, or other causes which do not affect the value of the property.

4. Where plaintiff sues, as trustee of property, to recover for nuisance, she can show sickness and suffering in her family caused thereby for the purpose only of proving the unhealthy condition of the premises.

5. Where evidence tending to prejudice the jury is properly admitted for one purpose, it is the duty of the court to instruct the jury that it is to be considered by them for that purpose only.

6. A complaint for nuisance alleged that the private sewer of defendant had an insufficient fall, whereby the sewerage was collected and thrown upon plaintiff's property, to his great injury. The only evidence showed that the fall was sufficient. *Held*, that an instruction that, if the sewer was so badly constructed as to affect plaintiff's property, he was entitled to recover, was improperly given.

7. A declaration alleged that defendant's sewer was out of repair from the year 1886 until the time of bringing suit, and that the nuisance was a continuous one. Evidence showed that after 1892 no damage was caused thereby, and that the damage caused thereafter was produced by separate causes, which were remedied on each occasion. *Held*, that plaintiff could recover for the occasional nuisances, though the declaration alleged a continuing nuisance, if the nuisances were caused in the manner alleged in the declaration.

8. Where a sewer connecting with a city main sewer was built at the expense of the landowner, and under the city ordinance it was his duty to repair the same at his expense on consent of the city, he is liable for a nuisance created by its want of repair, in the absence of evidence to show that the city had refused to allow him to repair.

9. Where a nuisance is a continuing one, the party complaining thereof cannot recover on the original cause of action after the expiration of the statutory period, but may for its continuance for any time within such period.

Error to law and equity court of city of Richmond.

Action by Bellenot, trustee, against Cohen & Co. Judgment for plaintiff, and defendants bring error. Reversed.

Meredith & Cocke, for plaintiffs in error.
L. O. Wendenburg, for defendant in error.

BUCHANAN, J. There have been two trials in this case, resulting in verdicts in favor of the plaintiff (defendant in error). The verdict on the first trial was set aside on the ground that it was not sustained by the evidence, the damages being excessive. Judgment was rendered for the plaintiff on the verdict at the second trial, and to that judgment this writ of error was allowed.

Under section 3484 of the Code, as amended by act of assembly approved March 3, 1892 (Acts 1891-92, p. 962), it is made the duty of the appellate court, in a case like this, to look first to the evidence and proceedings on the first trial; and, if it discovers that the court erred in setting aside the verdict on that trial, it must set aside and annul all proceedings subsequent thereto, and enter judgment thereon.

The defendant upon whose motion that verdict was set aside insists that, in determining whether or not the court erred, this court must consider the question as on a demurrer to evidence. This contention cannot be sustained. The statute provides that, in determining whether or not the lower court erred in setting aside the first verdict, the appellate court shall look to the evidence and proceedings upon the first trial. Look at them in what manner? In the same manner as the trial court ought to look at them, as far as that is possible. Both courts are bound to sustain the verdict of the jury upon a motion to set it aside because contrary to the evidence, unless the evidence is plainly insufficient. How can this court say that the trial court erred in sustaining such a motion, in a case of conflicting parol evidence, if it cannot look to any of the evidence upon which the jury based their verdict, but must look alone to that evidence which they by their verdict have said they did not believe? A construction involving such a result will not be put upon a statute, if any other reasonable construction can be placed upon it.

Considering the evidence and proceedings in this case as the trial court ought to have done, we cannot say that it erred in setting aside the verdict on the first trial. The evidence on that trial does not show that the plaintiff's property had been injured to the extent of the damages awarded by the jury. The plaintiff, suing in her right as trustee, and not as occupant of the property, had no right to recover any damages that may have resulted to her, as occupant of the property, by reason of offensive odors, sickness, or other cause which did not affect the value of the property itself.

The first error assigned is to the action of the court in admitting upon the second trial, over the defendants' objection, evidence as to certain sickness and deaths which had occurred in the plaintiff's family, as set out in bills of exceptions numbered 1, 2, 3, and 4.

The plaintiff was not, as above stated, entitled to recover in this action for any trouble arising from sickness, sorrow, suffering, or death in her family, although caused by the alleged nuisance, because she had sued as trustee, and not as occupant, of the premises. The court so informed the jury, and said to them, when the evidence was admitted, that it was only admissible to show the unhealthy condition of the premises, provided it was shown that the unhealthy condition of the premises was caused by the alleged nuisance.

For this purpose we think the evidence was admissible, and that the court did not err in admitting it.

It may be, and doubtless is, true that such evidence had a tendency to prejudice the minds of the jury; but that was no sufficient reason for rejecting the evidence, if it was admissible for any purpose. The proper practice is that which the court seems to have adopted, or at least intended to adopt, viz.

to admit the evidence for the purpose for which it was admissible, and to instruct the jury that it was to be considered by them for that purpose and none other.

Upon the next trial, as the case will have to be reversed upon other grounds, the court, if the defendants desire it, should instruct the jury more fully than was done upon the last trial for what purpose, and what purpose alone, they are to consider that evidence, if it is again introduced.

The next error assigned is to the action of the court in giving instruction marked "B," asked for by the plaintiff.

In that instruction the jury were told that if they believed that the sewer which drained the houses of the defendants was so constructed, out of repair, or obstructed as to cause a positive and direct invasion of the plaintiff's property adjoining the same on the south, as by collecting and throwing upon it, to the damage of said property, water or filth, which would not otherwise have flowed or found its way there, and thereby injured the said property, then they must find for the plaintiff. The objection made to that instruction is that the only allegation in the declaration stating in what respect the sewer was improperly constructed was "that said private sewer, in a distance of 105 feet, has only a fall of one and three-tenths feet, which is not sufficient to carry off the said water, filth," etc., and that there was no proof tending to show that the fall named was not sufficient, but, on the contrary, it appeared from the plaintiff's witness Riley (the only witness who testified on that point) that the fall named was sufficient.

There being no averment in the declaration showing in what respect the sewer had been improperly constructed, except that it did not have fall enough, and there being no evidence tending to sustain that averment, the objection made to the instruction upon that point should have been sustained.

The next assignment of error is that the declaration averred that the sewer was out of repair during all the time from the year 1886 to the institution of the suit, and that the nuisance was a continuous one, while the evidence shows that after the year 1892 no damage was caused by any part of the sewer being out of repair, except that part which was in the street, and that the damage caused after that time was produced by separate and distinct causes, which were remedied and removed on each occasion. The point raised by the assignment of error is that a party who alleges a continuous nuisance cannot recover, if the proof shows that it was only occasional, and not continuous. This assignment of error is not well taken. We know of no good reason, nor of any rule of law, which would prevent a plaintiff from recovering for occasional nuisances under a declaration alleging a continuing nuisance, if the occasional nuisances were caused in the manner alleged in the declaration.

The next assignment of error is to the re-

fusal of the court to instruct the jury that, if they believed that the water was thrown back upon the property of the plaintiff by reason of the sewer being out of repair after it left the line of the street curbing, they must find for the defendant.

It appears from sections 54 and 55 of chapter 38 of the city ordinances copied in the record, and from the evidence of the assistant city engineer, that the sewer in question, from the point it leaves the curbing to the point where it enters the city Main street sewer, was built at the expense of the landowner, and when it gets out of repair it is the duty of the owner of the property from which the sewer runs to repair the same at his own expense, after first getting permission to dig up the streets for that purpose. It being the duty of the property owner to keep that portion of the sewer in repair at his own expense, and there being no evidence tending to show that the city, whose permission he was required to get before making the repairs, had refused to give such permission, we are of opinion that, notwithstanding the fact that the city may also be responsible for the nuisance, the landowner was liable, and that the court did not err in refusing to give the instruction.

The court instructed the jury that, "if they believed that the nuisance complained of was a continuous one until this suit was brought, the statute of limitations does not apply, and they may find damages for the time said nuisance continued, as claimed in the declaration."

This is assigned as error, and that it is so is clear. Ang. Lim. § 300, says that any continuance of that which was originally a nuisance the law considers a new nuisance, and therefore, though the party complaining cannot, in an action on the case, recover upon the original cause of action after the expiration of the statutory period, he may for its continuance any time within that period. Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427; Fell v. Bennett, 110 Pa. St. 181, 5 Atl. 17.

That the instruction of the court was erroneous does not seem to be seriously controverted by the plaintiff's counsel, but his contention is that, if it were erroneous, no injury could have resulted from it. That no prejudice did or could result from the instruction not only does not appear, but it is very probable, on the contrary, that it did prejudice the defendant; for it allowed the jury to take into consideration a much longer period than they were entitled to consider, and by reason of which they may have given increased damages.

As the case will have to be remanded for a new trial, it is unnecessary to pass upon the question whether the verdict of the jury was contrary to the evidence.

The judgment must be reversed for the reasons given, the verdict set aside, and the cause remanded for a new trial. Reversed.

RIELY and CARDWELL, JJ., absent.

**RICHMOND RAILWAY & ELECTRIC CO.
v. HARRIS.**

(Supreme Court of Appeals of Virginia. Feb. 2, 1899.)

**CONTRACT TO BUILD RAILROAD—LIABILITY TO SUB-
CONTRACTOR—EXTRAS.**

A railroad company which has let a contract for the construction and equipment of its road is not liable to a subcontractor for extra work done by him in constructing it under his contract with the principal contractor.

Appeal from chancery court of Richmond.

Bill by one Harris against the Richmond Railway & Electric Company. There was a decree for complainant, and defendant appeals. Reversed.

Wyndham R. Meredith and Christian & Christian, for appellant. James Lyons and Hill Montague, for appellee.

HARRISON, J. The Richmond Railway & Electric Company, as successor to the Union Passenger Railway Company, having assumed the debts of the last-named company, this proceeding was instituted by the appellee to recover of the first-named company a balance claimed to be due him for extra work done in the construction of the Union Passenger Railway.

It appears from the record that the Union Passenger Railway Company made a contract with the firm of Guy C. Hotchkiss, Field & Co., as general contractors, to build and equip for it a certain street railway partly in the city of Richmond and partly in the county of Henrico. It further appears that Guy C. Hotchkiss, Field & Co. made a contract with the appellee, Harris, as subcontractor, to do the work of construction of the contemplated railway. The claim now set up by Harris against the Richmond Railway & Electric Company is for extra work done by him under his contract with Guy C. Hotchkiss, Field & Co. It clearly appears that there was no contractual relation, either express or implied, between Harris and the railway company. His contract was with Guy C. Hotchkiss, Field & Co., and to them alone can he look for settlement of what may be due under his contract with them. Harris was in no sense a creditor of the railway company, and therefore had no standing in court to maintain the proceeding he has instituted. It is not, as contended, a case for putting the saddle on the right horse. Guy C. Hotchkiss, Field & Co. are not parties to this proceeding, and, for aught that appears to the contrary, the railway company may have settled in full with them for all irregular as well as all regular work done under their contract to build and equip the road.

For these reasons the decree appealed from must be reversed, and a decree entered dismissing the petition filed by the appellee in the court below.

BUCHANAN and CARDWELL, JJ., absent.

**WHITELAW'S ADM'R v. WHITELAW'S
ADM'R et al.**

(Supreme Court of Appeals of Virginia. Feb. 2, 1899.)

**WILLS—VALIDITY—TESTAMENTARY CAPACITY—UN-
DUE INFLUENCE—EVIDENCE—ADMISSIONS
OF LEGATEES.**

1. On an issue of a testatrix's testamentary capacity, evidence that, prior to the making of the will, testatrix's husband made a will disposing of the property in question, and thereafter his devisees, children of testatrix, deeded the property back and forth among themselves, and while the title derived through such deeds stood in the name of one of the children she confessed judgment, is inadmissible, where it does not appear that testatrix ever declared her intention of disposing of the property in accordance with the wishes of her husband as disclosed by the will.

2. On an issue of *deviseavit vel non*, admissions of a legatee interested in maintaining the will, which tend to impeach it, are inadmissible, where there are other legatees interested in sustaining it.

Appeal from circuit court, Orange county.

Suit between Whitelaw's administrator and Whitelaw's administrator and others. From a judgment for complainant, defendants appeal. Reversed.

J. G. Field, J. G. Williams, and F. M. & C. H. McMullan, for appellants. Harbourn & Rixey and G. D. Gray, for appellee.

BUCHANAN, J. This was an issue to determine whether or not a writing which had been admitted to probate was the last will and testament of Mrs. Mary Whitelaw, deceased.

Two bills of exceptions were taken upon the trial to the action of the court in admitting certain evidence.

The evidence set out in the first bill of exceptions consisted of the nuncupative will of David Whitelaw (late husband of Mrs. Mary Whitelaw), who died April 8, 1825.

A deed from Elizabeth Yager (daughter of David and Mary Whitelaw) and her husband to her brothers, B. R. and I. D. Whitelaw, dated August 11, 1844, conveying all the interest which they took under their father's will.

A deed from I. D. Whitelaw to B. R. Whitelaw, his brother, dated March 16, 1848, by which he conveyed all the interest in the lands which he acquired under his father's will, and which he had acquired from his sister, Mrs. Yager, and her husband, under the deed of August 11, 1844.

A deed from B. R. Whitelaw to his sister, Mrs. Yager, dated September 10, 1867, by which he conveyed to her a certain parcel of land which he had acquired under his father's will, and through the deeds of his brother and sister.

And six judgments confessed by Mrs. Yager in favor of her brother B. R. Whitelaw on the 20th day of October, 1877.

This evidence was offered by B. R. Whitelaw and those who claim under him to sustain

their contention that her alleged will was made at a time when the testatrix was mentally incompetent to make a will, and that it was procured by improper influences.

If the party offering the nuncupative will in evidence had shown that Mrs. Whitelaw (the validity of whose will is in issue in this case) had declared her intention, prior to the execution of her will, of disposing of her property, or of the property attempted to be disposed of by her, in accordance with the wishes of her husband as disclosed in his will, it would, as counsel argue, have been admissible in evidence as a circumstance, perhaps of no great value, tending to show that she had been improperly influenced in making a will disposing of her property in a different manner. But no such evidence was offered with the will, so far as the bill of exceptions shows; nor have we been able to find any such evidence in the record as would render it admissible in evidence.

Mrs. Whitelaw was not a party to either of the deeds, nor to the judgments which were offered in evidence. There was nothing in them which could in the most remote degree shed any light upon the issue submitted to the jury, so far as we have been able to see.

The general rule is that collateral facts are inadmissible in evidence, because they do not afford any reasonable presumption or inference as to the principal fact or matter in dispute, and tend to draw away the minds of the jury from the point in issue, excite prejudice, and mislead the jury. 1 Greenl. Ev. § 52.

There is nothing in this case to take it out of the general rule, and the evidence ought to have been excluded.

The question presented by the second bill of exceptions is whether, upon an issue of *devisavit vel non*, the legatee or devisee who is attacking the validity of the will can introduce in evidence the admissions of another legatee or devisee, tending to impeach it, where there are other legatees or devisees interested in sustaining the will.

This question has never been passed upon by this court in any reported case.

It was somewhat discussed in *Burton v. Scott*, 3 Rand. 399, but the declarations in that case were held to be inadmissible, on the ground that they were made prior to the execution of the will; the court being of opinion that the declaration of a person as to a subject in which he had no interest at the time could not be given in evidence against him, if by any subsequent event an interest in the subject should be thrown upon him.

Though the admissions of a party to the record are generally receivable against him, yet, where there are several parties on the same side, the admissions of one are not admitted to affect the other, who may happen to be joined with him, unless there is some joint interest or privity in design between them, although the admissions may, in proper cases, be received against the person who

made them. 1 Greenl. Ev. § 174. The fact that two or more persons have a common interest in the same subject-matter does not entitle them to make admissions respecting it, as against each other; and where each claims independently of the other, though under a common instrument, neither the words nor the acts of one can bind the other. Steph. Dig. Ev. art. 17, p. 47; 1 Greenl. Ev. § 176. In a case like this, where the validity of the whole will is attacked, and in which it must either stand or fall as a whole, the admissions of Mrs. Yager tending to show a want of mental capacity in the testatrix, or the use of improper influence in the execution of the will, must necessarily affect her daughters (who are attempting to sustain the will) as well as herself. The only way, therefore, by which they can be protected from the influence of such admissions, for which they are in no wise responsible, is by excluding them from the jury, and by allowing the party attacking the will to introduce such evidence only as is competent against all the parties seeking to establish its validity.

This seems to us to be the correct rule in principle, and, while the decisions of the courts of the states which have passed upon the question are conflicting, the weight of authority and the better reason are, in our opinion, in favor of the rule as laid down above. *Nussear v. Arnold*, 13 Serg. & R. 323; *Clark v. Morrison*, 25 Pa. St. 453; *Shaller v. Bumstead*, 99 Mass. 112, 113; *Thompson v. Thompson*, 13 Ohio St. 356; *Forney v. Ferrell*, 4 W. Va. 729; *Hayes v. Burkham*, 67 Ind. 359; *Blakey's Heirs v. Blakey's Ex'r*, 33 Ala. 611.

We are of opinion, therefore, that the circuit court erred in admitting the evidence set out in bills of exceptions numbered 1 and 2, and that for such error its judgment must be reversed, the verdict of the jury set aside, and a new trial awarded. This being so, it will be unnecessary to consider the other assignment of error, that the judgment was contrary to the law and the evidence.

CARDWELL, J., absent.

WRIGHT v. INDEPENDENCE NAT. BANK.
(Supreme Court of Appeals of Virginia. Feb. 8, 1899.)

NOTES — INDORSEMENT — EXTENSION OF TIME OF PAYMENT — HARMLESS ERROR.

1. An indorser of a note is not released from liability by an agreement of the holder with a subsequent indorser to extend the time of payment.

2. A judgment will not be reversed for erroneous instructions where a different verdict could not have been rendered if proper instructions had been given.

Error to corporation court of Lynchburg city.

Action by the Independence National Bank

against one Wright. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Edmunds and J. Emory Hughes, for plaintiff in error. John H. Lewis, for defendant in error.

BUCHANAN, J. The defense relied on in this case is that the defendant, an accommodation indorser, had been released by an agreement of the creditor extending the time for the payment of the writing sued on. The paper was a negotiable note made by W. P. Roberts, payable to H. D. Wright or order, at the Traders' Bank of Lynchburg, indorsed by Wright to that bank, and by it indorsed to and held by the plaintiff as collateral, with other notes, to secure the payment of a note due to it from the Traders' Bank. After actions at law had been brought by the plaintiff on the notes held by it as collateral, including the note sued on, the plaintiff made a verbal contract with the Traders' Bank by which it was agreed that, if the latter would curtail or reduce its note to the plaintiff to \$1,000, it (the plaintiff) would allow the Traders' Bank to give a new note for that sum, payable in 30 days, and dismiss all the suits on the collaterals, upon the payment of the court costs and attorney's fees. The curtailment was made, the new note given, the costs and attorney's fees paid, and the suits dismissed.

In the view we take of this case, it is unnecessary to consider whether the agreement made between the plaintiff and the Traders' Bank was such an agreement giving time for the payment of the note as would have discharged the defendant if the agreement had been made with the maker of the note, instead of the Traders' Bank, the last indorser.

The defendant's counsel insists that, while the agreement was made with the vice president of the Traders' Bank, he was the agent of the defendant to have the suit against him dismissed, and that under the facts of the case the agreement must be regarded as having been made with the maker of the note as well as with the Traders' Bank. In this he is mistaken. The record not only fails to show that the maker was any party to the agreement, but it shows clearly that he was not.

The first question, therefore, to be considered, is whether an agreement for indulgence, which will discharge or release the first indorser, can be made with any other person than the maker of the note, or principal debtor.

In 1 Daniel, Neg. Inst. (4th Ed.) § 1324, it is said "that the agreement for indulgence, in order to discharge the drawer or indorser, must be made with the maker or acceptor, who is the principal debtor; and, if it be made with a third party, it will not affect the drawer's or indorser's rights or remedies, although such third party may have his appropriate remedy for breach of the contract with him."

The text writers generally, in discussing the character of the agreement which will

operate as a discharge of the indorser, drawer, or surety, seem to treat it as a matter of course that the agreement must be with the principal debtor. 2 Brandt, Sur. § 342; Baylies, Sur. p. 240; 1 Pars. Notes & B. p. 238; Edw. Bills & N. p. 567; 24 Am. & Eng. Enc. Law, p. 238; 5 Rob. Prac. 769. And this would seem to be necessarily so from the grounds upon which it is held that the indorser, drawer, or surety is discharged from liability.

The reason given why the extension of time for payment discharges the indorser, drawer, or surety is because the creditor thereby inflicts an injury on him, and deprives him of the means of relieving himself, either by paying the debt and immediately proceeding against the principal (being substituted to the creditor's rights), or by filing his bill *quia timet* to compel the debtor to pay the creditor, for the surety's exoneration; for if the creditor could not himself, in consequence of his own agreement, compel the principal debtor to pay, neither could the indorser, drawer, or surety, who in such case asserts the rights of the creditor for his own safety. *Norris v. Crummey*, 2 Rand. 333, 334; *Shannon v. McMullin*, 25 Grat. 212, 213; 2 Daniel, Neg. Inst. (4th Ed.) § 1313.

But, if the agreement of the creditor be made with some other person than the principal debtor, what is there to prevent the indorser, drawer, or surety from paying the debt and proceeding at once against the principal, or from requiring the creditor to forthwith institute suit on the contract, as provided by section 2890 of the Code, or from filing his bill *quia timet*? The principal debtor, being no party to the agreement, and having paid no consideration for the promise, cannot rely on it. This was the view taken by the court in *Frazer v. Jordan*, 8 El. & Bl. 303, where the agreement was made with a stranger. In that case it was said: "We think that the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor, having given no consideration for the promise, has no ground to complain of a breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him, and we see nothing on which any right, either at law or in equity (see Lord Abinger's observations in *Lyon v. Holt*, 5 Mees. & W. 253, 254), for him to insist upon such contract, can be founded. The stranger may have some private reason of his own to wish for some indulgence to be shown, and, if he has given a good consideration, may be entitled to damages, nominal, large, or small, according to any legal interest he may have; but surely he is the only person to take advantage of his contract."

The agreement relied on in this case, having been made between the holder of the note (the plaintiff) and the last indorser upon it, did not prevent the first indorser (the defendant) from paying the debt, and proceeding at

once against the maker, or from exercising any rights which a surety may assert for his protection against his principal. The agreement did not discharge the first indorser from his liability on the note, and furnished no defense against the plaintiff's recovery.

The action of the court in giving and refusing certain instructions is assigned as error.

It is unnecessary to consider that assignment of error, for if it were conceded that the action of the court was erroneous, as claimed, it is immaterial; for, under the facts of the case, upon correct instructions, a different verdict could not have been rightly found by the jury. And it is the settled rule of this court, recognized and acted upon in numerous cases, not to reverse where the court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the action of the court in giving the instructions given, or in refusing those which were rejected. *Electric Co. v. Garthright*, 92 Va. 627, 639, 24 S. E. 267; *Railway Co. v. Rogers*, 76 Va. 443, 451.

We are of opinion that the judgment complained of is right, and that it should be affirmed.

WILSON v. DAWSON.

(Supreme Court of Appeals of Virginia. Feb. 2, 1899.)

JUDGMENT ON MOTION—BREACH OF CONTRACT.

Under Code, § 3211, providing that a person "entitled to recover money by action on any contract may, on motion, * * * obtain judgment therefor," one cannot obtain a judgment for a breach of contract on motion in an action sounding in damages.

Error to hustings court of Radford.

Action by M. J. Dawson against E. A. Wilson. Judgment for plaintiff, and defendant brings error. Reversed.

Scott & Staples, for plaintiff in error. Watts, Robertson & Robertson, for defendant in error.

CARDWELL, J. On the — day of November, 1894, E. A. Wilson & Co., styling themselves general contractors for the erection and construction of the United States public building in the city of Roanoke, entered into a contract under seal with Mrs. M. J. Dawson, through her agent, M. F. Normoyle, whereby she undertook to do all the foundation work of this building at prices for the masonry, excavation, and concrete work stipulated in the contract, payments for the work to be made by Wilson & Co. monthly as the work progressed; but no time was specified in the contract within which the work was to be completed, nor was there a stipulation as to the force to be employed by Mrs. Dawson in the prosecution of the work.

Mrs. Dawson entered upon the work which

she contracted to do, and prosecuted it till about the 12th of March, 1895, and on March 14, 1895, she received a letter from Wilson & Co. to the effect that if she did not, within three days from the receipt of the letter, have sufficient hands at work to complete her contract by the 1st of May, and continue them at work, and keep them supplied with sufficient machinery and materials, they (Wilson & Co.) would go upon the premises, and do the work themselves, holding her (Mrs. Dawson) responsible for all losses which they (Wilson & Co.) might incur on account of having to pursue that course. Mrs. Dawson not having resumed work under her contract, Wilson & Co., on March 19, 1895, went upon the premises, and proceeded to do the work which Mrs. Dawson had contracted to do, and notified her of their action, whereby she was dispossessed of the premises, and deprived of the right to prosecute this work further.

On the 12th of November, 1895, the following notice, served upon E. A. Wilson, was filed in the clerk's office of the hustings court of the city of Roanoke:

"To E. A. Wilson and H. D. Schenk, partners as E. A. Wilson & Co.: Take notice that on the 1st day of the December term, next, of the hustings court for the city of Roanoke, Va., being the 2d day of December, 1895, I will move the said court to render judgment against you, and each of you, for the sum of twelve hundred and forty dollars and thirty-two cents (\$1,240.32), with interest thereon from the 19th day of March, 1895; being the amount which I am entitled to recover on a certain contract in writing, under seal, bearing date on the — day of November, 1894, between E. A. Wilson & Co., of the first part, and myself, as party of the second part, the amount due me being on account of a breach of said contract on your part, as shown by the following statement of account. [Signed] M. J. Dawson," by counsel.

The account appended to this notice consists of 31 items, all of which, except from 1 to 7, inclusive, and 27 and 28, having been abandoned at the trial, no further notice of them need be taken. Items from 1 to 7 are for masonry, excavation, and concrete work done, and stone quarried and delivered at the building and stone quarried and not delivered; and items 27 and 28 are for profits claimed by Mrs. Dawson upon concrete and masonry work that she would have made had she been permitted to complete her contract.

At the calling of the case December 2, 1895, the defendant Wilson moved the court to require a further bill of particulars to be filed by the plaintiff, which was accordingly done, whereupon the defendant filed a statement of the defense of Wilson & Co. to this action. The further bill of particulars filed by the plaintiff is as follows:

"All of the items in the account filed with

the notice are claimed as damages arising out of the defendants' breach of the contract in this, to wit, that on or about the 19th of March, 1895, they interfered with the complainant in the prosecution of the work on the contract, refused to let the plaintiff carry out the contract, and took possession of the building, and have kept plaintiff out ever since, and have failed to pay the amounts claimed to be due on said contract."

There was a verdict and a judgment against E. A. Wilson, one of the partners of E. A. Wilson & Co., for the sum of \$1,074.42, without interest, and a verdict and judgment for the plaintiff on the offsets filed by the defendants. To this judgment Wilson obtained a writ of error from one of the judges of this court.

The verdict and judgment complained of plainly include items 27 and 28 of the account sued on, which are for profits the plaintiff alleged she would have made upon the work which she was to do under her contract had there been no breach of it on the part of the defendants; that is, for damages claimed by her by reason of the breach of the contract on the part of the defendants; and the question presented at the threshold of the case is, can the plaintiff recover, upon motion under section 3211 of the Code as it stood when this action was brought, damages for a breach of her contract with Wilson & Co.?

"If the contract is such that the person making the motion is entitled to recover money upon it by action, he is entitled to proceed to do so by motion, whether his right is based upon an expressed or implied contract. The remedy extends to all cases in which a person is entitled to recover money by action on contract." *Long v. Pence*, 98 Va. 586, 25 S. E. 596.

Section 3211 of the Code, as it stood when this action was brought, provides that a person "entitled to recover money by action on any contract may, on motion," etc., "obtain judgment therefor." There have been amendments to this section which may have enlarged its scope, but with these we have nothing to do.

In discussing this subject, *Bart. Law Prac.* 1067, says: "It will be observed, however, that the statute confines this motion to cases where one would be entitled to recover money by action on any contract, as distinguished from actions usually termed 'sounding in damages.'"

The revisers of the Code in 1849, in which the right to recover money by action on any contract on motion was first ingrafted upon our statutes, say in their report: "By this mode of proceeding, all claims of the commonwealth, and a large number of those of individuals, are now recoverable; yet a formal point scarcely ever arises upon a motion. The

case is very generally decided upon its merits. A brief notice serves the double purpose of a writ and a declaration; and, though a defendant is not precluded from pleading, yet, as the case can be heard without pleading, pleadings are in fact very rarely filed. Seeing that this mode of proceeding has worked well in the cases in which it has been heretofore allowed, it seems to us advisable to extend it to all cases in which a person is now entitled to recover money by action on a contract. We do not propose to take away the right of bringing an action from any person. We propose, merely, when his claim to money is on a contract, to allow him to use, if he please, the more simple remedy by motion, instead of an action. The permission to proceed in this way will, we believe, cause motions gradually to take the place of actions for all such claims. It may, perhaps, be objected that judgments for debts generally should not be rendered so promptly as in those cases wherein judgments are now allowed on motion; but this is not really an objection to the allowance of a remedy for such debts by motion. It merely goes to show that the notice for such debts should be longer than in the cases wherein the remedy now exists."

Clearly, it was not intended by the statute, in affording a more speedy remedy for the enforcement of contracts by the recovery of money due thereon by motion, to extend this mode of proceeding to actions usually termed "sounding in damages." Damages for an injury resulting from a breach of a contract recoverable in an action "sounding in damages" can in no sense be considered money due on a contract.

Counsel for defendant in error correctly say that the plaintiff in the court below was unquestionably entitled to recover money by an action of covenant on her contract, but his contention that the remedy by motion under section 3211 of the Code may be substituted for an action of covenant on the contract is wholly untenable; certainly as that section stood when this action was brought. We have been cited to no authority, and have been able to find none, which sustain this contention.

The utmost that the plaintiff had a right to recover in this mode of proceeding is the amount of the first seven items of the account filed with the notice, and therefore the verdict and judgment, including damages for the breach of the contract, embraced in items 27 and 28 of the account, is, we think, clearly erroneous, and should be reversed and annulled.

It becomes unnecessary for us to consider other questions raised in the record.

The judgment complained of will be reversed and annulled, the verdict of the jury set aside, and the cause remanded to the court below for a new trial to be had in accordance with this opinion.

JONES v. JONES' EX'R et al.

(Supreme Court of Appeals of Virginia.

March 9, 1899.)

HUSBAND AND WIFE—CONVEYANCES—SEPARATE ESTATE—CURTESY.

1. A deed by a husband to a trustee for the benefit of his wife and children, which expressly gives the wife absolute power to sell or exchange the land by the trustee's uniting in the conveyance, vests in the wife the entire interest, to the exclusion of the children.

2. A deed by a husband to a trustee for the benefit of the wife and children, she to have absolute power to sell or exchange the land with the trustee's consent, vests in her an equitable, and not a statutory, separate estate.

3. Acts 1876-77, pp. 333, 334, and Acts 1877-78, pp. 247, 248, amendatory thereof, creating the statutory separate estates of married women, the proviso of which recites that the separate estate created by any gift, grant, devise, or bequest shall be held according to the provisions thereof, and the provisions of the act so far as not in conflict therewith, do not affect an equitable separate estate; and the husband's right of curtesy therein is determined by the rules of equity.

4. Where a husband, by absolute conveyance, creates an equitable separate estate in his wife, he has no interest therein as tenant by the curtesy.

Appeal from circuit court, Mecklenburg county.

Action by J. Wesley Jones against the executor of the will of Mary E. Jones, deceased, and others. From a judgment for plaintiff, a child of decedent appeals. Reversed.

C. T. Baskerville and Stiles & Holliday, for appellant. Geo. B. Finch and C. J. Faulkner, for appellee.

RIELY, J. By deed of February 7, 1883, a certain tract of land was conveyed by J. Wesley Jones to Thomas N. Jones, trustee, for the benefit of Mary E. Jones (the wife of the grantor), and any child or children who might be thereafter born of their marriage, and the absolute power expressly vested in her by the deed to sell or exchange the property by the trustee's uniting in the conveyance.

The court is of opinion that the wife took under the deed the entire interest in the land, to the exclusion of the children. This conclusion is in conformity to a long line of decisions made in similar cases, in which the reasons for holding this construction to be the real purpose and meaning of the grantor are fully given, and any discussion of them here would be superfluous. *Walke v. Moore*, 95 Va. 729, 30 S. E. 374, and the cases there cited.

Mary E. Jones died on July 19, 1890, leaving one child of the marriage (the appellant) surviving her; and the main question presented for decision is whether her husband has an estate by the curtesy in the land.

Whether a separate estate is an equitable separate estate or a statutory separate estate must be determined from the language and provisions of the instrument to be construed in each case. If the instrument grants powers or imposes restrictions not granted or im-

posed by the statute, but which are yet consistent with the rules and principles of equity, the estate will be construed to be an equitable, and not a statutory, separate estate; and that which, prior to the passage of the "Married Woman's Act," was held to be an equitable separate estate, retains that character, is controlled by the provisions of the settlement by which it was created, and is governed by the rules and principles applicable to such estate. *Dezendorf v. Humphreys*, 95 Va. 473, 28 S. E. 890. Bearing in mind this rule of construction, we are of opinion that the nature of the estate acquired by Mary E. Jones under the deed of February 7, 1883, was unquestionably an equitable separate estate in fee simple, defeasible upon her dying without issue of the marriage living at her death, and not a statutory separate estate. And, being an equitable separate estate, the right of the husband to curtesy is to be determined by the rules and principles of equity applicable to such estates, for it was not intended that those estates should be affected by the creation of the statutory separate estate. On the contrary, the legislature expressly recognized equitable separate estates, and intended to preserve them. This plainly appears from the proviso to the original act (Acts 1876-77, pp. 333, 334), creating the statutory separate estate and the act amendatory thereof (Acts 1877-78, pp. 247, 248) that "the sole and separate estate created by any gift, grant, devise, or bequest, shall be held according to the terms and powers, and be subject to the provisions and limitations thereof, and to the provisions and limitations of this act, so far as they are not in conflict therewith." *Hutchings v. Bank*, 91 Va. 68, 20 S. E. 950, and *Burks*, Sep. Est. 75.

A husband, if he survives his wife, and the common law requisites exist, is entitled to curtesy in any real estate held by her as her equitable separate estate, which may remain at her death undisposed of by her during the coverture, or by will, under a power to that effect vested in her by the instrument creating the separate estate, just as in any other real estate of inheritance owned by her, unless his marital rights are excluded by such instrument. Whether they are excluded or not depends upon the intention of the grantor. This may appear from the instrument creating the separate estate in the wife, or may result from the nature of the transaction. Where the separate estate is created by a stranger, the intention to exclude must be plain and unequivocal, or the husband will be entitled to curtesy. *Burks*, Sep. Est. 14, 15; *Chapman v. Price*, 83 Va. 392, 11 S. E. 879; *Mitchell v. Moore*, 16 Grat. 275; *Nixon v. Rose*, 12 Grat. 425; and *Charles v. Charles*, 8 Grat. 486.

But, where the equitable separate estate is created by the husband, the intention to exclude is presumed or results from the transaction itself, except so far as he may have reserved his marital rights in the instrument creating the separate estate. The law attaches to every absolute conveyance complete

alienation of the entire interest of the grantor, so far as the alienation is permitted by the principles of law and equity. Upon this principle, the law presumes that a husband by an absolute conveyance creating an equitable separate estate in the wife intended to vest in her his entire interest in the subject conveyed, including all his marital rights, present and future, and the conveyance is so construed. Consequently, a husband has not an estate as tenant by the curtesy in land conveyed by him in such manner as to create an equitable separate estate in his wife, whether the conveyance be made directly to her, or to another person for her, in the absence of a reservation in the conveyance of his right thereto at her death. *Burks*, Sep. Est. 16; *Sayers v. Wall*, 26 Grat. 354; *Irvine v. Greever*, 32 Grat. 411; and *Dugger v. Dugger*, 84 Va. 130. 4 S. E. 171.

The circuit court erred in holding that J. Wesley Jones was entitled to curtesy in the land conveyed by the deed to Thomas N. Jones, trustee, by the deed of February 7, 1883. Its decree must therefore be reversed, and the cause remanded for further proceedings, to be had there in accordance with the views herein expressed.

CARDWELL, J., absent.

FOWLKS v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. March 9, 1899.)

CARRIERS—DAMAGES—CONTRACT OF CARRIAGE.

Where a person purchased a ticket on the statement of the ticket agent that the train she was about to take made close connections at a certain point with another train going to her place of destination, which statement was erroneous, and such person, on arriving at such connecting point, was obliged to wait some time for such connecting train, and thereupon, in the face of a storm, and of her delicate state of health, she procured a buggy, and drove over a rough road to her father's house, she could not recover for the injuries resulting from such drive.

Error to law and equity court of city of Richmond.

Action by Eva C. Fowlks against the Southern Railway Company. Judgment for plaintiff for \$150, and she brings error. Affirmed.

Smith, Moncreur & Gordon, for plaintiff in error. B. B. Munford and H. C. Riely, for defendant in error.

KEITH, P. Mrs. Eva C. Fowlks sued the Southern Railway Company in the law and equity court of the city of Richmond to recover damages for injuries sustained by her in consequence, as she alleges, of the negligent act of the defendant company.

The facts upon which she relies to support her contention are as follows: On the morning of July 22, 1896, Mrs. Fowlks, a resident of the city of Richmond, purchased of the

Southern Railway Company a ticket to Skinquarter, a station on the Farmville & Powhatan Railroad, which crosses the Southern Railway at Moseley Junction, 25 miles south of Richmond. Skinquarter, her point of destination, is 8 miles east of Moseley Junction. The plaintiff had made this trip before in visiting her parents, and had always found the train of the Farmville & Powhatan Railroad made a close connection with the Southern Railway, and she could step from one train to the other. When she purchased her ticket at Richmond on the morning in question, she asked the agent whether the train which she then proposed to take would connect at Moseley Junction with the Farmville & Powhatan Railroad train for Skinquarter. He told her that it did, and she bought a ticket for Skinquarter, and boarded the train. Upon arriving at Moseley Junction, she discovered that no such connection would be made that day. It seems that she was pregnant; that the day was hot and sultry, and a storm was brewing, when she got off of the train. The Southern road had no depot there, and she failed to see a small ticket office of the Farmville & Powhatan Railroad, which had been recently constructed. She walked 300 or 400 yards from the place where the train stopped to a store, where she received such accommodations as it afforded. The Southern Railway having made no provision for getting her to her destination, she endeavored to find the means of private conveyance. After waiting in the store for about four hours, and suffering great anxiety, she succeeded in hiring a team, and set out for her father's home. It was raining at the time, but the owner of the team would not let it wait, and, as it was getting late, she thought it best to start. The road was very rough, and she was greatly jolted. Several hard showers came up during the drive, and she was wet through, and her baggage was also damaged. She was perfectly well when she got on the train at Richmond and when she got off at Moseley Junction. When she got to her father's house, she was suffering with abdominal pains and hemorrhage, from the womb. These pains continued till August 23, 1896, when she suffered a miscarriage. Since that time she has been in bad health, and has had another miscarriage.

After the evidence was closed, the defendant asked the court to exclude from the jury "all evidence of the plaintiff and witness Eva C. Fowlks, and which tended in any way to show that she suffered from the wetting, the cold, the jolting, the anxiety of mind, the pains, the subsequent sickness and miscarriage occasioned by her trip in the buggy from Moseley Junction to Skinquarter; and in like manner to strike out the testimony of the three medical experts tending to establish that the miscarriage complained of was the result and consequence of said wetting, cold, jolting, anxiety of mind," etc. The court sustained this motion, and struck out all of said evi-

dence as requested by defendant's counsel, and to this action of the court the plaintiff excepted.

A number of instructions were asked by the plaintiff, which the court refused to give, and this action of the court was also excepted to. Thereupon the court gave an instruction of its own, to which the plaintiff excepted, whereupon the jury found a verdict for the plaintiff for \$150, upon which judgment was entered, and the case is before us upon the plaintiff's objection to the ruling of the trial court.

The sole question which we need to decide arises upon the action of the court in sustaining defendant's motion to exclude the plaintiff's testimony.

That the defendant was guilty of negligence is conceded, and that it is liable in damages for the direct consequences of that negligence is also conceded. The negligent act of the defendant consisted in the statement by its agent to the plaintiff at the time she purchased her ticket that the train she was about to take made close connection with the Farmville & Powhatan Railroad at Moseley Junction, and the contention of the plaintiff is that this negligence was the proximate cause of the entire sequence of events which followed, including the delay at Moseley Junction, the rough ride across the country to Skinquarter, the exposure to the rain and storm, and the subsequent miscarriage and loss of health.

"It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. * * * In other words, the law always refers the injury to the proximate, not to the remote, cause. * * * If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. * * * To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. * * * If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined, or concatenated as cause and effect, to support an action."

Shear. & R. Neg. §§ 28, 29, state the law as follows: "Very great difficulty has been found in determining what damages should be considered as flowing, in a 'natural and

continuous sequence,' from an act of negligence, especially when it is not a matter of contract liability. On the one hand, it has been maintained that, in cases of tortious negligence, the defendant should be held responsible for all damages which do in fact result from his wrongful acts, whether they could have been anticipated or not. On the other hand, it has been maintained that he should not be held responsible for any damages except such as he could, in the exercise of reasonable foresight, have foreseen as the probable consequences of his act. As a middle ground, it has been asserted that he should be made responsible for such damage as is known by common experience to usually follow such a wrongful act. The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur; and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen. So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any fixed rule, and have indicated a disposition to leave all doubtful cases to the jury."

Continuing, the same author says, at section 29: "The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."

In *Connell's Ex'rs v. Railway Co.*, 93 Va. 57, 24 S. E. 467, this court adopts the language of Justice Miller in *Scheffer v. Railroad Co.*, 105 U. S. 249: "To warrant the finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The negligent act proved in this case was committed at the time the ticket was purchased, and it seems to us manifest that a most prudent and experienced man, acquainted with all the circumstances which existed at that moment, could never have foreseen or anticipated the consequences which supervened. It might reasonably have been anticipated that a failure to make the connection at Moseley Junction would involve delay and inconvenience, but not that the plaintiff would procure a buggy, and, in the face of

a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result.

It was the province of the court to say what evidence should go before the jury, and its action in that respect is, of course, the subject of review; but it is a question exclusively for the court, and upon it was devolved the duty of determining, in the first instance, whether the facts offered in evidence tended to prove an injury to the plaintiff too remote from the defendant's act of negligence to constitute an element in the plaintiff's recovery.

For the foregoing reasons we are of opinion that there was no error in excluding the evidence offered. This disposes of the controlling question in the case.

We do not deem it necessary to discuss the instructions, as the verdict of the jury was plainly right upon the evidence properly in the record.

Upon the whole case we are of opinion there is no error in the judgment of the law and equity court, which is affirmed.

CARDWELL, J., absent.

STREET, County Treasurer, v. BROADDUS.

(Supreme Court of Appeals of Virginia.

March 9, 1899.)

DEPUTY TREASURER—LIABILITY FOR DEFICIENCY—
DAMAGES—TAXES—JURORS—AFFIDAVITS—MISTAKE.

1. Under Code, § 854, making a deputy county treasurer liable for deficiency in taxes not accounted for by him, with damages at 10 per cent. a month from the time such taxes should have been accounted for, a verdict will not be set aside, as failing to include the damages, where it does not appear as of what date the jury found the deficiency, and hence whether the damages were included.

2. Affidavits of jurors will not be received to show that the damages were not included, it not being shown that failure to do so was the result of mistake.

Error to circuit court, Essex county.

Action by W. H. Street, county treasurer, against one Broaddus. There was a judgment for plaintiff for less than the relief demanded, and he brings error. Affirmed.

Olagget B. Jones, for plaintiff in error. Thos. E. Blakey and W. W. Woodward, for defendant in error.

KEITH, P. The plaintiff in error, W. H. Street, treasurer of Essex county, gave notice to Broaddus, his deputy, that he would ask the circuit court of Essex county for judgment against him, and his sureties on his bond of indemnity, for certain taxes and levies which, as deputy treasurer, he had collected and failed to account for. Upon the trial the jury rendered a verdict for \$756.55, which the plaintiff asked the court to set aside, upon the ground that the jury should have given 10 per cent. damages per month

for the amount of the deficiency in said taxes and levies from the time payment of them should have been made; secondly, that the verdict was contrary to the law and the evidence. The plaintiff in error also moved the court to enter judgment upon said verdict, with 10 per cent. damages per month from the 1st of January, 1896; but the court denied all of said motions, and entered judgment upon the verdict as rendered, with 6 per cent. interest thereon, to which rulings of the court the plaintiff excepted, and the case is now before us upon a writ of error to this judgment.

The case is to be considered as upon a demurrer to the evidence, which consists of the testimony of Street, the plaintiff, and of Broaddus, the defendant. With the testimony of Broaddus there appears a statement of the transactions between himself and Street which shows a balance as of January, 1894, of \$1,035. He says in his testimony that, in addition to credits claimed in that statement, he had paid the sum of \$518.14. Just when the jury applied this latter payment does not appear from the evidence. There is a presumption in favor of the correctness of the judgment of the circuit court, and he who seeks to reverse it must show error to his prejudice. The credit of \$518 reduces the amount due, according to Broaddus' testimony, to \$517, but the record does not enable us to say at what date the jury struck the balance.

Section 854 of the Code provides that "if any such deputy shall fail to collect, or having collected fail to pay over to his principal any taxes or levies which he ought to have collected or may have received, he and his sureties shall be liable to such principal, upon motion, for the amount of the deficiency in said taxes or levies, together with damages thereon, at the rate of ten per cent. per month from the time such payment should have been made."

This statute is highly penal in its nature. It is not to be extended by implication, but he who seeks to avail himself of the ruinous penalties which it imposes must bring himself strictly within its terms. It is clearly for the jury to ascertain the amount of the deficiency, the date when the default occurs, and, upon the balance thus ascertained, to impose damages, as provided in the section above cited. Those damages, we think, are to be embraced in the verdict, and upon the verdict it was the duty of the court to enter its judgment, with interest at the rate of 6 per cent.; for, under the law, the damages do not continue after the rendition of the verdict. If that had been its purpose, it should have been expressly so provided. It would have been easy to say that the liability should continue until payment, but in that respect the statute is silent, and we cannot extend it beyond its letter.

Looking to the verdict and the evidence only, we cannot say whether or not the jury

imposed the penalties denounced by this act from the date when a balance was struck by them against the defendant. As we have seen, there is evidence to support the theory that the principal sum which the defendant failed to pay over was, in the judgment of the jury, about \$517. Their verdict was rendered for \$756. It may be that, upon the ascertained deficiency, the damages allowed by section 854 were given by the jury. We cannot say with confidence, confining ourselves to the verdict and the testimony, whether this is so or not, because we do not know, we repeat, the date at which the jury struck the balance between the plaintiff and defendant.

It is contended, however, by plaintiff in error, that we can look to the affidavits of the jurors to show that damages were not allowed. There may be occasions when, in order to prevent a failure of justice, it is proper to consider the affidavits of jurors as to the manner in which they arrived at their verdict, but the general rule, as established by the decisions of this court, is otherwise; nor does this case come within any of its exceptions.

In *Bull's Case*, 14 Grat. 613, Judge Moncure reviews at large the authorities touching this question, and shows, in the language of Chief Justice Hosmer in *State v. Freeman*, 5 Conn. 548, "the opinion of almost the whole legal world is adverse to the reception of the testimony in question, and on invincible foundations."

"It seems to be universally agreed," says the court in *Johnson v. Davenport*, 3 J. J. Marsh. 390, "that such affidavits, if received at all, should be with great caution, and their admissibility should be confined to cases of mistake clearly made out, and which may be conceded as true, without subjecting the jury to any imputation of impure motives or palpable impropriety of conduct."

Now, it is to be observed just here that in the case before us, while the jurors do say that they made no allowance in their verdict for damages, it is nowhere suggested that the failure to do so was the result of any mistake on the part of the jury or any member of it.

In *Cochran v. Street*, 1 Wash. (Va.) 79, the court permitted affidavits to be read, as it was clear that the verdict was found under a mistake, and the court awarded a new trial; but says Judge Moncure in *Bull's Case*, 14 Grat. 630: "That case was decided in 1792, when the practice was more unsettled than it now is. Since then the tendency of judicial opinion has been more and more in favor of the exclusion of such testimony. Whether, if that were a new case, it would now be decided in the same way, is, at least, a doubtful question."

In *Kolner v. Rankin's Heirs*, 11 Grat. 420, Judge Lee says: "The leaning of the courts of most approved authority is against the practice of grounding motions for new trials

upon them; and a disposition has been manifested greatly to restrict the class of cases in which, upon such affidavits, new trials will be allowed."

Continuing, Judge Moncure, in *Bull's Case*, *supra*, uses the following language: "In view of all the authorities, and of the reason on which they are founded, we think that, as a general rule, the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct. And, without intending to decide that there are no exceptions to the rule, we think that, even in cases in which the testimony may be admissible, it ought to be received with very great caution. A contrary rule would hold out to unsuccessful parties and their friends the strongest temptation to temper with jurors after their discharge, and would otherwise be productive of the greatest evils."

Bull's Case may be considered as settling the law in Virginia. It has since been frequently referred to, and always with approval.

We are of opinion that the plaintiff in error has failed to show any error to his prejudice in the judgment of the circuit court, which is therefore affirmed.

CARDWELL, J., absent.

DAVIS v. HEPPERT et al.

(Supreme Court of Appeals of Virginia.
March 9, 1899.)

DEEDS—LIFE ESTATE—EQUITABLE FEES.

A conveyance was in trust for the sole use and benefit of the beneficiary for life, with power to sell through her trustee, should she desire, and after death to be conveyed to her surviving children. *Held*, that the beneficiary took an equitable fee, which passed to her heirs at law.

Appeal from chancery court of Richmond.

Suit between one Davis and one Heppert and others. From a judgment for the latter, the former appeals. Reversed.

Anderson & Anderson, for appellant. D. C. Richardson, for appellees.

HARRISON, J. We are called upon to determine the estate acquired by Mary G. Hendrick under the deed filed with the bill in this case, which conveys the land in question to a trustee, to be held for the sole use and benefit of Mary G. Hendrick for and during the term of her natural life, and after her death to be conveyed by the trustee to such child or children of Mary G. Hendrick as shall be living at the time of her death: provided that, if the said Mary G. Hendrick should desire, she shall have the power, for her sole use and benefit, to sell and dispose of the said property through her said trustee, she expressing her desire for such sale or other disposition to the said trustee in writing.

A line of decisions of this court, from May

v. Joynes, 20 Grat. 692, to *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, establish the doctrine, well stated by Judge Burks, that "though property is devised or bequeathed to one for life, even in the most express terms, yet if, by other terms in the same instrument, it is manifest that the devisee or legatee is invested with absolute power to dispose of the subject at his will and pleasure, he is not a mere life tenant, but absolute owner; for there can be no better definition of absolute ownership than absolute dominion."

In *Farish v. Wayman*, following the doctrine so frequently theretofore declared, it is said "that an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee."

In *Society v. Calvert's Adm'r*, 32 Grat. 357, the testator gave to his wife, during her natural life or widowhood, all of his estate. In a subsequent paragraph he says: "But so long as she remains my widow she is at liberty to receive from my executors or from my estate such part of it as she may choose, and to appropriate it as she believes to be just and right." Judge Burks, in delivering the opinion of the court, says: "Now, here is a right, not only to the interest in this fund, but to the fund itself. It is not a mere naked power to appoint or dispose of, but a right to receive such part of the fund as she may choose, and further to appropriate, when received, as she believes to be just and right. This language imports absolute dominion, and absolute dominion is one of the best descriptions of absolute property."

It would be needless repetition to quote from or cite the numerous decisions of this court where this doctrine is declared. They all lead to the conclusion that an estate for life, coupled with absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee.

The consideration for the deed in question was natural love and affection for the daughter, and while a life estate was given her in express terms, with remainder to her children, it was coupled with a clearly expressed and unlimited power to sell and otherwise dispose of the entire estate for her sole use and benefit. If Mary G. Hendrick had sold the property for her sole use and benefit, and united with the trustee in conveying the same, which she clearly had a right to do, under the express terms of the deed, it cannot be doubted that the purchaser would have taken a fee-simple title; and this he could not have acquired, unless the fee-simple title was in his grantor.

The learned chancellor rests his conclusion in this case, that Mrs. Hendrick took a life estate only, with remainder in her children, upon the authority of *Miller's Adm'r v. Potterfield*, 86 Va. 876, 11 S. E. 486, and *Johns v. Johns*, 86 Va. 333, 10 S. E. 2. In those cases the doctrine we have adverted to is clearly recognized, and the cases distinguished from

the line of decisions referred to, upon the ground that the power of alienation there given was not absolute, but restricted. This distinction is again adverted to in the case of *Bowen v. Bowen*, 87 Va. 438, 12 S. E. 885, the court saying: "The cases cited by counsel, as per contra of *Johns v. Johns*, 86 Va. 333, 10 S. E. 2, and *Miller v. Potterfield*, 86 Va. 876, 11 S. E. 486, are not in conflict, but are distinguished from this case and the cases cited by the circumstance that in *Johns v. Johns*, supra, the power of disposal was not absolute in the first taker, for her sole benefit, but also for the benefit of her children; and in *Miller v. Potterfield*, for the benefit, not of herself alone, but of a named beneficiary, William Garrett."

In the case at bar, the naked legal title being in a trustee, we are of opinion that Mary G. Hendrick took an equitable fee-simple estate, which passed at her death to her heirs at law.

For these reasons the decree appealed from must be reversed, and the cause remanded for further proceedings to be had therein.

CARDWELL, J., absent.

POSTAL TEL. CABLE CO. v. FARMVILLE & P. R. CO.

(Supreme Court of Appeals of Virginia.
Jan. 28, 1899.)

STATE DECISIONS—STATUTES—CONSTRUCTION—TELEGRAPH COMPANIES—RIGHT OF WAY—RAILROADS—APPEAL—REVIEW.

1. Where a decision of the highest court, which has been followed in no other case, was rendered by a bare majority, and, in the opinion of the court in a subsequent case, the decision construes a statute erroneously and contrary to public policy, the decision is not binding.

2. Code, § 1287, authorizes a telegraph company to construct its line along county roads, railroads, and streets. Sections 1288 and 1289 authorize such a company to obtain its right of way by contract or condemnation. Section 1290 groups the three preceding sections, and authorizes their repeal or modification. *Held*, that such statutes are in pari materia, and are to be construed together.

3. Where a word is used in different places in a statute, and its meaning in one instance is clear, it must be given the same meaning elsewhere, unless it clearly appears that a different meaning was intended.

4. Every part of a statute is presumed to be necessary, and no part can be rejected, unless, on a consideration of all the language, it is impossible to give it a rational effect.

5. Code, §§ 1287-1289, authorize a telegraph company to construct its line "along" state or county roads, "along and parallel to" any railroads, and "along or over" city streets, and to contract with any person or corporation, the owner of lands, over which the line is proposed to be constructed, for a right of way, and provide that, if the company and such owner cannot agree, the former shall be entitled to the right of way making just compensation to such owner. *Held*, that a telegraph company may construct its line on a railroad right of way.

6. Where an application by a telegraph company for appointment of commissioners to as-

certain the compensation to be paid to land-owners for construction of its line is denied, on the ground that the company has no right to construct its line, and on appeal the judgment is reversed, the measure of damages will not be considered.

Appeal from Chesterfield county court.

Proceedings by the Postal Telegraph Cable Company for ascertainment of damages for constructing its line over the right of way of the Farmville & Powhatan Railroad Company. From a judgment for defendant, plaintiff brings error. Reversed.

J. R. McIntosh, for plaintiff in error. S. D. Davies and T. M. Miller, for defendant in error.

KEITH, P. The Postal Telegraph Cable Company served notice upon the Farmville & Powhatan Railroad Company that it would apply to the county court of Chesterfield, at its November term, 1898, for the appointment of commissioners to ascertain and report what would be a just compensation to the railroad company for the right to construct, maintain, and operate a telegraph line of the Postal Telegraph Cable Company along its right of way. The railroad company appeared, and upon its motion the notice was quashed. Thereupon the Postal Telegraph Cable Company applied for a writ of error to the judge of the circuit court, who refused it, and the case is now before us upon a writ of error.

The judgment complained of is in accordance with the decision of this court in the case of Postal Tel. Cable Co. v. Norfolk & W. Ry. Co., 88 Va. 920, 14 S. E. 803. Plaintiff in error urges us to inquire into the correctness of that decision; while upon the part of the defendant it is earnestly contended that the reported case was correctly decided, and, if it were not, we are bound to adhere to and respect it as an authority binding upon us. We recognize the value of the principle invoked. The rule of stare decisis is entitled to the greatest respect, and, under our system of jurisprudence, is an essential feature of the administration of justice. Where a decision, and especially a line of decisions, has been acquiesced in, where it has been followed in other cases, and has become a rule of property, and men have, in the conduct of affairs, learned to respect and conform to it, it becomes of especial, and indeed of binding, force, and should not be disturbed except by the interposition of legislative power. But we do not consider that the circumstances adverted to as lending force to a judicial interpretation of a statute, and which may be of so strenuous a nature as to preclude further inquiry into the correctness of the adjudication, apply to the case before us. We have here a single judgment followed in no other case, rendered by a bare majority of the court, two of the judges dissenting, and placing a construction upon the statute law involved in it, which we think palpably erro-

neous and contrary to public policy, as tending to foster and promote a monopoly.

The sections of the Code to be considered are 1287, 1288, and 1289. These sections are taken from the act of assembly found in Acts 1879-80, p. 53, and cover substantially the same ground. The revisers, for the sake of perspicuity and convenience, divided the subject treated of in that statute, and it now appears in the Code in the three sections referred to. These sections are in pari materia, and each and all can and should be looked to in order to reach the right interpretation of them. They are as follows:

"Sec. 1287. Every telegraph and every telephone company incorporated by this or any other state, or by the United States may construct, maintain, and operate its line along any of the state or county roads or works and over the waters of the state, and along and parallel to any of the railroads of the state, provided the ordinary use of such roads, work, railroads and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof.

"Sec. 1288. Such company may contract with any person or corporation, the owner of lands, or of any interest, franchise, privilege, or easement therein or in respect thereto, over which such line is proposed to be constructed, for the right of way for erecting, repairing, and preserving its poles and other structures necessary for operating its line, and the right of way for the erection and occupation of offices at suitable distances along its line for the public accommodation.

"Sec. 1289. If the company and such owner cannot agree on the terms of such contract, the company shall be entitled to such right of way, upon making just compensation therefor to such owner. Such compensation shall be ascertained and made, as provided in chapter forty-six, for the acquisition of lands by a company incorporated for a work of internal improvement, when such internal improvement company cannot agree on the terms of the purchase with those entitled to the lands wanted for the purpose of the company. The title which may be acquired by a telegraph or telephone company under this section shall be only to a right of way for the purposes stated in the preceding section; and no right of way acquired by any such company under this or the preceding section shall be to the exclusion of other like companies from having or acquiring a like right of way over the same lands."

The rules of interpretation which have been established for the guidance of courts in the construction of statutes are correctly stated in Postal Tel. Cable Co. v. Norfolk & W. Ry. Co., supra. It will be observed that a telegraph company is authorized by the first section quoted to construct its line along any of the state or county roads, and the case just cited concedes that "along," in that connection, is equivalent to "along and upon"

or "on it." In the last clause of this section they are given the right to go along or over streets of any city or town, with the consent of the council thereof. Here, too, "along" has the signification just given it of "along and upon." Of this there can be no doubt. Here, then, we have in this section the word "along" appearing three times, and the sense in which it is used in the first and third instance is clear and unquestioned. The same meaning, therefore, will be attributed to it elsewhere, unless there be something in the context which clearly indicates that the legislature intended some other and different meaning to attach to it.

It is claimed that this intention is to be found in the phrase "along and parallel to," and that, by the use of the words "parallel to," the legislature intended to restrict the meaning theretofore and thereafter given to the word "along," and to confine the telegraph company to a line following the length of the railway's right of way, but never encroaching upon it. Or, in the language of the court in 88 Va., and 14 S. E., it is to run in the direction of the railroad line, "along-side of and equidistant from it, throughout all its parts, so that neither shall meet or touch; not in or upon the railroad strip." We are wholly unable to perceive, if this be the true construction, why the legislature found it necessary to say anything about the railroad. The rights which a telegraph company is authorized to acquire would be a matter of indifference to railroad companies if the construction heretofore given by this court were correct, and the mention of them in the statute would be utterly irrelevant; but railroads are mentioned in the statute, and it is to be presumed for a necessary purpose, and we must find and give effect to the legislative intent by considering, not a part, but all, of the language used, and are justified in rejecting any part of the statute as unnecessary and irrelevant only in the last resort, when it has been found impossible to give effect to all the language used, and reach a rational conclusion. It is impossible to read the three sections under consideration without at once concluding that the regulation of the rights of telegraph companies in their relation to railroad companies in the matter of the construction, maintenance, and operation of their lines was one of the essential objects of the original statute, and the sections into which it has been divided as they now appear in the Code. "Parallel," as used in section 1287, does not have its primary and scientific meaning "as lines extended in the same direction, and in all parts equally distant." That definition can in no case be applied to a line of railway, for no railway line is, we believe, mathematically straight. The legislature merely intended to say that the telegraph line should be "along and parallel to," in the sense of "conforming to," "having the same direction of, tendency with" the railroad, in order to

guard against any undue interference with or hindrance of the railroad company in the enjoyment of its property. If there were any doubt left as to the proper construction of section 1287, the two succeeding sections should remove it. Section 1288 provides that a telegraph company "may contract with any person or corporation, the owner of lands, or of any interest, franchise, or easement therein or in respect thereto, over which such line is proposed to be constructed, for the right of way of erecting * * * its line"; and section 1289 provides that, if a telegraph company and "such owner" cannot agree, the company shall be entitled to such right of way upon making just compensation therefor to "such owner."

Referring to section 1288, we find that the "owner" referred to is "any person or corporation"; and the right of way referred to is one to be constructed "over" their lands. There seems to be hardly room to doubt that these two sections, one of which provides for the acquisition of the right conferred by section 1287 by contract, and the other by condemnation, contemplate that the right is to be "over" the property of the "landowner," whether he be a person or corporation, provided only, in the case of county roads, public works, and waters of the state, and of railroads, that their ordinary use shall not be thereby obstructed.

As bearing upon the proposition that the three sections discussed are to be considered and construed together, we refer, in addition to the considerations already mentioned, to section 1290, which expressly groups the three sections together, and provides that they "shall be subject to repeal, alteration, or modification, and the rights and privileges acquired thereunder shall be subject to revocation or modification by the general assembly at its pleasure."

The plaintiff in error urges upon us the propriety of considering the measure of damages. It would be premature to do so at the present time. We shall content ourselves, therefore, with reversing the judgment of the county court, and direct it to enter judgment in conformity with the views herein expressed.

COTTRELL et ux. v. WATKINS et al.

(Supreme Court of Appeals of Virginia.)

March 9, 1899.)

ACCOMMODATION NOTES—WITNESSES—DECEDENTS
—APPEAL—LAW OF CASE.

1. The beneficiary of an accommodation note took it up and indorsed it, and afterwards died. In a suit by the accommodation maker against the indorsee, to which the decedent's administrator was a party, the indorsee released all claims against the decedent's estate. *Held*, that the estate, being still primarily liable to the accommodation maker, had an interest in the suit, authorizing the administrator to call the maker as a witness in its behalf, as permitted by Code, § 8346.

2. Questions decided on an appeal become the law of the case, and cannot be reviewed on any subsequent appeal in the same cause.

Appeal from circuit court, Henrico county.

Bill by John W. Cottrell and Harriet Ann Cottrell, his wife, against Charles T. Watkins and others. There was a decree for defendants, and complainants appeal. Reversed.

L. O. Wendenburg, for appellants. W. P. De Saussure, M. M. Gilliam, and Thos. N. Carter, for appellees.

BUCHANAN, J. This is the second time this case has been to this court. Cottrell v. Watkins, 89 Va. 801, 17 S. E. 328. The former appeal was from a decree sustaining a demurrer to the original and amended bills upon the ground of laches, and from a decree refusing to permit a second amended bill to be filed, explaining the complainant's delay in bringing his suit.

Upon that appeal it was held that the allegations of the second amended bill fully accounted for the complainant's delay in asserting his rights, and that his pleadings stated a case entitling him to relief.

The decrees complained of were reversed, and the cause remanded, with directions to the trial court to allow complainant to file his second amended bill, and for further proceedings to be had in accordance with the views expressed in the opinion of the court.

The second amended bill was filed as authorized. To it and the original and first amended bill the defendants filed their answers, some of them also demurring. Upon a hearing of the cause, the bills were dismissed. From that decree this appeal was allowed.

As the sufficiency of the complainant's pleadings was decided upon the former appeal, no further notice will be taken of the demurrers.

Objections were made to the reading of the depositions of the complainant and his brother, Benjamin Cottrell,—first, on the ground that they were taken after an agreement had been entered into between all the parties by which the evidence in the case was closed, and the cause set for hearing upon an agreed state of facts. This objection was not well taken, because the record shows that the personal representative of Joseph F. Cottrell, deceased, in whose behalf the depositions were, or purport to have been, taken, was no party to the agreement, and was not represented by either of the counsel who signed it. Another ground of objection is that the deponents were parties to the original contract or transaction which was the subject of the investigation, and that Joseph F. Cottrell, the other party to it, being dead, they were incompetent witnesses (Code, § 3346), and were not rendered competent by the action of the personal representative of Joseph F. Cottrell, calling them to testify in his behalf, because his decedent's estate had no interest in the suit, or, if it did,

the parties objecting to the reading of the depositions had, before their taking, released his decedent's estate from any and all claims which had arisen or might arise out of the suit, or the property or notes involved in it, and for the further reason that, while called in the name of the personal representative of Joseph F. Cottrell to testify in favor of his decedent's estate, they were in fact examined at the instance of the deponents, who testified in their own favor, and against the estate of Joseph F. Cottrell.

While the record shows that the evidence of these witnesses was in a large measure favorable to the complainant, and to the prejudice of Joseph F. Cottrell's estate, and causes surprise that they should have been examined by the administrator of the latter, yet it does not establish the charge of collusion, upon which the exceptions are based, even if such collusion could be considered in passing upon the admissibility of the depositions. The offer of Watkins to release Joseph F. Cottrell's estate from any and all claims which had arisen or which might arise out of the suit, or the property or notes involved in it, might have been sufficient to protect it from liability on that account, so far as Watkins was concerned; but how could that release protect Joseph F. Cottrell's estate from liability to the complainant, if the notes which the latter's property had been sold to satisfy were accommodation notes made by him for the benefit of James F. Cottrell, and for whose payment his estate was primarily liable?

We are of opinion that neither of the objections to the depositions was well taken.

Upon the merits, the record shows that the notes for which the house and lot were sold by Wise and Logan, trustees, were accommodation notes made by the complainants, and indorsed by Benjamin Cottrell, for the benefit of their brother, Joseph F. Cottrell; that the latter used them in the payment of his own debt; that, when they became due, he paid them, and took up the notes; and that subsequent to the date of their maturity he delivered them to the appellee Watkins for value.

Watkins insists that while it is true that the transferee of ordinary negotiable paper, overdue, acquires no better title than that which his transferor had, yet that this rule does not apply to accommodation paper.

Whatever be the correct doctrine as to the rights of a bona fide purchaser of overdue accommodation paper, that question is no longer an open one in this case. Upon the former appeal it was held that such a purchaser gets no better or greater right to enforce it against the maker or indorser than if it were ordinary negotiable paper given for value, and that an accommodation note, paid at its maturity by the real debtor, though he is not a party to it, cannot thereafter be transferred by him, so as to give it validity against the accommodation maker and indorser. That decision is the law of the case, not upon the principle of stare decisis, but of res judicata; for it is settled

law that questions decided upon an appeal cannot be reviewed or reversed upon any subsequent appeal in the same cause. *Holleran v. Melsel*, 91 Va. 143, 148, 21 S. E. 658.

Watkins having acquired no rights against the maker and indorser of the notes by his purchase from Joseph F. Cottrell, the sale of the complainant's property by Logan and Wise, trustees, was a fraud upon the complainant's rights, and entitled him to have the sale set aside, unless he had lost his right to do so by laches.

In justice to Mr. Watkins, it is proper to say that there is nothing in the record to show any intentional misconduct on his part in having the trustees sell the trust property to satisfy the notes held by him. He was evidently laboring under the impression, as was his counsel, that under the decision of *Davis v. Miller*, 14 Grat. 1, he had the legal right to have it sold for their payment.

Upon the former appeal it was held that the facts alleged in complainant's second amended bill, which are substantially sustained by the evidence, explain "in the most satisfactory manner * * * everything savoring of laches and acquiescence, and why he did not resist the sale made by said trustees." That decision is conclusive of the question of laches.

We are of opinion, therefore, that the complainant, upon the facts proven, and the law applicable thereto, as settled by the former appeal, was entitled to have the sale of the trust property made by Logan and Wise, trustees, to Watkins, the sale by Watkins to John T. Jones, and the sale by Jones to the Richmond Coal-Mining & Manufacturing Company, set aside and annulled, and that the circuit court erred in not so decreeing, instead of dismissing the complainant's bills.

The decree appealed from must be reversed and set aside, and the cause remanded to the circuit court of Henrico county, to be there proceeded with in accordance with the views expressed in this opinion.

CARDWELL, J., absent.

TODD et al. v. McFALL et al.
(Supreme Court of Appeals of Virginia.
March 9, 1899.)

WILLS—CONSTRUCTION—DEBTS—PAYMENT OF LEGACIES—REAL PROPERTY—JUDGMENT—REHEARING.

1. A will declaring that testator's undivided share in partnership land was realty thereby fixes the character of such property as against the beneficiaries, though otherwise such land would be treated as personality.

2. A will stated that testator bequeathed all his "personal property" to his nephews, "subject to certain legacies hereinafter specified." It then devised all "real property" to the nephews, followed by a bequest to M., payable from his "said estate." The will was not written by a lawyer. *Held*, that the land was not chargeable with the payment of M.'s legacy, where the personal property was insufficient to pay it.

3. Where a will provided for the payment of

a legacy from testator's personal property, the legatee is not entitled to payment from lands on which there was a vendor's lien, which was paid from the personal property as a debt of the estate, thereby rendering such property insufficient to pay the legacy.

4. Ten years' acquiescence in an interlocutory decree declaring that a legatee is entitled to a sum out of testator's "estate" does not estop the devisees from having a rehearing, wherein they may show that the legatee is not entitled to have the legacy charged on testator's lands, where they promptly applied for the rehearing when they learned that the legatee claimed payment from the land.

Appeal from circuit court, Augusta county.

Suit by Catherine McFall and others against James Todd and another to charge devised land with the payment of legacies. Decree for plaintiffs, and defendants appeal. Reversed.

George M. Cochran and Elder & Elder, for appellants. Jas. Bumgardner and H. St. G. Tucker, for appellees.

RIELY, J. This case presents for decision the single question whether the legacies to Catherine McFall are a charge upon the real estate devised to James Todd and Rankin Todd.

It is universally conceded that, as a general rule, the personal estate is not only the primary, but the only, fund for the payment of legacies. It is equally a general rule that the real estate is not chargeable under the law with their payment, if the personal estate proves insufficient, unless the testator has charged the land with their payment. This he may do either in express terms or by implication, but his intention to do so must be clear and manifest. And so, in every case, whether the real estate is charged with the payment of legacies is a question of intention. The intention to charge must be either expressly declared, or be clearly deducible from the language and dispositions of the will.

In the case of *Lupton v. Lupton*, 2 Johns. Ch. 614, Chancellor Kent said: "The real estate is not, as of course, charged with the payment of legacies. It is never charged, unless the testator intended it should be; and that intention must be either expressly declared, or fairly and satisfactorily inferred, from the language and dispositions of the will. This general rule does not seem to admit of any dispute."

In the case of *Lee v. Lee*, 88 Va. 805, 14 S. E. 534, it was said by Judge Lewis: "The testator, however, may charge the land, and this may be done either expressly or by implication; but in any case the intention to charge must be clear,—so clear as to admit of no reasonable doubt."

In the case at bar, the testator, before proceeding to dispose of his estate, states in his will of what it consists. It is an undivided half interest of all property, both real and personal, held and owned by J. H. & P. Todd, except the gray horse Shiloh, which he

claimed as his individual property. It appears that the testator, Preston Todd, and his brother, James H. Todd, were engaged in the business of farming and dealing in cattle; that James married and raised a family of children, but that Preston never married; that they lived together all of their joint lives; that all of their business was carried on in the name of J. H. & P. Todd, James giving his attention to all the outside transactions of their business, buying and selling the cattle, and marketing the crops, while Preston cultivated and managed the farms, and looked after the stock; and that all their lands and personal property were jointly held and owned by them.

Whether the lands were owned in partnership, and impressed with the character of personality, as is the case in equity for certain purposes with land so held, or whether they were held by James H. Todd and Preston Todd simply as joint owners, it is unnecessary to decide or consider. The testator, in making his will, made a clear distinction between the lands and personal property owned by J. H. & P. Todd. He regarded and treated his share of the personal property as personality, and his share of the lands as realty. He had the right, as respects the objects of his bounty, in disposing of his estate, so to regard and treat his property; and in seeking for his intention, in the construction of his will, as to the fund from which the legacies are payable, his property must be so regarded and treated. Whatever right creditors might have to complain, clearly his beneficiaries cannot do so.

The testator, after stating of what his estate consists, bequeaths all his personal property, "subject to certain legacies hereinafter specified," to his two nephews James Todd and Rankin Todd. He next devises all his real estate to them for life and their heirs after them. He then directs that the property devised remain undivided, and that the partnership previously existing be continued until May 1, 1883, by placing in his stead his said nephews. The object of this arrangement was, as he states, to provide for the payment of the "McCue Homestead," which, it seems, he and his brother had recently purchased.

Having made the foregoing dispositions of his estate, he comes now to the legacies which he had in mind, and referred to when bequeathing his personal property. He gives to Catherine McFall the sum of \$3,000, payable after May 1, 1890, in annual installments of \$500, and also the sum of \$180, to be paid annually to May 1, 1890, said moneys to be paid to the daughter of Catherine McFall, if the latter should die before May 1, 1890. He then gives a legacy of \$50 for 10 years to "Mossy Creek Presbyterian Church"; and his horse Shiloh to his nephew Howard Todd.

It thus appears from the will that the testator expressly charged the legacies on his personal property. It is given to his nephews

James and Rankin Todd, subject to the legacies to be thereafter specified. The presumption is that he considered the personal property ample to discharge the legacies, or he would not have bequeathed it subject to the legacies; for, unless it was more than sufficient to pay them, the bequest was worthless and meaningless, and it cannot be supposed that the testator meant to do a vain and useless thing by the bequest of his personal property. The record shows that the personal property owned by J. H. & P. Todd was worth about \$10,000, and the testator's part thereof was more than sufficient to discharge the legacies, if it had not been absorbed in the payment of debts, as to which he does not seem to have been informed, since he mentions no debt except that due for the "McCue Homestead," for whose payment he made special provision.

Having bequeathed his personal property subject to the legacies, he then specifically devises his real property to his said two nephews, without making any reference whatever to the legacies. It was entirely natural that he should not refer to them; for if he believed that the personal property was ample to pay them, which is an irresistible inference from the gift of the personal property subject to the legacies, any reference to the legacies in disposing of the real property was unnecessary; or, if he did not mean to charge the legacies on the land in case the personal property proved insufficient for their payment, it was in that case equally unnecessary.

The only part of the will that affords any foundation whatever for the contention that the legacies in question constitute a charge upon the land is the language in which the legacy of \$3,000 to Catherine McFall is expressed. The testator says: "I will and bequeath to Catherine McFall the sum of three thousand dollars, payable from my said estate on or before the 1st of May, 1890." It was argued that the testator, by the use of the words "said estate" in this connection, referred to his entire estate, both real and personal, and thereby intended to charge the legacy on the land as well as on the personal property. The testator, in the preceding part of his will, had disposed of both his personal and real estate, referring to and bequeathing the one as his "personal property" and referring to and devising the other as his "real property"; and from this fact the conclusion is sought to be inferred that, in making the legacy payable from his "said estate" he intended to use the word "estate" in a technical sense, and to include both his personal and real property.

The will was evidently not written by a lawyer, and it would be an extreme presumption that the testator was aware of any technical distinction between "property" and "estate." Both words are in familiar and common use, and indifferently applied to either species of property or to both. The

mere use of the word "estate," as used by the testator in giving the legacy to Catherine McFall, is at least equivocal, and cannot avail to enlarge the fund for the payment of the legacy, and make it also a charge on the land if the personal property be deficient.

The words "said estate," as used by the testator, are more naturally referable to the personal property than to his entire estate, meaning by "estate" both species of property. The use of the word "said," in connection with "estate," would seem to make it refer directly to the personal property upon which the testator, in the preceding part of his will, had in express terms charged the payment of the legacies. The legacy is made payable from his "said estate"; that is, the particular estate upon which he had already and expressly charged it. This seems by far the most natural construction of his language.

The expression referred to is the only one contained in the will which gives any color to the construction that the legacies were intended to be a charge upon the land. It very clearly does not meet the requirement of the law that, to sustain the charge, the intention must be expressly declared, or be a fair and satisfactory inference from the language and dispositions of the will.

The case at bar differs widely from the cases of *Crouch v. Davis' Ex'r*, 23 Grat. 62, and *Wood v. Sampson's Ex'r*, 25 Grat. 845, in which it was held that the legacies were charged on the land. The conclusion that they were so charged was deduced from the fact that, in the wills construed in those cases, pecuniary legacies alone had been first given, and no part of the real estate been specifically devised; and there was a residuary clause devising and bequeathing the residue of the real and personal estate, thus blending the two kinds of property into a common fund, and thereby plainly manifesting a purpose to make no distinction between them. It was therefore held in those cases, as the well-established doctrine of both English and American courts, that inasmuch as pecuniary legacies alone were given, and the will contained no previous devise of any part of the real estate, the residue could only mean what remained after satisfying the legacies.

And an intention to charge the real estate is likewise inferred where a testator devises the real estate, after a direction that debts and legacies be first paid, or previously paid; or devises the remainder of his estate, real and personal, after payment of debts and legacies; or the devise is declared to be made after they are paid. *Lupton v. Lupton*, 2 Johns. Ch. 614, and *Lee v. Lee*, 88 Va. 805, 14 S. E. 534.

But the case before us is very different. Here all the real estate was specifically devised, as was also all the personal property, it is true, bequeathed; but the latter was expressly given subject to the legacies. Here there was no devise by the testator of the remainder of his estate, real and personal, after the payment of debts and legacies; nor, after

general pecuniary legacies, and no specific devise of any portion of the real estate, a residuary clause blending the residue of the real and personal estate into a common fund; no direction that the debts and legacies be first or previously paid; nor a devise declared to be made after they are paid.

It was contended by counsel that as the legacies were expressly made a charge on the personal property, and it was consumed in the payment of debts, Mrs. McFall is entitled to be paid her legacy out of the real estate, and especially to the extent that the personal property was applied to the relief of the lien on the "McCue Homestead." The answer to this position is that, the will not having charged the real estate with the payment of the debts, nor made any other provision for their payment, the law makes the personal property the primary fund for their satisfaction; and if the testator was mistaken as to the value of his personal property, and it has proved inadequate to pay both debts and legacies, the latter must abate to the extent of the disappointment, and cannot be reimbursed out of the land for the loss. A legatee has no right to call upon the devisee to contribute to the payment of the legacy, unless the real estate be charged with its payment, not even where the personal property has been applied in exoneration of the land from a mortgage debt or vendor's lien, if the debt was contracted and the mortgage or lien on the land was created by the testator himself. *Elliott v. Carter*, 9 Grat. 541; *Wythe v. Henniker*, 2 Myne & K. 635; *Waring v. Ward*, 7 Ves. 332; *Cumberland v. Codrington*, 3 Johns. Ch. 229; 2 Jarm. Wills (Bigelow's Ed.) 683; 2 Spence, Eq. Jur. 838; 2 Sug. Vend. 680; and *Adams*, Eq. 261 and note.

It was finally insisted that, even if the legacies were not chargeable on the land, yet as the court so decided by the decree of May 25, 1887, and the appellants acquiesced in the decision for 10 years, it is now too late to ask that it be reheard and reversed. It is certainly not clear that the court so decided. It simply held that Catherine McFall, if alive on May 1, 1890, was "entitled out of the estate of Preston Todd to the sum of three thousand dollars, payable in annual installments of five hundred dollars each," and fixed the time that interest should run on the installments, and on the annuity of \$180. Not a word was said in the decree as to the legacies being a charge upon or payable out of the real estate in the event that the personal property was exhausted in the payment of debts, or proved inadequate to satisfy both debts and legacies. The appellants assert that they did not understand from the language of the decree that the court meant to decide that the real estate was chargeable with the legacies, and that, as soon as they learned that the decree was being given that construction, they took steps to have it reheard and corrected in this respect. The decree is ambiguous and of doubtful meaning, and being interlocutory, without

saying more, it cannot be held that the appellants are estopped from having it reheard, and the will duly construed.

The court being of opinion, for the reasons herein given, that the legacies are not a charge upon the land, the decree of the circuit court must be reversed, and the cause remanded to be further proceeded in accordingly.

NEW YORK LIFE INS. CO. v. DAVIS et al.
(Supreme Court of Appeals of Virginia. Feb. 8, 1899.)

INSURANCE—FRAUD—INSURABLE INTEREST.

1. Assured applied for a life policy for the benefit of his estate, and afterwards assigned it to his employer, who, with others, had encouraged him to take it out. There was no evidence of an agreement to assign at any time prior to the assignment, though the assignee advanced the premium. Held that, though the policy be void as against the assignee by reason of his procuring the death of assured, it was not shown to be void in its inception, as against the estate.

2. The assignee of a life policy, having no insurable interest in the life of assured beyond the premiums advanced, can recover thereon only the premiums.

Appeal from circuit court, Henry county.

Suit by one Davis against the New York Life Insurance Company and others. There was a decree for complainant, and the company appeals. Affirmed.

E. W. Saunders, for appellant. Wm. M. Peyton, Hairston & Gravely, B. B. Munford, and Peatross & Harris, for appellees.

RIELY, J. On May 29, 1895, a policy of insurance was issued by the appellant to John W. T. Davis upon his life for \$1,000, and on June 30, 1895, it issued to him another policy upon his life for \$3,000. Both policies were taken out by Davis for the benefit of his estate, and were both assigned by him, on June 27, 1895, to W. W. Lester, who had advanced for him the premium on each policy.

On February 24, 1896, Davis died under circumstances indicating that he had been poisoned, and suspicion pointed to Lester as the perpetrator of the suspected crime. He was arrested, indicted, and tried in the county court of Henry county, but acquitted.

In the meantime, the father of Davis, he being the distributee of the deceased, filed his bill to enjoin Lester from collecting, and the insurance company from paying, to him the money due on the policies, and to compel the payment of the policies to the administrator of the deceased when appointed, except so far as necessary to reimburse Lester for the premiums he had advanced. The father subsequently qualified as the administrator of his son, and the suit thereafter proceeded in his name as such fiduciary.

The company resists all liability on the policies, upon the alleged ground that the application for the insurance was not the result of

the volition of Davis, and did not emanate from him, but that he was induced by Lester to take out the policies, and that it was only at the instigation and by the persuasion of Lester that he did so; that Lester, at the time he induced Davis to effect the insurance, had formed the purpose to procure from Davis an assignment of the policies, and then take his life, in order to collect the policies; and that, when the policies were issued to Davis, Lester did procure from him an assignment of them to himself, and subsequently murdered him.

It was conceded that, if the policies were taken out by Davis in good faith and were valid in their incipency, their subsequent assignment to Lester, although procured by him with a view to the murder of the insured and the collection of the policies, would not prevent a recovery on them for the estate of the deceased.

Upon the company rests the burden of making good its defense and establishing the alleged fraud. This it undertook to do, and it may be conceded that a number of facts and circumstances were shown in evidence which tend to excite suspicion that there was some foundation for the accusation of the company; but, upon a full and careful consideration of all the evidence, it falls short of that clear and satisfactory proof required to establish fraud. Fraud may be proved by circumstances as well as by direct evidence, but the circumstances, as in the case of direct evidence, must clearly and satisfactorily establish the fraud. It is not assumed on doubtful evidence or circumstances of mere suspicion. It must be clearly and distinctly proved. The law never presumes fraud, but the presumption is always in favor of innocence and honesty. *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225.

An effort was made to liken this case to that of *Insurance Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, but the two cases are very dissimilar in their material features.

In that case it was proved that the application for the insurance was instigated by Hunter, and the policy procured wholly for his benefit. It appeared in evidence that on the 3d or 4th of December, 1877, Hunter made inquiry at the office of the company, in Philadelphia, as to the rates of insurance on the life of a person aged about 40 or 41 years, upon an endowment policy of 20 years; stating that he thought of insuring for his own benefit the life of a person in the sum of \$10,000. After some conversation on the subject of insurance generally, he left; stating that the person to be insured would probably call in a day or two. On the 5th of the month, Armstrong called, and informed the agent that he came, at the request of Hunter, to make application for a life insurance. He was thereupon examined, and, after answering the questions usually propounded to applicants, he signed a formal application, leaving blank, however, the place for the amount of the insurance desired and for the answer

to the question respecting the manner of paying the premiums. He at the same time executed an assignment of the policy, leaving blanks for its date and that of the policy and for the name and residence of the assignee. This was his entire connection with the transaction. In the afternoon of the same day, or on the following morning, Hunter informed the office that the amount of the insurance desired was \$10,000, and that it would be more convenient for him to pay the premiums quarterly. The blanks left by Armstrong in the application were thereupon filled, and the application forwarded to the home office of the company in New York. Before the receipt of the policy at the office in Philadelphia, Hunter called and paid the premium, and stated that his lawyer would call for the policy. Some days thereafter his lawyer received the policy and the assignment, and they were subsequently delivered to Hunter. Within six weeks thereafter Armstrong was attacked at night, and died from the wounds he received. Suspicion fell upon Hunter as the perpetrator or instigator of the attack. He was accordingly arrested and tried for the murder of Armstrong, convicted, and sentenced to be hanged, and the sentence executed.

In the case at bar, the application for the insurance was made by Davis, and not by Lester. It was applied for by Davis, for the benefit of his estate, and not for the benefit of Lester. There is no evidence of any agreement at the time the insurance was applied for, or at any other time prior to the assignment, that Davis was to assign the policies to Lester. It is true that he was encouraged by Lester to take out the policies, but he was also encouraged by the other persons present,—at least when the first policy was applied for. The policies were issued by the company, and delivered to Davis as their owner; and he afterwards assigned them to Lester, in whose employment he was, and who had promised to see the first premiums on the policies paid, and did pay them before the assignment.

In *Insurance Co. v. Armstrong*, supra, it was stated by the court that, "the assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it, if the policy were not void in its inception"; but Lester, even if he honestly acquired the assignment of the policies on the life of Davis, the policies not being proved to be void in their inception, would have only had a claim under them for the amount necessary to reimburse him for the premiums he had paid. However valid the transaction, this was all that he could recover, in any event, and the residue of the proceeds of the policies belong to the estate of the insured. *Roller v. Moore's Adm'r*, 86 Va. 512, 10 S. E. 241, and *Long v. Britannia Co.*, 94 Va. 594, 27 S. E. 409.

The court, by its decree, forfeited to the company an amount equal to the premiums

paid by Lester, and only decreed the residue of the policies to be paid to the estate of the insured. The evidence does not justify, nor public policy require, a decree more favorable to the appellant.

The decree must be affirmed.

CARDWELL, J., absent.

TATE v. BANK OF THE STATE OF NEW YORK.

(Supreme Court of Appeals of Virginia.
March 9, 1899.)

APPEAL—OBJECTIONS—HARMLESS ERROR—JUDGMENT—DISMISSAL—RETRAXIT—NOTES—INDORSEMENT—EXTENSION OF TIME OF PAYMENT—ALTERATIONS.

1. A judgment will not be reversed because the court permitted a second examination of a witness who had consulted with defendant in error after the first examination, where plaintiff in error does not show that he was prejudiced.

2. After a holder of a note had delivered it to a bank as collateral security for a debt, he gave plaintiff an order entitling him to the note when the debt was paid. Pending an action by the bank on the note, said debt was paid, and the action was dismissed, and the note was subsequently delivered to plaintiff, pursuant to said order. *Held*, that the dismissal was not a retraxit precluding plaintiff, who was not a party, from subsequently recovering from an indorser who was a party, and acquiesced in the dismissal.

3. Nor did the dismissal discharge the indorser because it extended time to the maker.

4. An objection that a note sued on, written on a printed form, and having the printed name of the bank at which it was payable erased, and another name written in ink instead, appears to have been materially altered, is without merit, where no issue as to the genuineness of the note was made at the trial.

Error to corporation court of Lynchburg city.

Action on a note by the Bank of the State of New York against R. E. Hughes, J. D. Tate, and others. Judgment for plaintiff, and defendant Tate brings error. Affirmed.

Caskie & Coleman, for plaintiff in error. Blackford, Horsley & Blackford, for defendant in error.

CARDWELL, J. September 14, 1896, R. E. Hughes made his two notes to the order of J. Emory Hughes,—one for \$1,400, and the other for \$1,450,—payable four months after their date at the Traders' Bank of Lynchburg, Va.; and both notes were indorsed by J. Emory Hughes and J. D. Tate for the accommodation of the maker, and discounted at the said bank.

Before maturity, the notes were also indorsed by the Traders' Bank of Lynchburg, and turned over to the Third National Bank of New York, as collateral security, with other notes, for a loan by the last-named bank to the Traders' Bank of Lynchburg.

In December, 1896, the Traders' Bank of Lynchburg gave an order to the Bank of the State of New York upon the Third National

Bank of New York for the collateral held, including the two notes in question, to be delivered after the Third National Bank was paid the indebtedness due it from the Traders' Bank of Lynchburg. Both of the collateral notes, aggregating \$2,850, having been protested, and there being a balance of about \$2,200 due on the note of the Traders' Bank of Lynchburg to the Third National Bank of New York, for which these notes were held as collateral, the Third National Bank brought its action by notice and motion under the statute, at the March term, 1897, of the corporation court of the city of Lynchburg, against the maker and indorsers of the two notes, instead of upon the note of the Traders' Bank of Lynchburg, for which the two notes were held as collateral.

The Traders' Bank of Lynchburg having paid \$2,150 in cash on its note held by the Third National Bank (not on the two notes in suit), and the Third National Bank having collected, through its counsel, between \$150 and \$200 on another note also held by it as collateral for the note of the Traders' Bank of Lynchburg, this overpaid the balance due the Third National Bank on the note of the Traders' Bank of Lynchburg, and costs of suit and collection. The costs not being paid before the court adjourned its March term, 1897, the suit was dismissed, with a judgment against the defendants for costs, the following order being entered in the case:

"On motion of the plaintiff it is ordered that this motion be dismissed, and the plaintiff recover against the defendants the costs about its motion in this behalf expended."

The two notes upon which the suit dismissed was brought were then turned over to the Third National Bank, to be delivered by it to the Bank of the State of New York, in pursuance of the order of the Traders' Bank of Lynchburg in December, 1896, and in accordance with an agreement between the parties interested to the effect that, when the Third National Bank was paid the original debt it held against the Traders' Bank of Lynchburg, the suit was to be dismissed, and the two notes in question turned over to the Bank of the State of New York.

This having been done, and the two notes not having been paid, the Bank of the State of New York brought its action to the June term, 1897, of the corporation court of Lynchburg on each of the notes, by notice and motion under the statute, against B. E. Hughes, as the maker, and J. D. Tate and the Traders' Bank of Lynchburg, as indorsers, of the notes, which motions were heard together as to the defendant Tate, he alone making defense thereto; and, both parties agreeing, all matters of law and fact involved in the motions were submitted to and determined by the court without a jury, resulting in a judgment against the defendant Tate for the amount of the two notes, with interest and costs, to which judgment a writ of error was awarded by this court.

The first exception taken by the defendant is to the refusal of the court below to sustain the objection of the defendant to the introduction and further examination of a witness, J. G. Haythe, after he had been examined, cross-examined, and told to stand aside, and after he had held a whispered conversation or consultation with plaintiff's counsel.

The practice here complained of is not without object, and should not be encouraged; but as was said by this court in the case of *Burke v. Shaver*, 92 Va. 352, 23 S. E. 749, citing *Brooks v. Wilcox*, 11 Grat. 411, and *Fant v. Miller*, 17 Grat. 187, the subject of the examination of witnesses lies chiefly in the discretion of the court in which the case is tried, and its exercise is rarely, if ever, to be controlled by an appellate court. Unless it is palpably improper to grant leave for the second examination of a witness, an appellate court will not for this cause reverse the decree or judgment, as the trial court ought to possess much latitude of discretion in the decision of such questions.

That the plaintiff in error was prejudiced by the recall of the witness Haythe is not made to appear, and therefore we cannot hold that it was palpably improper for the court below to overrule the objection to the second examination of the witness.

The next contention of the plaintiff in error, arising under his second bill of exceptions to the ruling of the court below, is that the proceedings and judgment in the suit of the Third National Bank of New York against the plaintiff in error and others, dismissed at the March term, 1897, of the corporation court of the city of Lynchburg, afforded an absolute and conclusive bar to any further recovery against him upon the notes then in suit—First, because the order dismissing that suit was a retraxit by the plaintiff, or it was a final and complete adjudication by the court of the matter in controversy, viz. the two notes, the subject of this suit, and that in either case the cause of action is forever extinguished; and, further, that plaintiff in error was discharged from liability upon the two notes in question, because the object and effect of the arrangement entered into and carried out by and between the plaintiff in the first suit (Third National Bank of New York) and the Traders' Bank of Lynchburg and B. E. Hughes (the maker of the notes) was to extend time to the maker, whereby plaintiff in error was discharged from further liability as indorser of the notes.

Was the order dismissing the first suit a retraxit, or a final and complete adjudication by the court of the matter in controversy?

The order dismissing the first suit was not a retraxit; and as we shall presently see, when we come to consider the evidence in this case, it was not so intended, but the dismissal was by agreement, to which defendant in error (Bank of the State of New York) was not a party, between the plaintiff, Third National Bank, and the defendant the Traders' Bank of

Lynchburg, known to and acquiesced in by plaintiff in error.

If the Third National Bank could have maintained its suit after it had been fully paid the balance of its debt, to secure which it held the two notes then in suit, it could only have been maintained for the benefit of the party who was entitled to the collateral notes after it (the Third National Bank) had been paid, viz. defendant in error, the Bank of the State of New York.

Defendant in error was not a party to the first suit, had no notice or knowledge of its pendency; and for the Third National Bank and the defendants to its suit to have dismissed the suit so as to preclude the Bank of the State of New York, defendant in error, would have been in fraud of the rights of the latter.

"A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action." 7 Rob. New Prac. pp. 903, 904; Welch v. Mandeville, 1 Wheat. 233.

In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of form of proceedings, or want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. Hughes v. U. S., 4 Wall. 287.

In the case before us, defendant in error does not hold the notes in suit through the Third National Bank, plaintiff in the first suit, and therefore is not a privy. It holds through the Traders' Bank of Lynchburg and the prior indorsers of the notes.

In the case of Coffman v. Russell, 4 Munf. 207, it was held that a dismissal of a suit by the plaintiff's order is no bar to his bringing another suit for the same cause of action, even though there was a judgment by the court for the defendant against the plaintiff for costs.

In *Muse v. Bank*, 27 Grat. 257, the court held that a dismissal of a case or a discontinuance is not a retraxit, saying: "But, clearly, the order in question was not a retraxit, as that can only be entered by the plaintiff in open court," and, in dealing with the question of discontinuance, says: "The judgment in the same case is no more than an agreement not to proceed further in that suit against the particular defendant. Such judgment is not a bar to any future action against the same parties."

A retraxit is an open and voluntary renunciation by the plaintiff in open court of his suit, and the cause thereof. The usual and proper order, where there is a retraxit, is as follows: "This day came the plaintiff in his

proper person, and here, in open court, acknowledges that he cannot support his action, and voluntarily withdraws the same, and renounces the cause thereof; wherefore, on motion of the defendant by his attorney, it is considered by the court that the plaintiff take nothing by his bill, but for his false clamor be in mercy, etc., and that the defendant go thereof without day, and recover against the plaintiff his costs by him about his defense expended." Rob. Forms, p. 96.

"It differs from a nonsuit," says the court in *Hoover v. Mitchell*, 25 Grat. 390, 391, "in that the one [the latter] is negative, and the other [the former] is positive."

But, surely, it cannot be said that a dismissal of a suit by a plaintiff who no longer has a right to a judgment upon the cause of action sued on, but this right is then in another, who is not a party to the suit or a privy of the plaintiff, is a retraxit, whereby the party having the right to the subject-matter of the suit is absolutely and forever barred from bringing another action thereon.

It is well said by counsel for defendant in error, if the judgment on the motion of the Third National Bank (first suit) precludes any further recovery on these notes, then these notes, which were due, beyond question, to the Traders' Bank of Lynchburg, by its vice president, director, and member of its finance committee, B. E. Hughes, its counsel, J. Emory Hughes and J. D. Tate, its directors and members of its finance committee, would be extinguished without payment to the Traders' Bank of Lynchburg or its assignee.

Much that has been said goes to answer the contention of plaintiff in error that he was discharged from further liability upon the notes in suit because the agreement by which the first suit was dismissed had the effect to extend time to the maker of the notes, which contention is upon the ground that a judgment at that time would have been good against the maker of the notes, whereby the indorsers of the notes would have been protected.

As we have seen, when the first suit was dismissed, the plaintiff, the Third National Bank, had been paid the debt due it, to secure which the notes in suit were held. In a court of law a defendant cannot be changed to a plaintiff, and the Traders' Bank of Lynchburg, the last indorser on the notes, could not be made a plaintiff. The Bank of the State of New York could not have been substituted as plaintiff even if it had been notified of the situation. Therefore there could not have been a judgment upon the notes when the first suit was dismissed. Moreover, it is abundantly shown that the court below was justified in taking the view that as plaintiff in error was anxious to avoid a judgment against himself and the Traders' Bank of Lynchburg, in which he was a director and member of the finance committee, all that was done or agreed on, resulting in a dismissal of the suit, was with his knowl-

edge and acquiescence. Here, then, was a suit to which all the parties to the notes were parties defendant; and, in open court, the suit was dismissed by the plaintiff, who had no further interest, and with the approval of the maker and indorsers of the notes sued on. Under such circumstances, the dismissal of the suit could not be regarded as a retraxit or an adjudication by the court of the matter in controversy; nor would it for one moment be regarded as a discharge of the indorsers because the dismissal extended time to the maker of the notes.

We have not deemed it necessary to discuss the question whether or not a dismissal of a suit upon a protested note will constitute a bar to any future action against the indorser because the dismissal operates to extend time to the maker. If such be the law, as to which we need not express an opinion, it had no application to the case at bar, and to no case in which the dismissal was by a plaintiff having no further interest in the suit, with the approval of the indorsers of the note sued on.

Upon the evidence in this case, viewed from any standpoint, but certainly when viewed, as we must upon this writ of error, as upon a demurrer to evidence, it clearly appears that the dismissal of the suit of the Third National Bank was with the understanding that the notes sued on were to be delivered to the defendant in error; that this understanding was concurred in by the plaintiff in error; and that he recognized that such was the agreement and understanding after the notes had been turned over to defendant in error.

The evidence shows that plaintiff in error was present when the representative of the Third National Bank of New York turned the notes over to counsel to get judgment thereon if they were not paid, and then said that he did not want a judgment to go against him, and that the matter would be settled before the court adjourned; that he several times came to the office of the counsel for the plaintiff in the first suit, to see what was being done about the matter, and was informed of the situation; that, in fact, plaintiff in error was fully advised of everything being done, and of the rights of defendant in error to the notes when the Third National Bank was paid the debt for which the notes were held as collateral, and its suit dismissed; and that he made inquiry from time to time, during the court, as to how the Traders' Bank was getting on paying the Third National Bank. He testifies in his own behalf that he thought B. E. Hughes, the maker of the notes, was paying them to the Third National Bank, and that the notes had been paid off, until he was informed by letter from counsel for defendant in error that they held the notes for collection; but on cross-examination he admits that he had always said to counsel for defendant in error that he would pay these notes, and that the suit had

been delayed during the term of the court at which the trial was had, in order for him to make his arrangements to do so.

The point made by plaintiff in error that there appears to have been a material alteration in each of the notes in question, in that the notes are written on printed forms for notes payable at the National Exchange Bank, while it appears that the printed words "National Exchange" have been erased in each note, and the word "Traders'" written in ink in lieu of the words so erased, is without merit.

There was no issue made as to the genuineness of the notes before or at the trial, although plaintiff in error had seen the notes when placed in the hands of counsel for suit in the first instance, and, besides, admits that he had always said to counsel for defendant in error that he would pay the notes, and that a trial of the case was delayed in order to give him time to arrange to do so.

We are of opinion that there is no error in the judgment complained of, and therefore it is affirmed.

BUCHANAN, J., absent.

BOARD OF SUP'RS OF MONTGOMERY COUNTY v. TALLANT.

(Supreme Court of Appeals of Virginia. Feb. 2, 1899.)

TAXATION—LICENSES—MERCHANTS—CAPITAL—CONSTITUTIONAL LAW.

1. Under Acts 1889-90, p. 197, §§ 27, 28, providing for a license tax on merchants, based on the amount of their purchases, which tax shall be in lieu of all state taxes on their capital, the county supervisors cannot assess a merchant's capital for taxation, notwithstanding section 8, cl. 4, requires the commissioner to ascertain from each person in his district the amount of his capital in any employment not otherwise taxed.

2. Conceding that under Const. art. 10, § 1, requiring taxes to be equal and uniform, the legislature cannot exempt a merchant's capital from taxation, nor deprive a county of its power to assess the same, a county can tax a merchant's capital only in the mode prescribed by the legislature, and hence not at all where no mode is prescribed.

Riely and Buchanan, JJ., dissenting.

Appeal from circuit court, Montgomery county.

Suit between W. F. Tallant and the board of supervisors of Montgomery county. There was a decree for the former, and the latter appeals. Affirmed.

T. L. Moore and J. C. Wysor, for appellant. Phlegar & Johnson, for appellee.

HARRISON, J. The question presented by this record is as to the power of the board of supervisors of Montgomery county to assess for taxation, for county, school, and district purposes, the capital employed by a merchant in his mercantile business.

It is conceded that for county purposes the

supervisors can only levy taxes upon such property as is assessed with state taxes within the county; that they cannot look beyond the subjects of taxation provided by the legislature, as it is the province of that body alone to provide when, how, and for what purposes a tax shall be laid, and to provide the subjects of taxation.

The real question, then, to be determined, is, does the state assess with taxes the capital employed by a merchant in his business? The act providing for the assessment of taxes (Acts 1889-90, p. 197, § 27) says: "Every merchant shall pay a license tax for the privilege of transacting business in this state to be graduated by the amount of purchases made by him during the period for which his license is granted." Section 28 says: "For every license to a merchant or mercantile firm the amount to be paid shall be graduated as follows: * * *,"—and then provides that "the sums imposed under and by virtue of this section shall be in lieu of all taxes, for state purposes, on the capital actually employed by said merchant or mercantile firm in said business," and further provides that "the sums required by this section to be paid, when the license is taken out, shall be collected in the same manner that the amounts required to be paid for other licenses are collected."

It seems perfectly clear from the language quoted that the legislature has not only failed to declare that the capital employed by merchants in their business shall be assessed for taxation, but has expressly said that it shall not be so assessed, by declaring that the license required "shall be in lieu of all taxes for state purposes, on the capital actually employed by said merchant or mercantile firm in said business." And, to further make plain the legislative intent, the same section provides what the word "capital" shall include, and says, "All other property held by such merchant or firm shall be listed and taxed as other property," again excluding the idea that the capital employed by the merchant should be assessed for taxation.

Prior to 1874 the capital employed by merchants in their business was assessed for taxation, but in that year an act was passed containing the same provisions found in the present act,—providing for a license, instead of an assessment of the capital for taxation. This act was assailed by the merchants as unconstitutional, and the question was brought to this court, where the law was sustained upon the ground that it was a license tax upon the business of the merchant, and that the legislature had the power to determine whether the business of the merchant could be reached by the ad valorem system or not, and to adopt the policy of requiring a license in its stead. *Com. v. Moore*, 25 Grat. 959. This being so, the language, "the sums imposed under and by virtue of this section shall be in lieu of all taxes for state purposes on the capital actually employed," etc., clear-

ly relieves the capital so employed from the burden of any tax for state purposes; and, having expressly withheld said capital from taxation for state purposes, it cannot be assessed by the board of supervisors, and made liable to levy for county purposes. Code, § 833, cl. 2.

The appellant insists that under section 8, cl. 4, of the act, it was the duty of the commissioner to assess the capital of appellee, employed in his mercantile business, for taxation. That clause provides as follows: "He [the commissioner] shall ascertain from each person in his district, city, or town the amount of capital invested, used, or employed in any trade or business not otherwise taxed."

This clause, standing by itself, would be subject to the construction contended for; but, when it is read in connection with the other provisions of the law already quoted, it was clearly not the duty of the commissioner to assess the capital of appellee for taxation,—certainly not for state purposes, and consequently not for county purposes. If there were doubt as to the correctness of this conclusion, the result would be the same; for it is well settled that statutes levying duties or taxes upon citizens are to be construed most strongly against the government, and in favor of the citizen, and these provisions are not to be extended, by implication, beyond the clear import of the language used. Revenue laws are neither remedial statutes, nor laws founded upon any permanent public policy, and are not, therefore, to be liberally construed. Hence, whenever there is a just doubt, that doubt should absolve the taxpayer from his burden. *Planer Co. v. Flournoy*, 88 Va. 1029, 14 S. E. 976, and authorities there cited.

Appellant invokes article 10, § 1, of the state constitution, which declares that taxes shall be equal and uniform, and that all property, both real and personal, shall be taxed, and insists that the legislature has no power to exempt the capital in question from taxation, or to deprive the county of its right to assess the same. If this were conceded, it could not help the county of Montgomery, for, if all property must be taxed as well by the county as by the state, it can only be done in the mode prescribed by law, and the constitution makes it the duty of the legislature to pass such laws as are necessary to carry its provisions relating to taxation into effect. *Virginia & T. R. Co. v. Washington Co.*, 30 Grat. 471.

The legislature has made no provision authorizing counties to assess for taxation the capital employed by merchants in their business,—on the contrary, it has expressly refrained from taxing said capital for state purposes; and this determines the right of the county to do so.

Whether or not the present condition of the statute in this matter is the result of design, or mere inadvertence, is not for the

courts to determine. The policy of the state in the matter of taxation, subject to the fundamental law, rests with her representatives. If wrong is done the counties by allowing the capital employed by merchants in business to escape taxation, the remedy is with the legislature, and not in the courts.

For these reasons the decree appealed from must be affirmed.

RIELY and BUCHANAN, JJ., dissent.

MERCHANTS' BANK OF DANVILLE v. BALLOU et al.

(Supreme Court of Appeals of Virginia. Feb. 8, 1899.)

TRUSTS FOR CREDITORS—KNOWLEDGE OF TRUSTEE OF UNRECORDED CONVEYANCE—JUDGMENTS—CONSTITUTIONAL LAW—VESTED RIGHTS—OBLIGATION OF CONTRACTS.

1. Though trustees in a deed of trust to secure creditors did not know of the debtor's intention to execute the deed, nor of its recordation, until afterwards, their knowledge of a prior unrecorded conveyance binds the beneficiaries.

2. The legislature cannot destroy or diminish the value of an existing judgment, as it is a vested right of property.

3. The fact that a retroactive statute, which destroys the lien of a judgment, does not impair its validity, does not prevent the statute being unconstitutional, as impairing vested rights.

4. The statute giving the right to a judgment lien is a part of the contract on which the judgment is based, and hence a retroactive law, taking away the lien, is void, as impairing the obligation of contracts.

Keith, P., dissenting.

Appeal from circuit court, Halifax county.

Suit by the Bank of South Boston against C. E. Ballou and others. There was a decree for complainant, and defendant The Merchants' Bank of Danville appeals, and complainant brings a cross appeal. Affirmed.

Green & Miller, for appellant. William Leigh, for appellees.

HARRISON, J. This is an appeal from an interlocutory decree settling the principles of the cause, determining the right of priority between liens, and ordering the sale of certain real estate for the satisfaction of said liens. The appellee contends that the appellant has no standing in this court—First, because the appeal was not taken from the interlocutory decree complained of until after there had been a final decree; and, second, because appellant acquiesced in the decree complained of until it was too late to put the parties in statu quo if the same was reversed.

These questions it is unnecessary to consider, for the reason that the decree complained of must be affirmed, and therefore, whether they are decided for or against appellant, the result is the same.

The case presented by the appellant is as follows: On September 21, 1892, C. E. Ballou conveyed to R. W. Lawson, trustee, a cer-

tain mill property to secure the Bank of South Boston \$2,000. This deed was not recorded until April 14, 1893. In the meantime, on April 12, 1893, C. E. Ballou conveyed this same property to J. M. Carrington and H. J. Watkins, trustees, to secure numerous creditors; this last-named deed being recorded on April 13, 1893. Soon thereafter Carrington and Watkins proceeded to execute the deed to them by advertising the property for sale, and on May 17, 1893, an injunction was awarded stopping the sale, upon the alleged ground that the trustees, Carrington and Watkins, had notice of the deed for the benefit of the appellee the Bank of South Boston, and that, therefore, neither they nor the beneficiaries under their deed had acquired priority over appellee by its recordation. The rights of all the creditors were determined in this proceeding, the court holding that the beneficiaries under the deed to Carrington and Watkins took in subordination to the Lawson deed securing the Bank of South Boston.

The testimony of Carrington and Watkins shows that each of them had full and complete knowledge all the time of the Lawson deed securing the Bank of South Boston, and that they knew of the existence of said deed at the time the deed from Ballou to them was executed, although they did not know of the intention of Ballou to execute the second deed, and did not know it was executed until it was recorded; that on the day it was recorded they were notified of the fact, and immediately asked if the Bank of South Boston had been protected.

That Carrington and Watkins had full knowledge of the Lawson deed at the time the deed to them was made and recorded is not denied. That a trustee or trustees in a deed to secure bona fide debts are purchasers for value, and that notice to him, or them, or either of them, is notice to the beneficiaries in said deed, is not controverted.

The contention of appellant is that Carrington and Watkins, being ignorant of the execution and recordation of the deed to them at the time it was executed and recorded, were in no sense agents of the beneficiaries under that deed; that they knew nothing of the claims of the beneficiaries, or of the intention of Ballou to make a deed to secure them, until the deed had been fully executed and recorded; that they were only purchasers of the legal title, and if they had died, or had declined to accept the trust, that notice to them would not have affected the beneficiaries; that their failure to act would have related back to the date of the record of the deed, and their appointment thereunder become void, while the deed would have remained a subsisting security in favor of the beneficiaries; that, under such circumstances, it would be inequitable to allow the rights of the beneficiaries to be affected by knowledge of the trustees, not acquired in their capacity as agents of the beneficiaries, but as agents of the South Boston Bank, it appearing that

the trustees acquired their knowledge of the first deed while officers of the South Boston Bank.

In contemplation of law, the relation of principal and agent between the trustee named in a deed and the beneficiaries under it begins when the transaction is completed. The trustee named may not act when informed of his appointment, but his acceptance is presumed until he declines, and when he refuses to act a successor is appointed, who takes his shoes, and is substituted to all the rights and responsibilities of the position, as if he had been originally appointed, and the trust in his hands is tainted with all the imperfections that attached to it in the hands of the original trustee. It is not necessary to the validity of the deed that it should be executed by the trustee or the beneficiaries, or even that they, as a matter of fact, should know of its execution. The duties and powers of the trustee are not conferred by the creditor, but arise out of the instrument creating the trust. The rights of the creditor come to him through the trustee, under the provisions of the deed, and so it has been repeatedly held by this court that the knowledge of the trustee of a prior existing deed is imputed to the creditor. Under the settled law of this state, Carrington and Watkins are, under the deed in question, purchasers for value, and under the facts proven they are purchasers with notice; for they were, confessedly, at the time of the execution and recordation of the deed to them, fully possessed of the fatal knowledge of the first deed, which made the second deed subordinate to the first.

It is not perceived how the position of Carrington and Watkins, as purchasers for value with notice, can be affected by the fact that they were not aware of the intention of Ballou to make the second deed or of its recordation when made; nor is it seen how their ignorance of that fact can take this case out of the established principles already adverted to.

Under rule 9, the Bank of South Boston, one of the appellees, assigns as error to its prejudice the action of the court in giving the lien of certain judgments priority over its deed of trust.

This deed was acknowledged before the president of, and a stockholder in, the Bank of South Boston, the beneficiary thereunder, and was therefore not duly recorded, as against the judgments in question. It is, however, contended that the defect in its acknowledgment and recordation was cured by an act of assembly approved March 1, 1894, which provides "that no acknowledgment heretofore or hereafter taken to any deed or other writing executed by a company for the benefit of a company shall be held to be invalid by reason of said acknowledgment having been taken by a notary public or other officer who, at the time of taking said acknowledgment, was a stockholder or officer in the company which executed said deed or writing, and who was in no otherwise interested in the property con-

veyed or disposed of by said deed or writing; and the record of any such deed or writing heretofore made shall in all respects be deemed valid, notwithstanding the fact that the notary or other officer was, at the time of such acknowledgment, a stockholder or officer in the company executing said deed or writing or for the benefit of which such deed or writing was executed: provided, said notary or other officer was in no otherwise interested in the property conveyed or disposed of by said deed or writing when said acknowledgment was taken." Acts 1893-94, p. 580.

The contention is that this act was intended as a remedial, curative, and validating statute; that it was in the power of the legislature to enact it, and to make it retroactive, so as to cure any defect in the recordation of the deed in question, and to give it the same force and effect that it would have had if properly recorded in the first instance.

A statute will not be construed so as to give it a retroactive operation unless there is something on the face of the enactment putting it beyond a doubt that such was the purpose of the legislature. Whether or not the act relied on shows on its face a plain purpose on the part of the legislature to make the imperfect acknowledgments mentioned therein valid from their date, even though it destroyed the rights of judgment creditors whose liens were acquired before the passage of the act, we will not stop here to consider, but will proceed to inquire as to the power of the legislature to enact a law having the retroactive effect claimed for this.

It is unquestionably true that the legislature has power to pass retroactive laws within certain limits, even though such laws may affect a certain class of vested rights. *Town of Danville v. Pace*, 25 Grat. 1. The opinion of Judge Staples in this case is an elaborate and instructive discussion of the subject under consideration. The reasoning of the learned judge and the authorities cited make it clear that it is not within the proper limits of the lawmaking power to disturb vested rights of property by retroactive legislation.

There can be no doubt that a judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value. *Murphy v. Gaskins*, 28 Grat. 207, 222; *Ratliff v. Anderson*, 31 Grat. 105; *Gilman v. Tucker* (N. Y. App.) 28 N. E. 1040. In the case last cited the power of the legislature to pass retroactive legislation affecting a judgment is denied, and in discussing the subject it is said: "We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication, the fruits of the judgment become the rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect."

In *Murphy v. Gaskins*, *supra*, an act of the

legislature was construed which empowered the court, in which any judgment or decree had been rendered prior to the passage of the act, on motion of the defendant, to review such judgment or decree, and abate the same to the extent of the war interest included therein. The court held the act to be in violation of the state and federal constitutions, and in the course of an able opinion Judge Burks says: "Judgments and decrees for money being contracts of the highest character, of course, and for the reasons before stated, to abate any portion of the interest included in them would necessarily impair their obligation. Moreover, by such judgments and decrees, the rights of the parties in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become vested, and cannot be divested, as provided by the act of the general assembly."

It is, however, contended that the effect of the statute in question is not to impair the validity of the judgment, but only to modify the remedy for its enforcement. In other words, that though the judgment itself is a vested right, that cannot be impaired or diminished by a retroactive law, yet the lien is not a vested right, but only a remedy provided for enforcing the judgment, which can be taken away by such a law. This position is not tenable. The right to the lien upon the debtor's real estate is in many cases the sole inducement to the credit which constitutes the basis of the judgment. Without the benefit of that lien, guaranteed by the law, at the time the judgment is taken, the credit would not have been given.

In Cooley, Const. Lim. (5th Ed.) p. 440, it is said that a right, to be vested, "must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another"; and at page 445 it is said: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In the case of *Edwards v. Kearzey*, 96 U. S. 595, it was held: "The remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of the obligation; and any subsequent law of the state, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution of the United States, and therefore void." Mr. Justice Swayne, in delivering the opinion of the court, says: "It is also the settled doctrine of this court that the laws that subsist at the time and place of making a contract enter into and form a part of the contract, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement."

Judge Christian, in delivering the opinion of the court in the *Homestead Cases*, 22 Gr.

288, says: "Nothing can be more material to the obligation than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which are guaranteed by the constitution against invasion. The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms. It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided that no substantial right secured by the contract is thereby impaired. But any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

If, then, the lien of a judgment be, as contended, a mere remedy for enforcing the judgment, the statute which gives that remedy forms a part of the contract for the lien, and any law which takes away such a remedy impairs the obligation of the contract. When these judgments were obtained, the creditor, unquestionably, had a clear statutory right to enforce them against the real estate in controversy; and it would seem to be equally clear that such a right is a vested right, that cannot be taken away by subsequent legislation. If the constitutional provision relied on can be successfully invoked, as we have seen it can be, to prevent a party from being deprived, by a retroactive law, of a few dollars of war interest included in his judgment, surely the same constitutional guaranty would avail to save the same party from having his whole judgment destroyed by a retroactive law taking away the lien which alone, as in the case at bar, gives that judgment its life and value. It has been well said: You take my house when you do take the prop. That doth sustain my house; you take my life When you do take the means whereby I live.

For these reasons the decree complained of must be affirmed.

KEITH, P., dissents from so much of the opinion as affirms the decree appealed from on the question raised by cross appeal, under rule 9. CARDWELL, J., absent. RIELY, J., absent, counsel in case below.

GOLDSMITH et al. v. LATZ.

(Supreme Court of Appeals of Virginia. Feb. 2, 1899.)

ACCOUNT STATED—EVIDENCE—MASTER AND SERVANT—COMPENSATION—INTEREST.

1. Where a servant received of the master a statement of the account between them for services, and accepted the same without objection, and continued his employment for more than a year, the presumption is that he agreed to the correctness of the account.

2. An employé whose compensation is measured by a share in the profits is entitled to interest on compensation remaining, after it is due, in the hands of the employer.

Error to corporation court of Danville city.

Action by one Latz against Goldsmith & Co. There was a judgment for plaintiff, and defendants bring error. Reversed.

Green & Miller and Withers & Withers, for plaintiffs in error. Peatros & Harris and N. H. Massie, for defendant in error.

HARRISON, J. The court is of opinion that the proper construction of the contract in writing between the parties to this controversy is that Latz, the defendant in error, was to serve Goldsmith & Co., the plaintiffs in error, as manager of their mercantile establishment, in Danville, Va., for one year, beginning April 16, 1894, and ending April 16, 1895, and that the contract should continue in force, upon the same terms and conditions, for like successive periods of one year, from the first term, until abrogated by one of the parties, in which event a written notice should be given not less than 60 days in advance of the period at which it was proposed to terminate the contract; that, for his services as manager, Latz was to receive \$50 per month, to be charged in equal proportions to the individual account of Joseph and Henry Goldsmith, and was to receive, as additional compensation, one-third part of the net profits of the business for the year ending January 15, 1895, as shown by the books of Goldsmith & Co., in such ratio and proportion as the time of such services rendered by said Latz bore to the whole fiscal year beginning January 15, 1894, and ending January 15, 1895, with the privilege to said Latz of drawing, on account of his interest in the profits, a sum not exceeding \$900 per annum.

The 15th of January was the time for taking the stock and ascertaining the net profits of the business for the preceding year. This could not be done in April without detriment to the business, as shown by the letter of Latz to Goldsmith & Co. written before the contract was made and attached thereto. The contract was made in April. It was, however, clearly contemplated thereby that the net profits were to be ascertained as of the 15th of January, 1895, and the interest of Latz ascertained therein for the nine months then ending, and that thereafter his annual compensation was to be ascertained on the 15th of January in each year. Hence the provision, in the second clause of the contract, that on the 15th of January, 1895, nine months after the contract was entered into, Latz should receive one-third part of the net profits for the year ending January 15, 1895, in such ratio and proportion as the time of such services rendered might bear to the whole fiscal year beginning January 15, 1894, and ending January 15, 1895. A further provision of the contract is that, in case it is abrogated by either party, the compen-

sation of Latz, for the time intervening between January 15th next previous thereto and the termination of the contract, shall be a sum equal in amount per month to the average amount received per month for the previous year ending January 15th next prior to the abrogation of the contract; thus showing that the period of profit sharing was from January to January of each year. This view is still further confirmed by the construction the parties have themselves put upon the contract. In March, 1895, Goldsmith & Co. inclosed to Latz, in a letter written from Baltimore, a full statement of the business for the year ending January 15, 1895, in which they say: "You will note that your part of the earnings amount to \$2,149.82 for the nine months which you have been engaged in the business, which would indicate an average of \$2,687.28 per annum." In the statement rendered the balance is struck, showing the amount due Latz for his nine months' service to be:

Interest in profits.....	\$1,699 82
Nine months' salary, at \$50.00.....	450 00

Earnings of Geo. Latz for nine months	\$2,149 82
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The words quoted from the letter, "which would indicate an average of \$2,687.28 per annum," were not intended as a statement that the sum named would be his compensation for the 12 months' service ending in April, 1895, but were merely intended, as stated, to indicate that, upon the basis of \$2,149.82 for 9 months, at a like ratio of profits, his compensation would be \$2,687.28 for 12 months. (It is agreed that the figures "\$2,687.28" should have been "\$2,866.42.") This letter and statement, which was received by Latz and not objected to, clearly shows that, while his term of service was from April to April of each year, his term of profit sharing was from January to January of each year. This is the most reasonable construction of the contract, and does no injustice to either party thereto.

The court is further of opinion that it was error to give the first instruction asked for by the plaintiff in the court below. That instruction excludes from the jury all consideration of the question whether Latz was discharged by Goldsmith & Co., or voluntarily, and in violation of his contract, left their service. There was evidence tending to show that he voluntarily abandoned their service without cause. This was a question of fact, that should have been submitted to the jury for their determination.

There is no error in the second instruction given for the plaintiff. Latz was entitled to have interest from January 15th, the end of each current year, upon any balance then due him, until paid. He was not a partner in the concern, but an employé, whose compensation was measured by a share in the profits on the amount of business he succeeded in doing each year, and, if his compensation remained in th-

hands of his employers, after it was due he was entitled to interest thereon.

The court is further of opinion that it was error to refuse the fourth instruction asked for by the defendant in the court below. That instruction tells the jury that if they believe from the evidence that the plaintiff received from the defendants a statement of the account between them, showing the exact amount of compensation for his services in the year beginning in January, 1894, and ending in January, 1895, and accepted the same without complaint or objection, and thereafter continued for more than a year in the employment of the defendants, without objection or complaint of the amount of profits awarded him in the statement, such conduct, without explanation satisfactory to the jury on the part of Latz, raises a strong presumption that he had agreed to the correctness of such settlement, and, unless the jury should believe that such presumption was rebutted by Latz, they should find for the defendants on that question. This instruction was based upon the letter of March, 1895, and the statement therein, already adverted to, and other evidence in the cause, and was a correct statement of the law, if the jury should believe the facts upon which it was predicated, and ought to have been given.

For these reasons the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, in accordance with the views herein expressed.

Reversed.

BUCHANAN and CARDWELL, JJ., absent.

SOUTHERN RY. CO. v. FRANKLIN & P. R. CO.

(Supreme Court of Appeals of Virginia. Feb. 2, 1899.)

RAILROADS—LEASES—ABANDONMENT OF OPERATION—INJUNCTION—ADEQUATE LEGAL REMEDY—DECREE.

1. A railway constructed by plaintiff to furnish a community with railway facilities was leased to defendant, the lease reciting that the leased line was a valuable feeder to defendant's main line. Plaintiff agreed to furnish rolling stock, defendant to pay from the receipts the annual running expense, annual rent, dividends to defendant's stockholders, and, at the expiration of the lease, to return the line in as good repair as when received. Under a statute, failure to operate the road for three years would work a forfeiture of plaintiff's charter. *Held*, that defendant was bound to continue the road in operation.

2. Plaintiff leased its road to the receiver of another road, the decree ratifying the lease providing that it should be valid under any reorganization of the road. On the sale of the road by the receiver, the order of sale and deed provided that the purchaser should take the property subject to leases, etc., "the purchaser to take the place of the receiver." The purchaser leased the road to one who conveyed it in trust to secure an indebtedness, the grantee

assuming the lease from plaintiff. *Held*, that the purchasers at foreclosure of the trust deed were, as against plaintiff, bound by stipulations in the lease requiring the road to be kept in operation.

3. Where the abandonment of operation of a road by the lessee before the expiration of the term will result in loss of traffic, decay of the road, and the possible forfeiture of the lessor's charter, and the lessor's damages cannot be ascertained, the lessee may be enjoined from abandoning the road, as the lessor has no adequate legal remedy.

4. Where the lessee of a road threatens to abandon its operation, in violation of the lease, the lessor will not be denied an injunction against abandonment because it will compel the performance of a series of acts involving the exercise of skill and judgment.

5. If the lease of a road stipulates that the road shall be operated by the lessee, an injunction restraining the lessee from abandoning the road will not be denied because the road can be operated only at a loss.

6. A decree enjoining the lessee of a road from abandoning its operation is not objectionable because it requires the lessee to furnish the same train service that it had previously, since it is to be presumed that defendant used no more trains than were necessary.

7. In a suit by a lessor to enjoin the abandonment of operation of its road by the lessee, the injunction may extend to a branch line owned by the lessee, but connecting the leased line with the lessee's main line, and necessary to the use of the leased line.

8. On enjoining the lessee of a road from abandoning its operation, the court should not dismiss the case from the docket, but should detain it, for the purpose of making such further orders as circumstances may require.

Keith, P., dissenting.

Appeal from circuit court, Franklin county.

Suit by the Franklin & Pittsylvania Railroad Company against the Southern Railway Company. From a decree for plaintiff, defendant appeals. Modified.

Blackford, Horsely & Blackford and Eppa Hunton, Jr., for appellant. Phlegar & Johnson, for appellee.

RIELY, J. The Franklin & Pittsylvania Railroad Company (hereinafter called the "Franklin Company") was incorporated by an act of the general assembly of Virginia of March 12, 1878, and authorized to construct a railroad from some point on the main line of the Washington City, Virginia Midland & Great Southern Railroad Company (hereinafter called the "Midland Company"), or any branch thereof, in the county of Pittsylvania, to Rocky Mount, the county seat of Franklin county.

On September 19, 1878, it made a lease of its road, to take effect when the same was completed, to John S. Barbour, receiver, in the chancery suit of Graham against the Washington City, Virginia Midland & Great Southern Railroad Company, pending in the circuit court of the city of Alexandria, for the term of 34 years, at the annual rental of \$7,000. The lease was made subject to the ratification of the stockholders of the Franklin Company and the approval and confirmation of the said court. It was duly ratified by the former,

and approved and confirmed by the latter. The road was constructed and equipped by the lessor, and delivered to the lessee on April 15, 1880, from which date the lease was to run for 84 years.

The Southern Railway Company having, on June 18, 1894, duly acquired, by purchase and conveyance, the road owned by the Midland Company when the lease was made, and along with it the lease to Barbour, receiver, by the Franklin Company, plainly manifested an intention, in the summer of 1897, to abandon and cease to operate the leased road. In anticipation of such action by the Southern Railway Company, and to prevent the consequences that would result from it, the Franklin Company brought its suit in equity in the circuit court of Franklin county, charging in its bill that the Southern Railway Company intended to abandon and cease to operate under the lease the road of the complainant after July 1, 1897, and asking that it be enjoined and restrained from doing so. The Southern Railway Company filed its answer to the bill, and admitted the charge of the complainant.

Is the defendant company bound to operate the leased road during the term of the lease, or may it rightfully abandon and cease to operate it? This is the first question presented for our determination. Its solution depends upon the provisions of the lease.

It is conceded that an express covenant to operate the road during the term of the lease is not to be found among the provisions thereof, but the complainant in the court below, which is the appellee here, contends that the obligation to operate the road throughout the entire term of the lease is so plainly contemplated by its provisions that the law will enforce it as an implied covenant, as fully as if the obligation were expressed in appropriate words.

Necessary implication is, beyond doubt, as much a part of an instrument as if that which is so implied was plainly expressed. "Although the words of a contract under seal," says Addison in his *Treatise on Contracts* (volume 3, § 1400), "do not, in themselves, import any express covenant, yet the law, in order to promote good faith, and make men act up to the spirit, as well as the letter, of their engagements, will create and supply, as a necessary result and consequence of the contract, certain covenants and obligations, which bind the parties as forcibly and effectually as if they had been expressed in the strongest and most explicit terms in the deed itself."

While this is very true, courts are nevertheless justly prudent and careful in inferring covenants or promises, lest they make the contract speak where it was intended to be silent, or make it speak contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. If however, it can be plainly seen, from all the provisions of the instrument taken together, that the obligation in question was within the contemplation of the parties when making

their contract, or is necessary to carry their intention into effect,—in other words, if it be a necessary implication from the provisions of the instrument,—the law will imply the obligation and enforce it.

Before proceeding to examine critically the provisions of the lease, it is proper to observe that a court, in construing an agreement whose language leaves in doubt its meaning as to the particular matter in controversy, in order to ascertain the intention of the parties, should have regard to the occasion which gave rise to the contract, the obvious design of the parties, and the object to be attained, as well as to the language of the instrument itself, and give the agreement that construction which will effectuate the real intent and meaning of the parties as thus ascertained from the entire instrument and by reference to the circumstances attending the making of it.

It is apparent that a principal object of the incorporators of the Franklin Company was to furnish railroad facilities to the citizens of Franklin county by connecting by rail Rocky Mount, the county seat, with the main line of the Midland Company, and thereby secure railroad communication with all sections of the state and country reached by that road and its connections. It was to this end that the county of Franklin subscribed to and paid for in its bonds \$200,000 of the capital stock of the Franklin Company. And the consummation of this object was the main inducement on the part of the Franklin Company to enter into the lease with the Midland Company; while the inducement to enter into it on the part of John S. Barbour, receiver, was, as expressed in his reports to the circuit court of Alexandria, to obtain, as he believed, a valuable feeder to his line of railroad. That the lease was in the contemplation of the parties thereto at the time the Franklin Company obtained its charter is shown by the eighth section thereof, whereby it is expressly made "lawful for said company to lease its road, or any part thereof, to the Washington City, Virginia Midland & Great Southern Railroad Company, or any other railroad company chartered by the commonwealth."

It is apparent, upon a fair construction of the whole instrument, considered in the light of the circumstances under which it was made, that it was within the contemplation of the parties and their intention that the road should be maintained and operated during the entire term of the lease; and, when we come to examine its provisions critically, the obligation to do so, though not expressed in words, is plainly implied.

By the lease the Franklin Company demised to John S. Barbour, receiver, its whole road from Rocky Mount to Pittsville, in Pittsylvania county, together with all its stations, water tanks, switches, sidings, privileges, franchises, and other appurtenances, including an equipment of rolling stock not to exceed in value \$20,000, for 84 years; said term not to

commence until the Franklin Company had completed and delivered the road to the receiver, and supplied the same with such amount of rolling stock and other equipment as might be necessary to its use and enjoyment, provided said equipment should not exceed in cost the sum of \$20,000. And the receiver, in consideration of the said demise, agreed to pay to the Franklin Company an annual rental, during the term of 34 years, of a sum equal to 7 per centum upon the amount of certain bonds which the Franklin Company proposed to issue and secure by a mortgage upon its road, privileges, and franchises, not to exceed \$100,000. He further covenanted to apply the receipts which might be derived from the property thereby demised as follows:

First. To the payment of the annual expenses of running the road and keeping it and the equipment in proper repair.

Second. To reimburse himself for the payment of the annual rent which he had agreed to pay for the use of the road.

Third. To the payment of a dividend of 7 per centum upon the capital stock of the company, provided the capital stock should not exceed in par value the sum of \$200,000.

Fourth. The residue of said receipts, if any, after making the said payments, should be retained by the receiver for the use and benefit of the trust in his hands, under the order of the court.

He still further covenanted to return the road, at the end of the term of 34 years, in as good repair as when he received it, and to return rolling stock and equipment equal in value to that which he received.

In the preamble to the lease, there is also the declaration that the Franklin Railroad, when completed, "will be a valuable feeder to the traffic of the main line" of the Midland Railroad.

The leased road could not be a "feeder," valuable or otherwise, to the traffic of the main line of the lessee, unless it was operated.

Neither would there be annual expenses of running the road, and of keeping it and the equipment in repair, nor receipts to pay them, unless the road was operated.

One of the obligations of the Franklin Company, as we have seen, was to furnish rolling stock and other equipment necessary to the "use and enjoyment" of the road, not to exceed a fixed amount. The obligation to furnish the rolling stock and equipment for the use and enjoyment of the road implied the corresponding obligation to use it, and to use it was to operate the road.

By the terms of the lease, the receiver was to reimburse himself for the annual rental out of the receipts arising from the operation of the road, and provision was also made for the payment out of the receipts of a dividend to the stockholders.

The stipulations referred to plainly manifest an undertaking by the lessee to operate the road, and are inconsistent with the theory that it might, at its will and pleasure, abandon

the road and cease to operate it. And that such was not the understanding of the lessee and his successors is unmistakably shown by their conduct; for although the road has been unremunerative from the first, and an increasing burden to the lessee and his successors, both he and they recognized the duty to maintain and operate it, without raising a question, so far as the record discloses, as to their obligation to do so, as did also the appellant until shortly before this suit was instituted and the injunction awarded to prevent its abandonment of the road, covering altogether a period of upwards of 17 years.

By the general statute law of the state in force when the lease was made, an abandonment by a railroad company of its road, or a failure to use and keep it in good repair, for three successive years, rendered the company liable to a forfeiture of its charter and of its property. The parties to the lease are presumed to have known the law, and it cannot be doubted that they were fully cognizant of it. It is inconceivable that the Franklin Company would have entered into a lease of its road which would permit its abandonment by the lessee, with the consequent liability to a forfeiture of its franchises and property; and such a lease would be no less incompatible with the express covenant of the lessee to return the road in as good condition as he received it, and rolling stock and equipment equal in value to that which he received.

It was asked in argument by counsel for the appellant if it could be imagined that the circuit court of the city of Alexandria would have approved and ratified the lease, if it bound the lessee to operate the road continuously during the whole term, even at a loss to the property then under its care. It may be replied, would the court have sanctioned the lease which bound the lessee to pay an annual rent of \$7,000 for 34 years out of moneys derived from the property then under its care, if the road might not be used, but could be abandoned at the will and pleasure of the lessee? for it is conceded that, by the terms of the lease, the rent must be paid during the whole term, whether the road be operated or not. Clearly not.

Our conclusion is that the obligation to maintain and operate the road during the term of the lease is a necessary implication from its expressed stipulations. It adds nothing to the written contract to infer an obligation to do what was actually intended by the parties and what is essential to give effect and vitality to it.

This conclusion is in no wise inconsistent with the case of *Sherwood v. Railway Co.*, 94 Va. 291, 26 S. E. 948, where this court refused to compel the railroad company to replace its tracks from its existing terminus to its former terminal station, in the city of Portsmouth, and to re-establish that point as the terminal station of its line. That case, which was much relied upon by counsel for

the appellant, furnishes no ground for the contention that the appellant may abandon, at its will, the use of the appellee's road.

In that case the contract sought to be enforced was made subsequent to the mortgage under which the road was sold and acquired by the defendant company. It was held that the contract, being subsequent to the mortgage, was abrogated by the sale, and that the purchaser took the property free and discharged from all the obligations of the contract.

It was further held in that case that, the original company having the right under its charter to fix its deep-water terminus at either one of two points, and having built its road to one of those points, and selected that as its terminus, it was not obliged by its charter to maintain any other terminus, or compelled by the general law to keep up a branch road that it had constructed to connect with its main line. So that neither by charter, nor by contractual obligation, was the defendant company obliged to make its terminal station in the city of Portsmouth.

But how different is the case at bar. By the lease there is the obligation by contract upon the lessee to use and operate the road during the term of the lease. It is true that the obligation is only implied, but it is nevertheless as operative as if it were expressed. The lease from which the obligation proceeds has never been in any wise abrogated, but in all the mutations of the properties of the lessee it has been expressly preserved, with all the duties and obligations arising under it.

In *Sherwood v. Railway Co.*, supra, the distinction was clearly drawn between the positive duties imposed by charter and those assumed by a corporation under permissive grants of power. As to the former, it was said that the court would compel their performance by appropriate remedies, while with respect to the latter it would enforce them or withhold its hands, as might seem just, upon a consideration of all the circumstances of the case.

In the case at bar there is the obligation by contract upon the lessee to maintain and operate the leased road. The obligation is in full force, and as binding as if it were a positive duty imposed by charter. The case is clearly distinguishable in principle from that of *Sherwood v. Railway Co.*

The lessee being bound, by the provisions of the lease, to maintain and operate the road of the lessor, the next question for determination is whether there is any binding obligation on the appellant to do so.

In the decree of the circuit court of the city of Alexandria of September 25, 1878, by which the court approved and ratified the lease, is contained the following provision in relation to it: "And, for the purpose of establishing the rights of all parties claiming under this contract, it is hereby declared that, in any order hereafter to be made in this cause providing for a sale of the road or a reorganization of the defendant corporation,

said contract shall be duly respected, and all rights acquired thereunder duly protected."

In the thirty-seventh section of the decree entered by the court, February 13, 1880, for the sale of the property of the defendant corporation (the Midland Company), the lease from the Franklin Company was expressly included; and in the forty-eighth section of the decree it was provided that "the purchaser must take the property rights, franchises, and works sold under this decree by said commissioner subject to the leases and contracts specially named in said thirty-seventh section of this decree, * * * and the said purchaser must, as to said contracts and leases, take the place of the said company or of said receiver, as the case may be, and assume any and all liability and obligations thereunder." In the deed made, in pursuance of the sale, to the purchasers, who adopted as their corporate name "The Virginia Midland Railway Company," the lease from the Franklin Company was expressly conveyed, and the foregoing provision in the forty-eighth section of the decree of sale duly incorporated.

The new corporation, on April 15, 1886, demised all of its property, including expressly the lease from the Franklin Company, to the Richmond & Danville Railroad Company, for a term of 99 years; and by deed of October 22, 1886, the latter company conveyed much, if not all, of the said property, including the lease from the Franklin Company, to the Central Trust Company of New York, trustee, to secure certain bonds issued by the Richmond & Danville Railroad Company. This deed was foreclosed by decree of the circuit court of the United States for the Eastern district of Virginia entered on April 13, 1894, in the consolidated causes of Central Trust Company of New York, trustee, against the Richmond & Danville Railroad Company, and William P. Clyde and others against the same and others, and the property conveyed by the said deed, including the lease from the Franklin Company, was bought by certain persons, who assumed and adopted the corporate name of "Southern Railway Company." A conveyance was duly made of the property on June 18, 1894, to the said company, by masters appointed for that purpose by decree entered in the said causes. It thereby acquired, and by the express terms of the conveyance assumed and adopted, the lease of the Franklin Company, and thereby became liable for the fulfillment of all the obligations of the original lessee. It, therefore, plainly appears that the Southern Railway Company stands in the shoes of Barbour, receiver, as respects the said lease, and is as firmly bound by its covenants, expressed or implied, as if it had been the original party thereto instead of the said receiver.

Having ascertained from the provisions of the lease under construction that the lessee, Barbour, receiver, was bound to operate the road of the lessor during the term of the lease, and being also of opinion that the appellant

company is likewise bound by the said obligation in all its force and vigor, it remains to be determined whether a court of equity will enforce the obligation.

It was earnestly contended by counsel for the appellant that, conceding such obligation to exist, the remedy of the appellee was a suit at law for damages for the breach thereof, and that equity was without jurisdiction in the case. As a general rule, the remedy for the breach of a contract, especially where it does not relate to real estate, is a suit at law for compensation in damages, but, if the remedy be not adequate, full, and complete, equity will interpose and compel the specific performance of the contract. The true rule is thus laid down in Story, Eq. Jur. § 33: "The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time and in future; otherwise, equity will interfere, and give such relief and aid as the exigency of the particular case may require." *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509.

It cannot be reasonably contended that a suit at law would afford redress for the threatened injury. Only half of the term of the lease has expired. It has 17 years still to run. It would be impossible to ascertain the amount of damage that the complainant would sustain from an abandonment of the road during the remainder of the lease. The injury from loss of traffic, from the natural and certain decay of buildings and structures, and from the possible, if not probable, forfeiture of its franchises and property, could not be estimated nor compensated by damages. The right of the complainant to have the road operated by the defendant until the expiration of the lease is a continuing right, and, if the injury were reparable in damages, it would require a multiplicity of actions for the daily breach of the agreement. The remedy at law would be neither complete nor adequate. Nothing short of the interposition of a court of equity would meet the exigencies of the situation, and secure the complainant the protection of its rights.

It was objected that, conceding the remedy at law to be inadequate, equity will nevertheless not compel specific performance of a contract having some years to run, which is practically what is sought by the mandatory injunction, that requires continuous acts, involving the exercise of skill and judgment. It may be admitted that the authorities are not uniform, and that there are decisions which sustain the objection, but an examination of the decided cases will disclose the fact that the great weight of authority, and especially the recent decisions of courts of the highest

respectability and influence, maintain the jurisdiction of equity in a case like that at bar. The courts are constantly called upon to exercise the very jurisdiction here called in question, in operating railroads through receivers. No particular difficulty is encountered in doing so, although the operation of the road in such case requires a continuous series of acts, involving the exercise of skill and judgment; and, if the court can do this through its receiver, no good reason is perceived why it may not compel a railroad company to operate a road in performance of its contract to do so.

In *Joy v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, the St. Louis, Kansas City & Colorado Railroad Company claimed that it was entitled by succession, under a certain contract, to use, jointly with the Wabash, St. Louis & Pacific Railway Company, that portion of the tracks of the latter company which extends, from a point on the northern line of Forest Park, through the park, and thence to the Union Depot, in the city of St. Louis, together with the right to use side tracks, switches, turnouts, and other terminal facilities. It was a continuing right, and unlimited in time. The contract contained provisions regulating the running of trains, and prescribing the duties of superintendents, train masters, and other officers. The claim being denied, and the right to use the tracks refused, the court, in a suit brought to enforce the same, decreed the specific performance of the contract, and enjoined the Wabash Company from refusing to permit the Colorado Company to use its tracks.

In *Telegraph Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900, the telegraph company had entered into a contract with Harrison Bros., by which it agreed to allow them the right to put up, at their own expense, maintain, and use, a telegraph wire on its poles between Philadelphia and New York, which, when put up, was to be maintained and kept in good working order at the expense of the telegraph company, and over which Harrison Bros. were to be allowed to transmit messages free of all charge. At the expiration of 10 years the wire was to become the property of the telegraph company, after which time it was to lease the same to Harrison Bros. for \$600 per annum, and upon the same terms, in all other respects, as if the wire had not been given up. The 10 years having expired, Harrison Bros. continued to use the wire as before, but paying the stipulated sum of \$600 per annum. After this had gone on for about 3 years, the telegraph company gave notice to Harrison Bros. of its intention to terminate the agreement. The court held that the contract was one proper for specific performance, and enjoined the telegraph company from terminating the agreement, and required it to maintain the wire in good working order for Harrison Bros.

In *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.*, 144 N. Y. 152, 39 N. E. 17, it appears that the plaintiff owned a steam

railroad, which extended from Coney Island to a depot at the corner of Ninth avenue and Twentieth street, in the city of Brooklyn, and also owned certain horse-car railroads, extending from the depot to Fulton Ferry, and that the defendant operated certain horse-car lines from Fulton and other ferries to Fifteenth street, and thence to Coney Island. A contract was entered into between them by which the plaintiff granted to the defendant the right to use the tracks of its horse-car line on Ninth avenue, from Fifteenth street to the depot at Ninth avenue and Twentieth street, free of charge, for 21 years from June 1, 1882, and the defendant covenanted to run cars to plaintiff's depot to connect with its trains run to and from Coney Island. The contract contained a provision that, in case the defendant should use steam as a motive power on its line between the city and the island, either party could terminate the contract on six month's notice. They acted under the contract until October, 1889, when defendant, having adopted the "trolley system" of running cars by electricity upon its road between the city and the island, ceased to run its cars to the plaintiff's depot, and advised the plaintiff of its intention not to do so. Upon a bill filed by the plaintiff to compel specific performance of the contract, the court so decreed.

In *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, a contract between certain railroads for trackage arrangement in all its details, for a period of 999 years, was decreed to be specifically performed upon the refusal of the party, which had contracted for the use of its tracks, to abide by the agreement, and the recalcitrant company enjoined from interposing any obstacle to the enjoyment by the other party of the rights and privileges secured to it under the contract.

The case of *Schmidt v. Railroad Co.* (Ky.) 41 S. W. 1015, is very similar in its principal features to the case before us. The Northern Division of the Cumberland & Ohio Railroad Company leased its roadbed, right of way, and other property to the Louisville, Cincinnati & Lexington Railway Company for the period of 30 years. The Louisville & Nashville Railroad Company purchased the entire property of the lessee, including the said lease; took possession of the demised road; and, after operating it for a considerable period, gave notice of its intention to abandon the operation of the road. Suit was thereupon instituted to enjoin it from doing so, and to compel the performance by it of the lease.

The lessor was required by its charter to operate the road, but the defendant contended that no duty rested upon it except such as was imposed by the lease itself, and denied that the duty to operate the road was so imposed. The court held that, as assignee of the lease, it assumed all the obligations thereof, and that it being the statutory duty of the lessor to operate the road, and the lessor hav-

ing agreed that the lessee should operate it for the term of 30 years, the defendant was obliged, under the agreement, to do so.

In all of the cases above referred to, or in nearly all of them, the same contention was made as is now made here, that a court of equity will not specifically enforce a contract that calls for continuous service, involving the exercise of skill and judgment, and requires constant supervision on the part of the court, but it was overruled, and specific performance decreed. Cases might be multiplied illustrating the maintenance of jurisdiction by courts of equity in cases like that at bar, but it is deemed unnecessary.

The enforcement of the contract is also objected to on the ground of hardship. It is not pretended that the lease was induced by fraud or false representations of facts. On the contrary, it was entered into after due deliberation, was reasonable and fair when made, and, as declared in the preamble, "deemed judicious and beneficial" to both parties. Operation under it has demonstrated that the Franklin Company, instead of becoming "a valuable feeder" to the main line of the lessee, has proved to be an unprofitable adjunct. The hardship is due, in the main, to miscalculation in making the contract, and in part to subsequent events and a change of circumstances in no wise attributable to the lessor.

It is not doubted that there are adjudged cases which hold that a court of equity will not decree specific performance of the agreement where it would entail great hardship, and the hardship was due, in some measure, at least, to the conduct of the other party. *Booten v. Scheffer*, 21 Gratt. 474; *Gish's Ex'r v. Jamison*, 96 Va. —, 31 S. E. 521; and *Willard v. Tayloe*, 8 Wall. 564.

But we question whether a court of equity ever refuses specific performance upon the sole objection of hardship, where the contract in its inception was fairly and justly made, and the hardship is the result of miscalculation, or is caused by subsequent events or a change of circumstances, and the party seeking performance is wholly without fault. In *Marble Co. v. Ripley*, 10 Wall. 356, Mr. Justice Strong, in speaking of contracts that were supposed to be fair and equal when made, but in the lapse of time have become bad bargains, said: "Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances and changing events." The element of risk enters more or less into every contract, and the obligation to perform it cannot be allowed to depend upon the question whether it has proved to be advantageous or disadvantageous. It would be a travesty upon justice, and the reputed sanctity of contracts would be of little avail, if parties could refuse the performance of contracts having some years to run, which were fairly entered into.

and believed to be just and equal when made, merely because from contingencies, whose possibility might have been foreseen, they had turned out, in the course of execution, to be a losing, instead of a profitable, bargain.

In *Schmidt v. Railroad Co.*, supra, it appeared that the lessor was largely indebted to the defendant company, the assignee of the lease, for moneys furnished for it under the contract of lease, and to be repaid by it; that judgment had been recovered for the amount, and an effort made to sell the leased road to pay it, but nothing could be made, because no one would give anything for the road subject to the mortgage subsisting upon it. It also appeared that the leased road was being run at a heavy loss, the necessary cost of operating having exceeded the receipts in the sum of \$199,411.70. The defendant claimed that it would be harsh and inequitable, under these circumstances, to require it to continue to operate the road; but the court held that the facts in the case were not such as to release the defendant from performing the contract. Nor can the objection of hardship, made in the case before us, avail to stay the hands of the court.

Objection is made to the decree appealed from that it enjoins the appellant from abandoning or ceasing to operate the road as it was then operating it, without regard to the exigencies of the case. The decree simply requires the same train service as the appellant had deemed to be proper and necessary during the three years it had been in control and operation of the road. It is to be presumed that it was then running only such trains, and with such cars, as its experience showed were required. This would seem to be reasonable and proper, and to furnish no good ground of complaint.

The further objection is made to the decree that it requires the appellant to operate the entire line from Rocky Mount to Franklin Junction, which includes seven miles not belonging to the appellee, but is the property of the appellant. This seven miles is a branch road of the Midland Company, running out from its main line to a place called Pittsville, and was in existence when the lease was made; and the provisions of the lease clearly show that it was the understanding and agreement of the parties thereto that the Franklin Company was to construct its road to the western terminus of the branch road, so as to obtain connection with the main line. Without the branch road, there would be no connection between the new road and the main line. It was by means of the branch road that the new road was to become "a valuable feeder to the traffic of the main line." It is plainly implied in the lease that the branch road was to be operated in conjunction with the new road. The two have been operated together as one line ever since the beginning of the lease. They were so operated by the original lessee and all of his successors, and were being so operated by the appellant when

this controversy arose. The branch road is essential to the use and enjoyment of the road of the Franklin Company, and the court committed no error in the respect complained of.

We find no error in the decree appealed from, except in dismissing the case from the docket. The court should have reserved the right to make additional orders from time to time, as circumstances might require, and kept the case on the docket for that purpose. The decree will be amended in this respect, and as so amended will be affirmed.

KEITH, P., dissenting.

Ex parte YANCEY.

Appeal of BOUSHALL.

(Supreme Court of North Carolina. March 14, 1899.)

ESTATES—SALE—PERSONS NOT IN ESSE.

Where a testator bequeaths land to his daughter for life, and then to her children, the court has power, on application of the daughter and all her children then living, to order a sale of the estate, since after-born children will be concluded by such sale by representation of those then living.

Appeal from superior court, Wake county; Brown, Judge.

In the matter of the administration of the estate of N. S. Harp, deceased, on application of Elodia B. Yancey and others, devisees, an order for the sale of land was made; and on refusal of J. D. Boushall, a purchaser, to comply with his bid, judgment was rendered against him, from which he appeals. Affirmed.

Shepherd & Busbee, for appellee.

FAIRCLOTH, C. J. N. S. Harp devised as follows: "All the residue of my estate, real and personal and mixed, I give and bequeath to my wife, Lucy H. Harp, during her natural life, and then in remainder to my daughter, Elodia Benton Yancey, wife of Thomas B. Yancey, during her natural life, and then to her children." Elodia and her children, some of whom are minors represented by their next friend, ask the court to order a sale of the land, and that the proceeds be invested, under the direction of the court, for their benefit. The purchaser of one lot declines to pay his bid, and raises the question whether the court has the power to order the sale, and that is the only question. We are not considering whether Elodia acquired an estate in fee, or for life only. She and her children are asking for a sale. The only suggested difficulty is that by possibility she may have other children, whose interest cannot now be sold. We think that appellant's contention is untenable. When the life tenant, still living, has no child, it has been held that the court has no power to order a sale of land, where it is limited in remainder to persons not in esse, because there can be no one before the court to

represent their interest. *Watson v. Watson*, 56 N. C. 400; *Justice v. Gulon*, 76 N. C. 442. So, also, if the devise was in remainder to such children as should be living at the death of the life tenant, the court could not sell; for, until that event, it could not be known who would take. *Ex parte Miller*, 90 N. C. 625; *Williams v. Hassell*, 74 N. C. 434. But, when all the remainder-men living are before the court, they represent a class, and when the gift is general, and there is no element of survivorship in it, it is otherwise, and by representation those who may afterwards be born are concluded by the action of the court upon those of the same class then before it, and the purchaser at such sale will acquire a good title against after-born children of the same life tenant. *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 30. In *Williams v. Hassell*, supra, the court said: "Suppose, in the case before us, the devise had been to the first takers for life, remainder to their children. That would take in all the children,—as well those born after the death of the testator as those born before; and in such case it may be that the born child might be allowed to represent the class." That supposed case is just what we now have before us. The investment will be made as the court may direct, and the cause is retained for further direction. It is to the interest of our people that the title to property should be clogged as little as possible with "limitations," "trusts," etc., and public policy requires that the alienation of land should be as free from such condition as any article of traffic. Affirmed.

PERDUE et al. v. PERDUE et al.

(Supreme Court of North Carolina. March 14, 1899.)

WILLS—CONSTRUCTION—CHARGE ON LAND.

Under a will devising all plaintiff's property to his grandson, and stating that it is testator's desire that the grandson shall take charge of his grandmother, his mother, and his sisters during their lifetime, no charge on the land for the support of such persons was intended.

Appeal from superior court, Vance county; Brown, Judge.

Suit by Mary A. Perdue and others against W. T. Perdue and others. Plaintiffs moved for judgment upon the facts admitted, and set out in the pleadings, and upon the issues found by the jury, charging the land with \$75 per year for plaintiffs' support, beginning January 1, 1898. Motion refused. Judgment for defendants. Plaintiffs excepted and appealed. Affirmed.

W. B. Shaw and T. M. Pittman, for appellants. A. C. Zollicoffer, T. T. Hicks, and A. J. Harris, for appellees.

FAIRCLOTH, C. J. The following facts constitute the case: James H. Falkner died about the year 1888, having first made and

published his last will and testament, the construction of items 2 and 3 of which form the basis of this action by the plaintiffs. The said items are as follows: "Item 2. I will and bequeath unto my grandson, William Thomas Perdue, all of my land and personal property; to him and his heirs and assigns, forever. Item 3. It is my will and desire that the said William Thomas Perdue shall take care of his grandmother Lundy Falkner and also of his mother, Mary Ann Perdue, during their lifetime, and also to take care of his two sisters, Jennie A. and Bettie Ann Perdue." The grandmother Lundy Falkner is dead, and the said Jennie A. and Bettie Ann Perdue are now married, and live with their husbands. The said James H. Falkner died seised and possessed of a tract of land in Vance county containing about 66 acres, which William Thomas Perdue mortgaged; and, upon default of payment of the debt secured by the mortgage, the land was after several years sold by the mortgagee, and the defendants Powell and Cooper became the purchasers, went into possession, and now hold the same. Lundy Falkner is dead, and the question is, does the will make the support of the plaintiffs a charge upon the land in the hands of defendants, or is it a personal trust and confidence in W. T. Perdue?

No rule is better settled than that the intention of the testator must govern. The intention must be expressed or implied from the language of the will, considered as a whole. *Beach, Wills*, §§ 255, 256. We see nothing in this will which implies that a charge on the land for the support of the plaintiffs was intended. It is only a recommendation or request. The following are some instances in which the court considered that certain words implied the intent to charge the property as a lien thereon: In *Outland v. Outland*, 118 N. C. 188, 23 S. E. 972, the care and support were the "consideration" expressed for the devise to the sons. In *Misenheimer v. Sifford*, 94 N. C. 592, there was a devise of land to a son, "provided" he maintained his mother during life comfortably, etc. Held to be a charge. In *Gray v. West*, 93 N. C. 442, it was provided in the will that "Arey Gray is to have her support out of the land." This was held a charge. *Taylor v. Lanier*, 7 N. C. 98, and *Wellons v. Jordan*, 83 N. C. 371, are instances where the trust was personal only, and similar in principle to the one before us.

We find no error in the ruling of the court below. Affirmed.

CITY OF GREENSBORO v. WILLIAMS.

(Supreme Court of North Carolina. March 14, 1899.)

PEDDLERS—ITINERANT MERCHANTS—DEFINITION.

One who delivers an article already sold, and collects the price, or who sells articles without traveling about, is not a "peddler or itinerant merchant."

Appeal from superior court, Guilford county; Timberlake, Judge.

R. J. Williams was convicted of peddling without a license, and he appeals. Reversed.

Chas. M. Stedman, for appellant. A. M. Scales, for appellee.

FURCHES, J. This is a criminal proceeding instituted by the city of Greensboro against the defendant upon the charge of violating its charter and ordinances against "peddlers and itinerant merchants." On the trial the jury found a special verdict, as follows: "That on the 16th day of June, 1898, R. J. Williams did sell a picture frame and picture in the city of Greensboro, North Carolina, without having any license to sell the same from the said city. That some time prior thereto an agent of the Chicago Portrait Company made an executory contract with Mrs. J. E. De Lorme to furnish her with a portrait and frame of the manufacture of the Chicago Portrait Company, doing business in the city of Chicago, state of Illinois, to be subject to her approval, and any executory contract made by her to purchase not to be binding, unless she afterwards approved of the frame, when delivered to her. That, in pursuance of the executory contract so made, the Chicago Portrait Company shipped to the city of Greensboro, N. C., several pictures and several frames in bulk, whereupon the defendant, R. J. Williams, acting for the Chicago Portrait Company, broke the bulk of the original package, consigned to the Chicago Portrait Company, Greensboro, N. C., and placed the pictures in the frames, and sold and delivered one to Mrs. J. E. De Lorme as aforesaid, and collected for the same, in pursuance of the executory contract heretofore alluded to. That section 57 of the charter of Greensboro, N. C., is as follows: 'That, in addition to the subjects listed for taxation, the aldermen may levy a tax upon the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes, and, if not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner, may be forthwith distrained and sold to satisfy the same, namely: (1) Upon all itinerant merchants or peddlers, vending or offering to vend, in the city, a license tax not exceeding fifty dollars a year, except such only as sell books, charts, or maps or wares of their own manufacture, but not excepting venders of medicine by whomsoever manufactured; not more than one person shall peddle under a single license.' That the following is an ordinance duly passed by the board of aldermen under and by virtue of the foregoing section of said charter: 'Be it ordained by the board of aldermen of the city of Greensboro, that all itinerant merchants or peddlers, except such as sell books, charts or maps, whether sold by auctioneers or otherwise, and except further, goods of their own manufacture, but not except medicines by

whomsoever manufactured, offering for same goods by sample or otherwise at retail in the town of Greensboro, shall pay a license tax of fifty dollars per year. Any person subject to this tax offering goods for sale without a license shall be fined \$25 for each and every offense. License under this ordinance shall be issued by the tax collector and said license shall bear the date of the issue.' If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise, they say that he is not guilty." Upon this special verdict, the court being of opinion that the defendant was guilty, the verdict was so entered, and the defendant appealed from the judgment pronounced thereon.

It was stated on the argument that the case was intended to present the question of interstate commerce, and the constitutionality of the charter and ordinances of the plaintiff city. But it does not seem to us that the special verdict (by which we must be governed) raises these interesting and troublesome questions. And we do not propose to raise or discuss them, unless they were presented by the record, and necessary to the determination of the appeal. The plaintiff's counsel, on this branch of his case, calls our attention to *Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352. There we discussed at considerable length the doctrine of interstate commerce, and the constitutional question involved in that case, and, if it was necessary that we should consider those questions in this appeal, we would probably be very much influenced by what is said in that case; but, as they do not arise here, we do not consider or discuss them.

The only question presented by the special verdict is as to whether the defendant was an "itinerant merchant or peddler." "Peddler" is defined in all the leading lexicons, and in many judicial decisions. But about the strongest and most favorable definition for the plaintiff that we find is that given in *Range Co. v. Carver*, 118 N. C. 334, 24 S. E. 353: "Hawkers: Those deceitful fellows who went from place to place, buying and selling; * * * and the appellation seems to grow from their uncertain wanderings, like persons that with hawks seek their game where they can find it." "Hawkers, peddlers, and petty shopmen: Persons traveling from town to town with goods and merchandise." This quotation is from the opinion of Justice Gray in *Emert v. State*, 158 U. S. 309, 15 Sup. Ct. 367. And even under this definition we cannot hold that the special verdict makes the defendant a peddler. Nor does it constitute him an "itinerant merchant,"—a traveling merchant,—if there is a difference between a peddler and an "itinerant merchant." There is no finding—not even a suggestion—that he traveled about to sell pictures. Indeed, this idea is negatived when it was found that the picture was sold before it was sent to him, and he only delivered it, and received the price

agreed upon beforehand. It seems to us that, in the language of the late Chief Justice Pearson, the plaintiff has "gotten the wrong sow by the ear." There is error. Reversed.

STATE v. ROBINSON.

(Supreme Court of North Carolina. March 14, 1899.)

CRIMINAL LAW—RIGHT TO OPEN AND CLOSE.

Under rule 3 of the superior court (89 N. C. 608, 22 S. E. xii.), that in all cases, civil or criminal, where no evidence is introduced by defendant, the right of reply and conclusions shall belong to his counsel, such right remains in the state, where there are several defendants, one of whom introduces no evidence.

Appeal from superior court, Wake county; Bryan, Judge.

B. J. Robinson was convicted of assault, and appeals. Affirmed.

The Attorney General and Douglass & Simms, for the State.

FAIRCLOTH, C. J. The defendant and Eliza Ward were indicted for an assault on Laura Robinson. At the trial, Ward introduced witnesses, but Robinson introduced no evidence. At the close of the evidence, Robinson's counsel claimed the right to open and close the argument. His honor, as a matter of discretion, allowed the state to open and close, and Robinson excepted. It is admitted that his honor's ruling, except under rule 3 (89 N. C. 608, 22 S. E. xii.), is final, and not reviewable. Rule 6 (119 N. C. 959, 27 S. E. xiv.). Rule 3 is that in all cases, civil or criminal, where no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel. This question of practice has not been heretofore presented. It is the recollection of the members of this court that the practice has been that, where one defendant introduces evidence, that gives the right to begin and conclude the argument to the state, and we adopt that view as the better rule. If there were several defendants, the rule claimed by the defendant would be inconvenient. Affirmed.

MARKHAM v. McCOWN et al.

(Supreme Court of North Carolina. March 14, 1899.)

JUSTICES OF THE PEACE—JURISDICTION.

The mortgagee of a crop consented to a sale thereof by the mortgagor, on her promise to pay the mortgage from the price. After the sale, the mortgagor was compelled to sue for the price; and at her request, and on her promise that, when collected, the mortgage would be paid, the mortgagee desisted suing to protect his interest, and aided in the prosecution of the suit by the mortgagor. The suit resulted in a collection of the money due, which was paid to the attorney of the mortgagor. Held, that an action by the mortgagee against the mortgagor and her attorney to recover his

share of the proceeds was not an equitable action, but one on assumpsit, within the jurisdiction of a justice.

Appeal from superior court, Durham county; Robinson, Judge.

Action by John L. Markham against Alice McCown and another in justice court. From a judgment for defendants, plaintiff appealed to the superior court, where he had judgment, and defendants appeal. Affirmed.

Boone & Bryant, for appellants. Manning & Foushee, for appellee.

FURCHES, J. In May, 1888, the defendant McCown, for the purpose of getting supplies from the plaintiff, made and executed a "lien bond and mortgage," under the statute, to the plaintiff, for an amount not to exceed \$113.55, upon the crop of that year. Under this contract and lien the defendant got 30 sacks of fertilizer, at the price of \$3.75 per sack, for which she still owes plaintiff a balance of \$82.50, according to the findings of the jury. Among other crops raised by defendant that year was a crop of tobacco, which she sold to one Snow and the Modern Tobacco Barn Company. After the defendant McCown had contracted to sell this tobacco, but before it was delivered, she saw the plaintiff, and told him that she had sold it for a good price, and asked him not to interfere with her delivering the same, and said, if he did not, he should have his money as soon as it was paid for. The plaintiff, under this statement, agreed for her to deliver the tobacco. But, Snow and the Modern Tobacco Barn Company failing to pay for the tobacco, the defendant McCown, through her attorneys, Fuller & Fuller, brought suit against the purchasers. This action pended until the fall of 1892, when the plaintiff in that action, and defendant in this, recovered judgment against Snow and the Modern Tobacco Barn Company. But, owing to the insolvency of the defendants, she was not able to enforce collection until 1895, when the money was paid to her attorney, F. L. Fuller, Esq., who still has this money in hand, and is therefore made a party defendant in this action. We say that he still has this money in hand, as it is shown that he had it in hand at the commencement of this action; and, as there is no evidence that he has disposed of it, the presumption is that he still has it in his hands. During the pendency of the action against Snow and the tobacco barn company, the plaintiff and the defendant McCown had more than one conversation about the matter in the presence of her attorney, W. W. Fuller. In one of these conversations, the plaintiff, Markham, told defendant that he would bring a suit for the tobacco, in order to protect his rights, and defendant told him not to do so; that her suit would settle the matter, and as soon as the money was collected he would get the balance due him. Plaintiff, accepting this statement of the defendant McCown, desisted from bringing an

action for the tobacco, and took his bond and mortgage to Mr. Fuller, her attorney, and left them with him. Plaintiff, being thus induced to do so, furnished some money, and aided in the prosecution and collection of the price of the tobacco from Snow and the tobacco barn company. But, after the money for the tobacco was collected and in the hands of Mr. Fuller, the defendant refused to allow plaintiff's debt to be paid out of the fund, and plaintiff brought this action. Upon the trial the plaintiff recovered judgment against the defendant McCown for \$82.50, for which sum the plaintiff had judgment, and the court declared it to be a lien on the fund in Mr. Fuller's hands, and defendants appealed.

Defendants do not object to the amount of the judgment against the defendant McCown, but to that part of the judgment that declares the lien. Defendants say that plaintiff cannot recover this fund, for the reason that what took place between plaintiff and defendant McCown did not amount to an equitable assignment, and, if it did, as this action was commenced before a justice of the peace who has no equitable jurisdiction, that plaintiff cannot succeed against this fund on that account. It must be admitted that a justice of the peace has no jurisdiction to declare an equity or to enforce an equitable lien, while, on the other hand, it seems to us that it must be admitted that a justice of the peace has the jurisdiction to enforce the collection of money which equitably belongs to a party. The distinction between the two is clear to our minds. *Nimocks v. Woody*, 97 N. C. 1, 2 S. E. 249. This tobacco had been dedicated by the defendant to the payment of plaintiff's debt by her "mortgage lien," under which plaintiff was entitled to the possession, and was authorized to sell the same, and appropriate the proceeds to the payment of his debt. He never surrendered or abandoned any right he had in this tobacco. He only agreed to her delivering it to Snow upon the understanding that his debt was to be paid out of the proceeds of this sale; that after it was delivered to Snow, and the payment was delayed, he proposed bringing suit for the tobacco, for the purpose of protecting his rights. This was in the presence of Mr. Fuller, her attorney, when she told him there was no need of this, that her action would settle the liability of Snow, and that, as soon as the money was collected, his debt should be paid. With this understanding, he desisted from bringing suit for the tobacco, assisted in prosecuting the action against Snow, and carried his "bond and mortgage" to Fuller, her attorney. And W. W. Fuller says in his deposition that he understood he was acting in the prosecution of this claim both for the plaintiff and the defendant McCown. This being so, it seems to us that this money in the hands of the attorney, Fuller, or so much thereof as is necessary to pay the balance of plaintiff's debt, belongs to the plaintiff, and that this is an action, in the nature of the old

action of assumpsit, for money had and received for his use; and, the amount involved being less than \$200, a justice of the peace had jurisdiction. The defendant Fuller is evidently simply the stakeholder, and only wishes to be protected in paying out the money. But as he has the money, and refuses to pay it over to the plaintiff, he is a necessary party defendant in the action. The judgment was properly entered against the defendants, McCown and Fuller, though it may not have been proper to declare it a lien on the fund. **Affirmed.**

WHITE et al. v. BOYD et al.

(Supreme Court of North Carolina. March 14, 1899.)

FACTORS—KEEPERS OF TOBACCO—SALESROOMS—LIABILITY TO THIRD PERSONS—CONVERSION—WAREHOUSEMEN.

1. Keepers of a tobacco salesroom received a consignment of tobacco for sale, and sold it at public auction, subject to the consignor's right to reject the bid, and then delivered it to the buyer, collecting the price, and paying it to the consignor. Their compensation was a commission on the sale. *Held*, that the salesroom keepers were agents of the consignor.

2. In handling the tobacco, the salesroom keepers were not warehousemen.

3. The tobacco having been subject to a crop lien and a mortgage, the salesroom keepers were liable to the mortgagee and landlord for conversion.

Appeal from superior court, Halifax county; Norwood, Judge.

Action by Mary A. White and another against Boyd & Young. There was a judgment for defendants, and plaintiffs appeal. Reversed.

E. L. Travis, for appellants. MacRae & Day, for appellees.

MONTGOMERY, J. For the convenience of both the buyers and the owners of the tobacco in the leaf, salesrooms, commonly called "warehouses," are to be found at convenient places in the tobacco-growing districts, to which the article is carried to be sold. This action was brought to recover the proceeds of the sale by the defendants of certain leaf tobacco, alleged to have been the property of the plaintiffs, and to have been sold by the defendants without the knowledge or consent of the plaintiffs. The plaintiffs waived the tort growing out of the alleged conversion of the tobacco by the defendants, ratified the sale, and brought this action for money had and received, which remedy they had the right to adopt. *Sugg v. Farrar*, 107 N. C. 128, 12 S. E. 236; *Brittain v. Payne*, 118 N. C. 969, 24 S. E. 711.

It appeared from the evidence that the defendants sold certain leaf tobacco which was delivered to them by one Crowder, who was both the cropper of the plaintiff White and a mortgagor of the plaintiff Green; that the compensation which the defendants received in the transaction was in the nature of com-

missions on the sales; that the tobacco was sold without the knowledge or consent of the plaintiffs; and that defendants had actual notice of the mortgage. The plaintiff White, landlord, had also executed a mortgage on the tobacco to the other plaintiff. Upon the conclusion of the plaintiffs' evidence, on motion of defendants' counsel, his honor dismissed the action, under chapter 109, Laws 1897.

We may say in the beginning of the discussion that the facts in this case do not constitute the defendants warehousemen, whatever they may call the place where the tobacco was sold. They sold upon commission, and did not undertake to store the tobacco for hire. "A warehouse is a building or place provided for the receipt and storage of property. A warehouseman is a person who receives goods and merchandise for hire." 28 Am. & Eng. Enc. Law, p. 636. Whether or not his honor was correct in dismissing the action depends upon the nature of the business of the defendants; that is, whether they were agents, under any of the various forms of agency, of Crowder, the person who delivered to them the tobacco to be sold. If they were the agents of Crowder, then, in our opinion, they are liable to plaintiffs for their action in the sale of the tobacco.

The defendants' contention is that they were not the agents of either Crowder or the purchaser of the tobacco; that they simply brought together the buyer and Crowder, the apparent owner of the tobacco, for the convenience of them both; and that it was in the power of Crowder to refuse the bid made to the auctioneer of the defendants "by turning the tag,"—that is, by removing or displacing the scrap of paper attached to a small pointed splinter of wood, and stuck into the pile of tobacco by an employé of the defendants, who followed along upon the heels of the auctioneer, and on which paper was written the name of the purchaser, and the price bid. And the defendants further contend that they did not undertake to hold the tobacco against the lawful claims of any one, and that they had no interest in, nor did they claim any in, the tobacco; and that, as a compensation for their services in offering the tobacco for sale and finding a purchaser, they received only a commission on such sales. In support of their contentions, the counsel of the defendants referred us to the case of *Abernathy v. Wheeler*, 92 Ky. 820, 17 S. W. 858. In that case the tobacco of the mortgagee was shipped to the managers (called "warehousemen") of the salesrooms by a person other than the mortgagee without the latter's knowledge or consent, was sold, and the proceeds paid to the shipper. The fact appeared there that the salesmen of the tobacco had no actual notice of the mortgage. In the opinion in that case it was recited as a reason for the decision that the defendants were not liable to the mortgagee for a conversion of the property; that they had no knowledge or information that any other person than the shipper had any in-

terest in the tobacco. The decision therefore can be of no service to us, even if it was correct in the conclusion that a lack of actual notice of the mortgage on the part of the defendants protected them against the suit of the plaintiffs, for, as we have said, the defendants here had actual notice of the mortgage of the plaintiff Green. But we do not concur in the reasoning of the case of *Abernathy v. Wheeler*, supra, nor in the conclusions of the court. We think that, so far as the legal effect of the acts of the defendants in our case is concerned, the matter of actual notice, on the part of the defendants, of the mortgage, is of no consequence.

The question is: Did the defendants, when, at the request and under the direction of Crowder, they took possession of the tobacco conveyed in the mortgage, and sold it in the manner set out in the evidence, become mere intermediaries,—mouthpieces of Crowder,—or did they become Crowder's agents, for the purpose of selling and delivering the tobacco to the purchaser? Their possession of the tobacco was complete. It was on their floor. It was "cried off" by their auctioneer. They delivered it to the purchaser. They collected the price from the buyer, and paid it to Crowder himself, who had no right to receive it. All this was done under the direction of Crowder. The agency was as complete as it could possibly be made. The contention that the sale was in fact made by Crowder himself, because he had the privilege, under the rules governing the sales, to indicate his refusal to accept the bid, will not stand the test of examination, for the reason that he did not avail himself of the privilege, but accepted the bid, and received the money on it. Also, the defendants received compensation in money for their services in making the sale. The agency, then, being complete, did the facts constitute a conversion? The conversion of personal property is complete when one who is not the owner of the property deals with it as if he was the true owner. In *Pol. Torts*, p. 435, the author says: "Actually dealing with another's goods as owner, for however short a time, and however limited a purpose, is therefore conversion. So is an act which in fact enables a third person to deal with them as his own, and which would make such dealing lawful only if done by the person really entitled to possess the goods. It makes no difference that such acts were done under a mistaken, but honest and even reasonable, supposition of being lawfully entitled." In *Cooley, Torts*, p. 451, it is written: "One who buys property must at his peril ascertain the ownership, and if he buys of one who has no authority to sell, his taking possession in denial of the owner's right is a conversion. The vendor is equally liable whether he sells the property as his own, or as an officer or agent; and so is the party for whom he acts, if he assists in or advises the sale." In *Story, Ag.* 311, 312, it is said in

reference to the liability of agents to third persons for their own misfeasances and wrongs: "In all such cases the agent is personally responsible, whether he did the wrong intentionally or ignorantly, by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or the property of another. * * * A fortiori, if the principal is a wrongdoer, the agent, however innocent in intention, who participates in his acts, is a wrongdoer also." In the case of *Hoffman v. Carow*, 20 Wend. 21, an auctioneer who sold stolen goods was held to be liable to the owner for the conversion, notwithstanding that the property was sold, and the proceeds handed over to the thief, without notice of the felony. To the same effect is *Koch v. Branch*, 44 Mo. 542. In that case is brought forward Lord Ellenborough's remarks in *Stephens v. Elwall*, 4 Maule & S. 259, where the plaintiffs were the assignees in bankruptcy of a man by the name of Spencer, and the bankrupt sold goods of the bankrupt to one Deane, who bought for the trade in America, and who had a house in London, in which the defendant was his clerk. "The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but nevertheless his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." In *Kimball v. Billings*, 55 Me. 147, it was said by the court: "It is no defense in an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." In that case a grocery merchant exchanged for money some government bonds, for a person who had stolen them, the grocerman (defendant) having no knowledge of the theft. In *Coles v. Clark*, 3 Cush. 390, the defendant, who was an auctioneer, sold goods which were delivered to him by a mortgagor, and without any knowledge of the mortgage, and the court said: "That the sale and disposition of the goods, the delivery of them, and receiving the proceeds by order and direction of the mortgagor, who had neither title nor power, was a conversion, and that this action may be maintained. * * * The plaintiff in the present case had a qualified property and right of possession by virtue of his mortgage, of which the registration was constructive legal notice. The sale and disposal of the goods by the defendants were in law a conversion, without knowledge, or suspicion of the fraudulent purpose of Blake, the mortgagor, and the jury should have been so directed." In

Robinson v. Bird, 158 Mass. 357, 33 N. E. 391, the defendant, who was an auctioneer, sold goods which were delivered to him to be sold by a bailee, and was held liable at the suit of the bailor for the conversion. The court said in that case: "The defendant is an auctioneer, who has sold personal property belonging to the plaintiff. Therefore he is liable for a conversion, unless he can show some other excuse or justification than his good faith and his ignorance of the plaintiff's title." There was error in the ruling of his honor in dismissing the action. New trial.

CARROLL v. THOMAS.

(Supreme Court of South Carolina. March 27, 1890.)

MARRIED WOMEN—CONVEYANCE OF SEPARATE ESTATE—RECITALS IN DEED.

1. A deed by a married woman, of her separate estate, in the usual form, is valid, though it contains no formal declaration of her intent to convey her separate estate, as the act of 1887 (19 St. at Large, p. 819) entitled "An act to declare the law relating to the separate estates of married women," providing that all conveyances, mortgages, and the like, affecting a married woman's estate, shall be effectual to convey such estate where the intent is declared in such conveyances, does not render a conveyance without such declaration ineffective to convey the estate.

2. Under Married Women's Act 1887, § 1, providing that conveyances by married women shall convey their separate estate when the intent is expressed in writing, applies to mortgages or similar instruments, and not to an absolute deed of conveyance.

Appeal from common pleas circuit court of Barnwell county; R. C. Watts, Judge.

Action by Julia R. Carroll against Charles B. Thomas. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the decree of the court below:

"The case was heard by the court upon an agreed statement of facts, of which the following is a copy: 'It is agreed between counsel for plaintiff and defendant in the above-entitled action: That trial by jury be waived in the above-entitled action, and that all the issues be submitted for trial to the judge presiding in the Second circuit, either at chambers without the county of Barnwell or in open court, as may be most convenient to him, upon the following agreed statement of facts: The plaintiff was, on the 1st day of January, 1890, and still is, a married woman, the wife of one Francis F. Carroll, Sr. That on the 1st day of January, 1890, she was seised in fee as her separate estate of the land described in the complaint. That, being so seised, on October 2, 1890, she signed, sealed, and delivered to her son, Francis F. Carroll, Jr., a deed in the following form: "The State of South Carolina. Know all men by these presents that I, Julia R. Carroll, in the state aforesaid, for and in consideration of the natural love and affection

which I have and bear to my son, Francis F. Carroll, Jr., in the state aforesaid, and in consideration of the sum of five dollars, to me paid by the said Francis F. Carroll, Jr., in the said state aforesaid, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Francis F. Carroll, Jr., and his heirs forever, all that certain piece, parcel, or tract of land situate, lying, and being in the county of Barnwell, in the state aforesaid, containing one hundred and forty-eight acres, and bounded on the north by lands of P. W. Farrell and S. L. Peacock, on the south by lands of Anna R. Carroll, Laura V. Baker, and Julia R. Carroll, on the east by lands of Julia R. Carroll and Dr. Alex Storm, and on the west by lands of Anna R. Carroll and P. W. Farrell, said tract being all of the part or portion of the woodland tract lying northwest of the Sheep Fold branch, as represented by plat made on the 2d day of December, 1889, by F. M. Mixson, and bearing such shape and boundaries as represented by a plat thereon made on the 13th day of August, 1890, by Robt. C. Mixson, surveyor. Also all that certain piece, parcel, or lot of land situate, lying, and being in the corporate limits of the town of Blackville, in the county of Barnwell, and state aforesaid, bounded on the north by Izlar street, and measuring thereon 100 feet; on the east by Julia R. Carroll, and measuring thereon 275 feet; on the south by Carroll street, and measuring thereon 100 feet; and on the west by Hayne street, and measuring thereon 275 feet,—as represented by plat made on the 13th day of August, 1890, by Robt. Mixson,—together with all and singular the rights, members, and hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining. To have and to hold, all and singular, the said premises before mentioned, unto the said Francis F. Carroll, Jr., his heirs and assigns, forever. And I do hereby bind myself, and my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Francis F. Carroll, Jr., his heirs and assigns, against me and my heirs, and all other persons whomsoever lawfully claiming or to claim the same, or any part thereof. Witness my hand and seal this 2d day of October, in the year of our Lord one thousand eight hundred and ninety, and in the one hundred and fifteenth year of the sovereignty and independence of United States of America. Julia R. Carroll. [L. S.] Signed, sealed, and delivered in the presence of L. T. Izlar, F. M. Mixson." The land mentioned in the complaint is the first tract described in the deed. The said Francis F. Carroll, Jr., thereupon entered into possession of said land, and subsequently the land was sold in foreclosure proceedings under a mortgage given thereon by said Francis F. Carroll, Jr., and purchased by the defendant, who is now in possession, claiming title under said Francis F. Carroll, Jr. The only question in dispute and to be determined by the court is, what was the effect of the deed above set

out, executed by the plaintiff to her son, Francis F. Carroll, Jr., October 2, 1890? The purchaser, Thomas, had no notice that Mrs. Carroll was a married woman, and the demand for damages is waived.'

"The question for this court to decide is whether the deed of Mrs. Carroll, made on the 2d day of October, 1890, to her son, Francis F. Carroll, Jr., in consideration of love and affection, conveyed the land described therein. It is admitted by the plaintiff that the defendant, Thomas, is a purchaser for value at the master's sale in foreclosure proceedings had under a mortgage given by said Francis F. Carroll, Jr., and that the defendant, Thomas, bought said land at said sale, and did not know that Mrs. Carroll, at the time the deed was made, was a married woman; and it is further admitted by the plaintiff that the defendant, Thomas, is not liable for damages in this case. The sole question before the court is whether the deed is sufficient to convey the land, Mrs. Carroll being at the time of its execution a married woman. Plaintiff contends that, in order for the deed to be valid, it must contain, in terms, a declaration of her intention to charge or convey her separate estate under the act of 1887. Let us consider what are the powers of a married woman. The constitution of 1868 conferred upon married women the power to convey. Art. 14, § 8: 'The real and personal property of a married woman * * * shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried.' This constitutional right of a married woman to alienate her property was incorporated in the General Statutes of 1882 as follows: 'Sec. 2036. A married woman shall have power to bequeath, devise or convey her separate property in the same manner, and to the same extent as if she were unmarried. * * * And all deeds, mortgages and legal instruments of whatsoever kind, shall be executed by her in the manner and have the same legal force and effect as if she were unmarried.' This section of the General Statutes not only declares the constitutional power of a married woman to convey, but it goes further, and fixes the manner and legal effect of the conveyance; it declares that all deeds and mortgages shall be executed by her in the same manner, and have the same legal effect, as if she were unmarried. Section 2037 gives her the power to contract and be contracted with as to her separate property. Does the act of 1887 repeal or modify the provisions of section 2036 of the General Statutes? By examining the act it will be seen that there is no repealing clause, and there is nothing in the act which curtails her statutory power to 'convey * * * in the same manner and to the same extent as if she were unmarried.' The act of 1887 is declaratory. It was designed to fix the liability of a married woman who executed deeds, mortgages, or like formal instruments by providing that such deeds, mortgages, etc., as contain the declaration of her intention to charge her separate estate should

be effectual to convey or charge whenever the intention is declared in such deed, mortgage, etc. In other words, if a married woman executed a deed, mortgage, or like formal instrument, and embraced therein a declaration that it was intended by her to charge her separate estate, then she was estopped to deny that the conveyance was intended to convey her separate estate, or that the mortgage so executed was intended to be a charge against her separate estate. During the period from 1882 to 1887 there was much litigation in which married women denied that the mortgage executed was a lien upon their separate estates, because it was not a contract such as a married woman was authorized to make under Gen. St. 1882, § 2037. So the legislature provided that if a married woman executed a deed, mortgage, or like formal instrument, declaring her intention to charge her separate estate, that the contract would be a valid one; and, whether for the benefit of a married woman or not, she was liable for the debt secured thereby. The act of 1887 placed conveyances and mortgages on the same footing, but it did not declare that a mortgage which did not contain such express declaration on the part of a married woman to charge her separate estate to be void on that account, and the act did not repeal the provisions of sections 2036 and 2037 of the General Statutes of 1882. But after the act of 1887, until the act of 1892 was passed, if a married woman executed a mortgage which was for the benefit of her separate estate, and did not embrace in it a declaration of her intention to charge her separate estate, then the mortgage was valid, or, if she executed a contract mortgaging her separate estate to secure a debt which was made in part for the benefit of her separate estate and in part for the debt of her husband, the mortgage was valid for so much of the debt secured as was for the benefit of her separate estate, and void as to the remainder. This doctrine was held in the recent case of *Gibson v. Hutchins*, 43 S. C. 294, 295, 21 S. E. 253. In this case the court says: 'No such intention appears in said notes and mortgages. We are, however, of the opinion that no such requirement is necessary under the act of 1887, where a contract is entered into by a married woman for the benefit of her separate estate.' The more recent case of *Rigby v. Logan*, 45 S. C. 657-659, 24 S. E. 56, affirms *Gibson v. Hutchins*. In *Gibson v. Hutchins*, supra, it was held that the deed of Mrs. Hutchins, which was made to secure a debt—therefore a mortgage—absolute in form, was held to be a mortgage to secure a debt, which debt being a portion for the benefit of her separate estate, and a portion being the debt of her husband, the court held it was valid as to her debt and void as to her husband's. This court has no doubt that the conveyance by Mrs. Carroll to her son in consideration of love and affection is a good and valid deed, and that it conveys the title from Mrs. Julia R. Carroll to her son, Francis F. Carroll, Jr., of the land in dispute, and that the defendant, Thomas, is now the

owner thereof. It is therefore ordered, adjudged, and decreed that the plaintiff's complaint be, and it is hereby, dismissed, with costs."

This decree was filed April 30, 1898, and judgment duly entered thereon. From this judgment the plaintiff gave due and legal notice of intention to appeal, and now asks this court to reverse said judgment, and grant a new trial, upon the following grounds and exceptions: (1) That his honor, the presiding judge, erred in holding and concluding that the act entitled "An act to declare the law relating to the separate estates of married women," approved December 24, 1887 (19 St. at Large, p. 819), did not repeal or modify the provisions of section 2036 of the General Statutes of 1882, prescribing the manner in which conveyances of her separate estate should be executed by a married woman. (2) That his honor, the presiding judge, erred in not holding that the act of 1887 (19 St. at Large, p. 819) effected a change in the law prescribing the manner or form of conveyances by married women, rendering it necessary that such conveyances should contain the declaration prescribed in the act in order to be effectual. (3) That his honor erred in holding that the deed of conveyance of plaintiff, a married woman, to her son, in October, 1890, not containing the declaration as to her intention to convey her separate estate prescribed in the act of 1887, was effectual to convey her separate estate.

Bellinger, Townsend & O'Bannon, for appellant. S. G. Mayfield and Izlar Bros., for respondent.

McIVER, C. J. This was an action to recover the possession of certain real estate, and, a trial by jury having been waived, the case was heard by his honor, R. C. Watts, upon an agreed statement of facts set out in the decree of the circuit judge, a copy of which appears in the "case." From this statement it appears that the plaintiff, on the 2d day of October, 1890, executed her deed, whereby she conveyed to her son, Francis F. Carroll, Jr., in consideration of natural love and affection, the land in question; that thereupon the said Francis F. Carroll, Jr., entered into possession of said land, executed a mortgage thereon, under which the land was subsequently sold, and bought by the defendant, who is now in possession, claiming title under the said Francis F. Carroll, Jr. It further appears that the plaintiff, at the time she executed said deed to her son, was, and is yet, a married woman, the wife of Francis F. Carroll, Sr., but that the defendant, at the time he bought the land under the proceedings to foreclose said mortgage, had no notice that the plaintiff was a married woman. The deed from plaintiff to her son is in the usual form, and contains no formal declaration of the grantor of her intention to convey her separate estate. The circuit judge held

that said deed was a valid conveyance, and rendered judgment dismissing the complaint. From this judgment plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as they all, substantially, raise the single question whether the deed from plaintiff to her son was effectual to convey the land described therein. The contention on the part of the plaintiff is that, by reason of the absence of any formal declaration in the deed of the grantor's intention to convey her separate estate, the deed is ineffectual to convey such estate, under the provisions of the act of 1887 (19 St. at Large, p. 819). That act is entitled "An act to declare the law relating to the separate estates of married women." In the first section of said act—the only one which is pertinent to the present inquiry—the language used is as follows: "All conveyances, mortgages, and like formal instruments of writing, affecting her separate estate, executed by a married woman, shall be effectual to convey or charge her separate estate, whenever the intention so to convey or charge such separate estate is declared in such conveyances, mortgages, or other instruments of writing."

In the first place, it will be observed that the legislature, by the language used in the title of this act "An act to declare the law," etc., indicated its intention, not to change or amend the law as it had been previously written, but to declare what should be the true intent and meaning of the language as it was previously written. This kind of legislation was resorted to in England mainly for the purpose of reviving old customs which had fallen into disuse, or had become disputable, and sometimes for the purpose of explaining the meaning of previous statutes as to which doubts had arisen. But in this country, where we have written constitutions, in which the limits between the several departments of the government are defined, and each is forbidden to invade the province of the other, declaratory statutes are not common, and are not of much expediency. *Potter's Dwar. St. pp. 68-70, note 28; Id. p. 221.* We have, therefore, referred to the language used in the title of the act of 1887 for the purpose of showing that the legislature, by the use of such language, indicated its intention, not so much to alter or amend the language of the previous law, but to declare what was the true meaning of such language in the future, because, of course, under the provisions of our constitution, the legislature would have no power to affect previous transactions; and it must be assumed that it did not intend to attempt to exercise any such power.

In the second place, it will be observed that the language used in the act is of an affirmative, and not of a negative, character. While it declares that all conveyances, mortgages, and like formal instruments in writing, affecting the separate estate of a married woman, shall be effectual to convey or charge her estate, if the intention so to convey or charge

such estate is declared in such conveyance, mortgage, or other instrument, it does not declare that, if such declaration is not inserted in such conveyance or mortgage, it shall not be effectual to charge or convey such separate estate. Accordingly, it has been held in *Gibson v. Hutchins*, 43 S. C., at pages 294, 205, 21 S. E. 253, that, even where no such declaration appears in the mortgage sought to be enforced against the separate estate of a married woman, and it otherwise appears that the contract was, in fact, for the benefit of her separate estate, the mortgage will be valid.

In the next place, it is very doubtful, to say the least of it, whether the legislature intended by the word "conveyances," as used in the act of 1887, to apply the same to deeds absolute in form, and not intended to be securities for a debt created by the contract of a married woman, as was the case with one of the instruments under consideration in the case of *Gibson v. Hutchins*, supra; for the constitution of 1868, then of force, expressly declared that the separate property of a married woman "may be bequeathed, devised, or alienated by her the same as if she were unmarried" (article 14, § 8), and this power could not be taken away from her, or in any way abridged, by a statute. This case is very different from that of *Brown v. Pechman*, 49 S. C. 546, 27 S. E. 520, cited by counsel for appellant, for in that case a married woman, in 1869, undertook to convey her estate of inheritance, without complying with the requirements of the act of 1795, then in force, prescribing the only mode by which a married woman could convey her estate of inheritance; and it was held that, while the constitution of 1868 invested her with the power to convey her separate estate, yet in exercising such power she must comply with the requirements of the then existing law as to the only mode in which such power could be exercised. Now, however, since the repeal of the provisions of the act of 1795, prescribing the only mode in which a married woman could effectually convey her estate, by the act of 1873, if not by the act of 1870, referred to in *Brown v. Pechman*, there is no statute, so far as we are informed, prescribing the only mode by which a married woman can convey her separate estate; for, as we have said, the act of 1887 at most only provides that when a conveyance executed by a married woman contains a certain declaration of intention, it shall be effectual, but it does not provide that it shall not be effectual unless it contains such declarations; and accordingly we find that in the case of *Gibson v. Hutchins*, supra, it has been expressly held that the absence of such declaration will not necessarily defeat the conveyance or mortgage. See, also, *Reid v. Stevens*, 38 S. C. 526, 17 S. E. 358. A brief review of the legislation in respect to the rights and powers of married women, and the judicial construction placed upon such legislation prior to the passage of the act of 1887, will show

clearly the true intent and purpose of that act. Inasmuch as the constitution of 1868, did not, in terms, confer upon a married woman the power to contract, the legislature, shortly after the adoption of the constitution, by the act of 1870, conferred upon a married woman the power "to contract and be contracted with in the same manner as if she were unmarried." This unlimited power to contract was, by the General Statutes of 1882, so restricted as to limit her power to contract only "as to her separate estate." Very numerous controversies arose under the law as thus amended, and many decisions were made, which are so familiar to the profession that they need not be cited, whereby it was settled that a married woman had no power to make any contract, no matter what may have been her intention, except as to her separate estate. See *Mortgage Co. v. Mixson*, 38 S. C., at pages 437, 438, 17 S. E. 246, for a fuller and more complete review of the law prior to the passage of the act of 1887, where it is said: "The act of 1887 was manifestly designed to effect some change in the previous law as to the contracts of married women, or at least in the construction which had been placed by the court on such law." And in the same case it is said that the change effected was "not only by making it a question of intention instead of a question of power, but declaring how the intention should be conclusively manifested." It seems to us, therefore, that the real object of the act of 1887 was to provide an easy mode by which parties dealing with a married woman could remove the question as to the intention of the married woman from the domain of controversy by simply inserting in the instrument sought to be enforced against her the declaration provided for by the act. We are also inclined to the opinion that the word "conveyances," as used in the act, meant only such conveyances as were intended to be securities for the performance of a contract entered into by a married woman, and did not mean conveyances not only absolute in form, but also in effect; for it will be remembered that all of the cases which had arisen between the passage of the act of 1882 and the act of 1887 were cases in which the question was as to the liability of the married woman upon some instrument of writing purporting to charge her estate with the payment of a debt intended to be secured thereby; and not a single one, so far as we are informed, in which the question was as to the validity or effect of a conveyance, not only absolute in form, but intended to be so in effect; and it is but reasonable to infer that an act designed to settle the law as to questions which had been so much controverted was not intended to cover any other subjects except those which had given rise to so much controversy. But, be this as it may, it seems to us that, under the express provisions of the constitution of 1868, which was of force at the time of the execution of the deed in question, the plaintiff, though a married woman at the

time, had the same power to execute this deed as if she were then an unmarried woman. It does not seem to us that in any view of the case there was any error on the part of the circuit judge in holding the deed from the plaintiff to her son to be a good and valid conveyance. The judgment of this court is that the judgment of the circuit court be affirmed.

HARVEY et al. v. DOTY.

(Supreme Court of South Carolina. March 15, 1899.)

SALES—FUTURE DELIVERY—VALIDITY—PRINCIPAL AND AGENT—BURDEN OF PROOF.

1 Rev. St. § 1859, provides that every contract of sale of grain for future delivery shall be void unless it is the bona fide intention of both parties when the contract is made that the grain shall be actually delivered and received at maturity of the contract; and section 1860 makes it incumbent on the party suing to enforce such contract to assume the burden of showing a compliance with such requirements. *Held*, that though an agent contracts in good faith in his own name with other parties for future delivery of grain, with the bona fide intention of both to actually deliver it, he cannot recover of his principal for losses he may have sustained, unless he shows that it was the bona fide intention of his principal to actually receive the grain at the maturity of the contract.

Appeal from common pleas circuit court of Fairfield county; R. C. Watts, Judge.

Action of W. P. Harvey & Co. against W. R. Doty. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

J. E. McDonald, for appellants. Ragsdale & Ragsdale, for respondent.

POPE, J. This action was once before in this court, when the nonsuit granted defendant was reversed. 50 S. C. 548, 27 S. E. 943. At September, 1898, term, it was tried before Judge Gage and a jury. After verdict for defendant and judgment thereupon, plaintiffs appealed to this court on the following grounds: (1) For that his honor erred in charging the jury that where an agent makes contracts in good faith, in his own name, with other parties as principals to such contracts, for the sale of property for future delivery, and there is a bona fide intention on the part of such agent and the other principals to the contracts, at the time of the making of the contracts, to actually deliver, on the one hand, and actually receive, on the other, at the time or period mentioned in the future, such agent cannot recover losses or advances made on such contracts from his principal, unless he shows that it was the bona fide intention of his principal and the other parties to the contracts, at the time of the making thereof, to actually deliver and receive the property so sold at the maturity of the said contracts. (2) For that his honor erred in charging the jury that where an agent makes contracts for future delivery in his own name with other parties, such agent and other parties being the principals to

said contracts, and it being the bona fide intention of both of said parties, at the time of the making of the said contracts, the one to deliver, and the other to receive, the property in kind at the maturity of the contracts, the burden of proof is upon such agent to show that it was the bona fide intention of both his principal and the other parties to the contracts, at the time of the making of the contracts, to actually deliver and receive the property in kind at the period fixed in the future for the delivery thereof. (3) For that his honor erred in not holding, and so charging the jury in this case, that section 1859, 1 Rev. St., contemplates the making of contracts, the sale and transfer of property therein mentioned for future delivery, by and through agents; that, under said section, such agents may make said contracts in their own names, with other parties as principals thereto; and if, at the time said contracts are made, it is the bona fide intention of the said agents and other parties to the said contracts to deliver and receive the property so sold, as required by said section, then said contracts of sale and transfer for future delivery are good and valid, under section 1, binding on the principal of such agents, and the agents may recover from their principal for all losses incurred on said contracts, or advance made thereon for their principal; and the undisclosed intention of their principal not to deliver the property so sold will not vitiate the said contracts, nor prevent a recovery by the agents for losses and advances arising upon such contracts. (4) For that his honor erred in not holding, and so charging the jury, in this case, that where an agent is authorized to sell for future delivery any of the property mentioned in said section 1859, and makes the contracts of sale and delivery in his own name with other parties as principals, and both parties have the bona fide intention required by said section to deliver and receive said property, then it is the intention of such agent and such other parties that makes the contracts valid, and not the intention of such other parties and the principal of the agent; and, if such contracts are made in good faith by the agent, his principal is estopped from disputing the validity of such contracts. (5) For that his honor erred in not holding and charging the jury in this case that when an agent is authorized to sell for future delivery, and makes the contract in his own name with other parties as principals, and with the bona fide intention on the part of both such agent and such other parties, as is required by section 1859, then said contracts are good and valid, under the laws of this state; and section 1860 simply places the burden of proof on the agent to show such fact, to entitle him to recover from his principal for advances made or losses incurred in executing such contracts; and the undisclosed and secret intention of his principal not to deliver, as required by section 1859, cannot affect or invalidate said contracts, or prevent a recovery of such advances and losses made and incurred by the agent. (6)

For that his honor erred in not granting a new trial upon the minutes of the court, when it was brought to his attention that he had erred in charging the jury that an agent could not recover for advances and losses upon such contracts, if it was not the intention of his principal to deliver the property according to the provisions of the law of this state, even although it was the bona fide intention of the agent and the other parties to the contracts to make the delivery as required by law.

The plaintiffs (appellants) are grain brokers in the city of Chicago. The defendant is a merchant in Winnsboro, S. C. In October, 1891, the latter procured the former to buy 20,000 bushels of corn for delivery in the month of November, 1891. The corn was bought at 52, and sold at 74½ and 75. The margins advanced by defendant, and the sale of the corn on November 30, 1891, left defendant due plaintiffs \$910. This action is brought to recover that sum. Defendant interposed two defenses. One was that plaintiffs had negligently attended to his business, which negligence was the cause of this debt of \$910. The second was that the purchase of the grain was naught but gambling in grain futures, and this \$910 arising therefrom was null and void, under our state statutes. Both of these defenses were submitted to the jury. They found a general verdict for the defendant.

It is not claimed by the plaintiffs (appellants) that Judge Gage committed any error in charging upon the first branch of the defense. Nor is there any complaint against the judge for his charge upon the requests to charge, submitted by the plaintiffs. Indeed, when reduced to a careful analysis, the main objection of the plaintiffs (appellants) to the judge's charge—that part which bore on the agency of the plaintiffs for defendant—embraces them all. To see what stress is laid upon the matter of the agency of the plaintiffs (appellants) for the defendant, we must have recourse to the legislation of this state whose purpose was to destroy root and branch gambling in "futures," as they are called. This legislation struck at purchases for future delivery of bonds, cotton, grain, meat, etc. In fact, it spared nothing in the animal or vegetable world which could be made the subject of sale for future delivery. The legislation in question may be found at sections 1859 to 1863, inclusive, 1 Rev. St. 1893. Section 1859 provided that "every contract, * * * for the sale or transfer at any future time * * * of any * * * grain * * * shall be void unless the party contracting * * * to sell or transfer the same is at the time of making such contract * * * the owner or assignee thereof, or is at the time authorized by the owner or the assignee thereof, or his duly-authorized agent to make and enter into such contract * * * or unless it is the bona fide intention of both the parties to the said contract * * * at the time of making the same that the * * * grain * * * so agreed to be sold and transferred

shall be actually delivered in kind by the party contracting to sell and deliver the same, and shall be actually received in kind by the party contracting to receive the same at the period in the future mentioned and specified in the said contract. * * * Section 1860, by its provisions, makes it incumbent upon the party who sues to enforce any such contract to assume the burden of proof that, when it was made, the party making the same was the owner or assignee of the grain so agreed to be sold, or was at that time authorized by the owner or assignee thereof, or his duly-authorized agent, to make and enter into such contract, or that at the time of making such contract it was the bona fide intention of both parties thereto that the grain so agreed to be sold or transferred should be actually delivered and received in kind by the said parties at the future period mentioned thereto. The other sections (1861, 1862, and 1863) need not be repeated.

This court has construed these sections in the cases of *Gist v. Telegraph Co.*, 45 S. C. 344, 23 S. E. 143, and also in *Riordan v. Doty*, 50 S. C. 587, 27 S. E. 939; and, if the contention was as to the parties as in those cited cases were considered, it would be governed by those cases. But the appellants seek to give a new energy to the discussion by contending that a new phase of the question is presented by the agent of the defendant when such agent purchased the grain in Chicago of different holders of grain there, without disclosing to such holders when he purchased that he was an agent, and not a principal; and as he, as such principal, and such holders, who dealt with him, had a bona fide intention to deliver in kind grain contracted for future delivery, the plaintiffs, as such agents of defendant, having acted bona fide in grain trade, intending a delivery in kind upon future delivery, are not affected by defendant's intention to the contrary, which was not communicated to such agents. It should be borne in mind that the record discloses that plaintiffs and defendant are directly at variance as to whether plaintiffs knew of defendant's purpose to gamble in grain futures. Plaintiffs say they did not know. The defendant insists that they had full knowledge. Of course, this is a question for the jury, and by their general verdict we are obliged to assume that they have found in favor of the defendant's contention. But, leaving that out of view for the present, let us examine this contention as to agency as raised by the appellants. We will agree with them thus far,—that the appellants, never having disclosed their agency for the defendant to the holders of grain in Chicago, with whom they made contracts for future delivery, could have been treated by such grain holders in Chicago as principals, in these grain transactions. But those Chicago grain dealers are not parties before us. They make no claim upon our attention. It is certain that, no matter how the grain dealers in Chicago may

have considered Harvey & Co. as principals, the defendant, Doty, was always obliged to treat them as his agents, and Harvey & Co., the plaintiffs, were always obliged to be bound by their agency to Doty. As such agents, they were obliged, so far as Doty was concerned, to hold themselves out to the grain dealers in Chicago as the agents of Doty, and not as principals. All the cases which are cited which seem to infringe upon the foregoing statement will be found to have reference to the rights of third persons, and not as existing between a principal and his agent.

But, admitting the foregoing view to be erroneous, still we must have recourse to and be governed by the terms of our statute; and certainly there is nothing to be found there that gives the slightest color to the contention of the appellants. It is Doty and his agents who are before our courts. The statute imperatively requires that both minds—that of Doty, on the one side, and the dealers in grain, on the other side—should contract with a bona fide intention to deliver grain in kind. There is no provision in the statute in question for the agents to be principals in their dealings with the grain dealers in Chicago. The judge kept in view in his charge to the jury the provisions of our statute, and we cannot see that he erred.

The last ground of appeal in relation to error for not granting a new trial is disposed of by the foregoing views. It is the judgment of this court that the judgment of the circuit court be affirmed.

CUDD et al. v. CALVERT, Mayor, et al.
(Supreme Court of South Carolina. March 28, 1899.)

PRELIMINARY INJUNCTION—DISSOLUTION—APPEAL
—REVIEW—RAILROADS—PUBLIC AID—
STOCK SUBSCRIPTIONS.

1. Where the facts alleged in the complaint entitle plaintiff to an injunction, and the injury may be accomplished before the final hearing, it is error to dissolve a temporary injunction on affidavits.

2. The supreme court will not refuse to consider a question involved in the decision, as not having been raised in the court below, unless the record shows that it was not so raised.

3. Where, on a motion on affidavits to dissolve a temporary injunction, the court considered the whole case as though the hearing was on the merits, the objection that a temporary injunction cannot be dissolved on affidavits where the injury may be accomplished before the final hearing, and where plaintiff's complaint entitles him to the relief, can be raised for the first time on appeal, on exceptions to the decree.

4. Act Feb. 9, 1882, authorizes cities and towns to subscribe to the capital stock of a railroad, subscriptions to be made in coupon bonds, with the consent of a majority of the voters of the subscribing towns. Citizens of the city of S. petitioned the council to submit the question of subscribing a stated sum by an ad valorem tax, to be expended in the construction of such railroad. This proposition was submitted to the voters, and carried by a majority. Const. 1895 authorizes the general assembly to validate the subscription of the city of S. to the capital stock of such railroad, and to validate and authorize

the issuance of bonds and payment of the same. Held, that the general assembly had no power to pass Act Feb. 25, 1896 (22 St. at Large, p. 316), declaring said election in the city of S., on the question of subscribing to the bonds of said railroad, to have been legally held, and said subscription to have been legally made, and to be binding, and authorizing the issuance of said bonds, because there never had been a subscription by the city to the stock of said railroad, and the constitution merely authorized the general assembly to validate a subscription which had already been made.

Appeal from common pleas circuit court of Spartanburg county; D. A. Townsend, Judge.

Action by J. N. Oudd and others against Archibald B. Calvert and others, as mayor and aldermen of the city of Spartanburg, for injunction. A temporary injunction was dissolved, and plaintiffs appeal. Reversed.

The ordinance of the city of Spartanburg referred to in the opinion is as follows, viz.:

"Whereas, an election was held in the city of Spartanburg on the question of the subscription of the sum of twenty-five thousand dollars to the capital stock of the Spartanburg & Rutherfordton Railway Company; and whereas, a majority of the qualified electors voted in favor of said subscription, and the same was thereupon made; and whereas, said subscription was made payable in bonds of the city of Spartanburg, as authorized by the act of the legislature; and whereas, an ordinance of the constitutional convention passed on the 20th day of November, 1896, provided that the general assembly might enact such laws as were necessary to validate and carry into effect the subscription to the capital stock of the Spartanburg & Rutherfordton Railroad Company, and validate and authorize the issue of bonds of the city of Spartanburg in payment of the said subscription; and whereas, by the terms of said act, the organization of the Spartanburg & Rutherfordton Railroad Company, the acts of incorporation, and all acts amendatory thereto was validated and confirmed: Now, be it ordained, by the mayor and aldermen of the city of Spartanburg, that the said subscription of twenty-five thousand dollars to the capital stock of the Spartanburg & Rutherfordton Railroad Company is hereby ratified and confirmed; that, in accordance with the authority given by the election duly held, the ordinance of the constitutional convention, and the act of 1896, the said city of Spartanburg will cause to be issued and executed twenty-five thousand dollars of seven per cent. coupon bonds, payable in sixteen, twenty, and twenty-four years after the date thereof; that the coupons shall be made payable semiannually, on the first day of January and July of each year, payable at the city treasurer's office in the city of Spartanburg, the bonds to bear such date as may be fixed and agreed upon by the city council and the proper authorities of the Spartanburg & Rutherfordton Railroad Company; that said bonds, when printed and executed, will be delivered to the proper authorities of the Spartanburg & Rutherfordton Railroad Company, pro-

vided that said bonds shall not be delivered to the said railroad company, or to any other person or company, or to any other person or corporation for it, until the said company, or some other company with which it shall become consolidated, shall have built and constructed a railroad into the city of Spartanburg from the direction of the North Carolina line, or shall have given sufficient guaranty to the committee herein provided for that said road will be constructed, said guaranty to be approved by city council. Ordained, further, that the faith and credit of the city is hereby pledged to the payment of the interest and principal of the said bonds, as they may fall due, and that an annual levy be made on all taxable property in said city to raise the amount sufficient to pay the interest upon said bonds, and also the principal as it may mature. Ordained, further, that the mayor will appoint a committee consisting of not less than two aldermen, who shall be charged with the special duty of printing said bonds and having them executed by the proper authorities; the said committee being authorized to select designs and make contracts for printing, and to do any and all acts necessary to carry out the object of this ordinance."

The decree appealed from is as follows, viz.:

"This is an action to enjoin the issues of certain bonds. A temporary injunction was granted, and an order to show cause issued. The return was made on August 16th, at Spartanburg. The plaintiffs contend, substantially, that the city authorities of Spartanburg are about to issue certain bonds, nominally in aid of the Spartanburg & Rutherfordton Railroad Company, but ultimately in aid of some other railroad company which it may consolidate, upon the basis and authority of a subscription claimed by said city authorities to have been authorized by a vote of the people of said city in 1882, under the charter of the Spartanburg & Rutherfordton Railroad Company and acts amending the same; that said issue of bonds will be a wrongful and injurious burden to the taxpayers of said city, and is not authorized by either the charter of the said Spartanburg & Rutherfordton Railroad Company or the acts amending the same; that the charter of the city of Spartanburg did not authorize the people of Spartanburg to vote for such subscription, or allow the said city authorities to make such subscription, even if voted by the people, and that no such subscription has been made; that neither the original petition of the people to the city council, nor the order issued by the council, was such as required by law, nor was the said election legal; that no such company as the Spartanburg & Rutherfordton Railroad Company was ever legally organized or ever existed in this state; and that the plaintiffs sue on behalf of all taxpayers of the said city. Defendants deny that plaintiffs sue for all the taxpayers of the city of Spartanburg, and deny the cor-

rectness of plaintiffs' construction of the acts of June 8, 1877, and February 9, 1882, and that said election was without authority, and that no such company as the Spartanburg & Rutherfordton Railroad Company was ever incorporated by the general assembly of the state, and that no act to amend the act of June 8, 1877, was ever enacted by the general assembly of the state, and that said Ordinance O was adopted without authority, and they also deny all the allegations of paragraphs 7 and 10 of the complaint. The defendants admit the incorporation of the city, and also the various acts of the legislature set forth in the complaint, and that the people of the city petition the city council to be allowed to vote for 'Subscription' or 'No Subscription,' and that the election was ordered and held, and they allege that at said election a majority of the qualified voters of the said city voted in favor of such subscription, and that by an ordinance adopted June 2, 1898, they have directed bonds to the city of Spartanburg to the amount of \$25,000 to be executed and delivered to the Spartanburg & Rutherfordton Railroad Company. The defendants set forth many other and various matters in relation to the importance of said railroad and its various connections, none of which I deem it necessary to set out here. Defendants also deny that the bonds so to be executed and issued are to be issued for any other or different purpose than that originally intended when the subscription was voted, in 1882.

"At the hearing in Spartanburg, there was a question raised as to whether certain affidavits should be read either in reply or as a part of the return. It was finally agreed that all the affidavits should be read, and I should rule on their admissibility; the affidavits referred to being in relation to the importance of the contemplated road and the various connections. I have read these affidavits, but do not consider them in forming my opinion, because I consider them irrelevant to the real issues in this proceeding, and therefore rule them out. I refer to the affidavit of O. S. Roberts, all of the affidavit of R. K. Carson except the last paragraph, and all of the affidavit of C. H. Schutte and others.

"After due consideration of the law and the evidence submitted before me, I think the temporary injunction heretofore granted herein should be dissolved. In my opinion, the defendants are simply proposing to do what a valid law of the state requires them to do, and I do not think that the disposition which they propose to make of the bonds about to be issued would be a diversion thereof, or would be in any other way illegal. None of the attacks made on the proceedings under which the bonds were originally voted, nor on the organization of the railroad company in whose aid they are about to be issued, nor on the power of the city council to issue and dispose of them as proposed, can, in my

judgment, be sustained. I regard the original petition presented to the city council as in proper form. The expression 'ad valorem' therein found refers merely to the manner in which the petitioner thought the tax should be levied, in order to pay the principal and interest on the subscription for which they petition to be allowed to vote, and may just as well have been omitted from the petition, as the law would have followed that course of taxation in any event. I can find nothing wrong about the order issued by the city council through J. S. R. Thompson, as mayor, for the election to be held. It refers unmistakably to the act of June 8, 1877, which chartered the Spartanburg & Rutherfordton Railroad Company, and sets out intelligibly and plainly the object of the order, so that no one could be mistaken as to the nature of the election held. The last-mentioned act (February 9, 1882) does not style the company the 'Spartanburg & Rutherford Railroad Company,' as it is styled in the act of June 8, 1877; but it is clear that the two names refer to the same company, and the difference does not amount to even an irregularity or discrepancy, because it is plain that the legislature intended to make that change in the name of the company without the use of the formal words to express it. As to the point that the act of February 9, 1882, in using the words, 'it shall and may be lawful for any city, town or county interested in the construction of said railroad to subscribe to its capital stock such sum as a majority of their voters may authorize,' excluded the city of Spartanburg, the answer is, it seems to me, that the circumstances in this case make the said act a special one in every respect; so that, to my mind, the question of the effect of legislation upon the special act chartering the city of Spartanburg and limiting its powers as to increasing its bonded indebtedness does not arise.

"The act is a special one, and directed specially to such cities or towns as were interested, and Spartanburg was probably more interested than other city or town. It would be too great a stretch of statutory construction to except Spartanburg, and I therefore conclude and find that Spartanburg was included in said act, and that the power was thereby granted to vote for a subscription to the capital stock of said road. The minute books of the city council show unmistakable evidence that the subscription was made. There was certainly no evidence before me to contradict this showing. It may not only be assumed, but the affidavits before me show, that the city council, being specially charged with the performance of this act, provided all antecedent steps were completed, had the proper evidence before it, when the subscription was made, that a majority of the qualified voters of the city had voted for the subscription. There is the affidavit of George W. Nicholls, Esq., showing that the company was actually organized in 1883, and that he

was then elected, and has ever since been one of its directors. Then, too, the affidavit of Arch. B. Calvert, Esq., shows that he is now the president of the said company. So that I conclude and find that the city of Spartanburg had the right to vote; that the petition and order for the election were in proper and legal form, as required by law; that the subscription was voted by a majority of the qualified voters of the said city; and that the subscription was afterwards actually made by the city authorities to the railroad company, which was then, and is now, a legally constituted corporation under the law of the state of South Carolina. But it is contended that, even if this be so, the subscription is illegal and void, because the purpose for which the bonds are to be issued is not a corporate purpose; because the railroad corporation had become extinct by not using its franchises; because the subscription is barred by the statute of limitations and by laches. I do not think that the positions can be sustained. Even if there had before been any merit in them, the validating act of 1896 (22 St. at Large, 316) permitted by special ordinance or the constitutional convention, cures all defects here complained of. Plaintiffs contended that this act is unconstitutional because it refers to more than one subject, and because the legislature assumed judicial powers in enacting it, and legislated facts into existence. According to my view of this case, the act so attacked is not amenable to these objections. It is true that the preamble to said act does recite certain facts as existing, but the preamble forms no part of the act, and, if it does, the facts there recited are the facts which I find did then exist. Therefore, in the light of the ordinance of the constitutional convention (Const. p. 108), finding as a fact that a subscription of \$25,000 to the capital stock of the Spartanburg & Rutherfordton Railroad Company had been 'voted for, and authorized by, the qualified voters of the city of Spartanburg,' and of the said validating act, I conclude that the legislature did no more than declare the law in reference to facts in existence and within their knowledge when they enacted that statute; and that said act, so far as objections to it go, is constitutional, and validates and confirms all that had previously been in promotion of the construction of railroad communication between Spartanburg, S. C., and Rutherfordton, N. C., under the act of June 8, 1877, and the act or acts amending the same, and styling the said company in the later act the 'Spartanburg & Rutherfordton Railroad Company'; and that the said council of Spartanburg have the right now, and are required by law, to execute and deliver the said bonds in accordance with their said ordinance. I find, further, that said act does not refer to more than one subject, to wit, the promotion of the construction of said railroad. It is therefore constitutional, so far as that objection goes. As to the point made that the sub-

scription is barred by the statute of limitations, I do not think that the statute applies in such cases; but, if I am wrong, a sufficient answer, it seems to me, is that the city council stands as the trustee of the people, constituted a trustee by a majority of the qualified electors, and in that capacity have the right to keep alive the promise made, and they are keeping it alive by acknowledging it and attempting to pay it with the bonds about to be issued. There is no evidence that the original trust thus created has ever been revoked by a majority of the qualified electors of the city of Spartanburg. It seems to me, therefore, that on none of these grounds on which the plaintiffs ask a temporary injunction can their motion prevail. It is therefore ordered, adjudged, and decreed that the temporary injunction heretofore granted in this cause, restraining the defendant the city council of Spartanburg from issuing and delivering bonds of the city in payment of the subscription hereinabove referred to, be, and the same is hereby, dissolved."

Jas. F. Hart and C. P. Sanders, for appellants. Bomar & Simpson and Munro & McCrary, for respondents.

McIVER, C. J. By an act approved 8th of June, 1877 (16 St. at Large, p. 272), it was declared, among other things, in section 1, "that for the purpose of constructing a railroad from the town of Spartanburg to the North Carolina line, in the direction of Rutherfordton, North Carolina, a company may be formed with a capital stock of not more than five hundred thousand dollars, to be known as the Spartanburg and Rutherfordton Railroad Company," etc. By the second section commissioners were appointed to open books of subscription for the purpose of raising a capital stock of said company. By the third section it is provided that, when the sum of \$10,000 shall have been subscribed to the said capital stock, the company may be organized. By the ninth section it is authorized "to unite and consolidate with any other railroad now built, or hereafter to be built, in this state or in the state of North Carolina," etc. On the 9th of February, 1882, an act was approved entitled "An act to amend an act entitled 'An act to incorporate the Spartanburg and Rutherfordton Railroad,' approved June 8, 1877, by reducing the shares to fifty dollars per share, and authorizing cities, towns and counties to subscribe to the capital stock of said company." By the second section of said act it is declared that "it shall and may be lawful for any city, town or county interested in the construction of said railroad to subscribe to its capital stock such sum as a majority of their voters may authorize the * * * proper authorities of such city * * * to subscribe, which subscription shall be made in seven per cent. coupon bonds, * * * said bonds to be made payable in equal install-

ments of sixteen, twenty, twenty-four, and twenty-eight years after the date thereof." It will be observed that this act purports to amend an act to incorporate the Spartanburg & Rutherfordton Railroad, and we are unable to find that any such act was ever passed; though we do find that an act had been passed, as set out above, incorporating the Spartanburg & Rutherford—not Rutherfordton—Railroad Company. But as we do not propose, at this stage of the case, to make any point as to this variation in the title of the company whose charter it was proposed to amend, we shall assume, for the purposes of the present inquiry, that the legislature intended, by the act of February 9, 1882, to amend the charter of the Spartanburg & Rutherford Railroad Company, the incorporation of which was authorized by the act of June 8, 1877, above cited.

In the act of 1880 (17 St. at Large, p. 434), incorporating the city of Spartanburg, it is provided "that the bonded debt of said city shall in no way be increased without an act of the general assembly authorizing the same, and without the consent of two-thirds of the qualified electors of said city being first had by an election for that purpose"; and the same provision is carried into the act approved January 4, 1894 (21 St. at Large, p. 686), amending said charter. At some time prior to the 2d of October, 1882, a petition, without date, was presented to the city council of Spartanburg, in these words: "We, the undersigned citizens of the city of Spartanburg, S. C., being desirous of forming a railroad connection with the town of Rutherfordton, N. C., respectfully request that it be submitted to the voters of said city to subscribe, by an ad valorem tax, the sum of twenty-five thousand dollars (\$25,000), to be expended in the construction of a railroad between the points above indicated." Upon the receipt of such petition, the mayor of said city, on the 2d day of October, 1882, issued his order directing an election to be held, on the 16th of November, 1882, for the purpose of determining the question whether such subscription to said railroad should be made. Accordingly, an election was held at the time appointed, and on the 1st day of December, 1882, the managers of said election made their return, showing that the result was in favor of such subscription by a majority of 319 votes. This return was received by the city council, who declared the result of the election to be in favor of subscription. No further action appears to have been taken by the city council upon the subject until the 2d day of July, 1898, when they passed an ordinance, a copy of which is set out as an addendum to the "Case," which should be incorporated by the reporter in his report of this case; which ordinance provided for the issue of bonds of the city of Spartanburg to the amount of \$25,000, to "be delivered to the proper authorities of the Spartanburg & Rutherfordton Railroad Company."

In the meantime, however, the constitutional convention which assembled in the year 1895 passed an ordinance providing, among other things, "that nothing in the constitution ordained and established by the people of South Carolina, now in convention assembled, shall prohibit the general assembly * * * enacting such laws as may be necessary to validate and carry into effect subscription by the city of Spartanburg to the capital stock of the Spartanburg & Rutherfordton Railroad Company, heretofore voted for and authorized by the qualified voters of the city of Spartanburg, and to validate and authorize the issue of the bonds of said city in payment of the same." In pursuance of this ordinance, as it is claimed by the city council of Spartanburg (but whether such claim is well founded is one of the questions in this case), the general assembly passed an act approved February 25, 1896 (22 St. at Large, p. 316), entitled "An act to validate and confirm certain acts of the Spartanburg and Rutherfordton Railroad Company, and the subscription of the city of Spartanburg to the capital stock thereof, and to authorize bonds of said city to be issued in payment of said subscription." The special provisions of this act need not now be more particularly referred to. On the — day of July, 1898, the plaintiffs, as taxpayers in the city of Spartanburg, on behalf of themselves and all other taxpayers in said city, commenced this action for the sole purpose of restraining and enjoining the city council of Spartanburg from issuing the bonds provided for in the ordinance of said city council above referred to. The grounds upon which the plaintiffs base their claim for an injunction are fully set out in the report of this case. Very soon after the action was commenced the plaintiffs applied for and obtained from his honor, Judge Townsend, an order, bearing date 25th of July, 1898, restraining and enjoining the defendants from issuing said bonds until the further order of the court. After the answer was filed, the defendants gave notice of a motion, to be made before Judge Townsend on the 12th of August, 1898, "on the pleadings and whole record therein, including the affidavit hereto attached, and such affidavits as we may hereafter serve, for an order dissolving the preliminary injunction herein, and for such other and further relief as may be proper," upon the grounds stated in said notice. This motion came on to be heard by Judge Townsend on the 16th of August, 1898, as we infer from a statement made in his decree, and on the 15th of September, 1898, he rendered his decree dissolving the temporary injunction previously granted. From this plaintiffs appeal upon the several grounds set out in the record, which, under the view we take of the case, need not be specifically stated here.

From an examination of the decree of Judge Townsend, it is very manifest that he considered and passed upon the whole case, just as if it had been heard by him regularly upon

the merits. For this reason a copy of the decree should be incorporated in the report of this case.

It seems to us that where, as in this case, the action is brought solely for the purpose of obtaining an injunction, and where, if the facts alleged in the complaint are found to be true, a proper case for injunction would be presented, it is error to dissolve a temporary injunction upon a mere motion, heard upon affidavits, as that would deprive the plaintiff of his legal right to have the facts determined in the mode prescribed by law, instead of by affidavits,—a most unsatisfactory mode of eliciting truth. Indeed, the practical result, in a case like this, would be to dismiss the complaint upon a mere motion, heard upon affidavits, without any opportunity being afforded the plaintiff to have the facts upon which he bases his claim for relief determined in the mode prescribed by law; for if, in this case, the injunction should be dissolved, there would be nothing to prevent the issue of the bonds before the case could be heard on its merits, and if the bonds passed into the hands of innocent holders without notice, as they might and probably would do, then the controversy would become absolutely useless. If, therefore, the facts alleged in the complaint can be established upon a trial on the merits, where the witnesses can be subjected to examination and cross-examination, then we do not think it can be denied that the plaintiffs would be entitled to the injunction prayed for. The authorities cited by appellants in their argument sustain the view we have taken. 2 High, Inj. (3d Ed.) §§ 1509, 1511, 1512; *Seabrook v. Mostowitz*, 51 S. C. 433, 29 S. E. 202. Exceptions 13, 15, and 21, raising this point, must be sustained.

It is contended, however, in the argument here, that the question which we have been considering was not made before the circuit judge, and therefore cannot be raised here. In the first place, we remark that the record before us does not show that such question was not raised before the circuit judge. True, it does not appear to have been considered in the decree of the circuit judge; but it frequently happens that the circuit judge does not, in rendering his judgment, consider, or rather pass upon, all the points raised by counsel, as he may overlook some, or disregard others, as in his judgment not pertinent to the case in hand. But, aside from this, appellants certainly could not know, before the decree was filed, that the circuit judge would go into a consideration of the whole case, just as if it had been heard on the merits, and therefore the only mode by which the question could be brought before this court was by the exceptions taken to the decree. It is very different from a case in which an appeal is based upon exceptions imputing error in the omission to charge certain propositions, when there has been no request to charge such propositions. Indeed, in a case like the present, we do not see how this court could ascer-

tain what points had been made below, unless we had the whole argument on circuit before us, or the fact is made to appear by admissions of counsel, which is not the case here.

This would be conclusive of the question before us; but, perhaps, we should notice the effect of the ordinance of the constitutional convention, and of the act of 1896, above referred to, as it seems to be argued that the facts in this case are concluded by such ordinance and act. As to the ordinance, it is very manifest that its only purpose and effect was to relieve the general assembly from any restraints imposed upon that body by the provisions of the constitution of 1895 with respect to the subject referred to in the ordinance. The practical effect and manifest object of the ordinance was simply to authorize the general assembly, if a subscription to the capital stock of the Spartanburg & Rutherfordton Railroad Company which had been authorized by a vote of the qualified electors of said city had been made, to validate the same, and authorize the issue of bonds in payment of such subscription. But it does not declare, or purport to declare, that the general assembly shall have power to legislate facts into existence which never did exist. As to the act of 1896, which defendants claim was passed in pursuance of said ordinance, it undertakes to recite in its preamble certain facts, and in the body of the act the existence of the facts thus recited are assumed,—which it had no power to do (*Cooley*, Const. Lim. [2d Ed.] 96); and upon such assumed facts, it proceeds to declare "that the election heretofore held in the city of Spartanburg upon the question of the subscription by the said city of the sum of twenty-five thousand dollars to the capital stock of the Spartanburg & Rutherfordton Railroad Company is hereby declared to have been legally held, and the subscription then made by said city to the capital stock of said railroad company be and the same is hereby validated and confirmed and declared to be a binding subscription by said city, and the proper officers of said city are hereby authorized and required to issue bonds in payment of said subscription," etc. If the facts, as recited in the preamble and body of this act, be true, then it is difficult to conceive any necessity for any validating act. Indeed, we do not see how the act of 1896 can be regarded as a "validating act," in any proper sense of those terms. The scope and purpose of a validating act is to perfect some transaction which from some irregularity or informality is not complete, or to confirm a contract creating a moral obligation, but which, from some irregularity or informality, lacks the force and effect of a legal obligation. A striking example is where a municipal corporation enters into a contract which, at the time, it had no power to make. If the contract be such a one as the legislature might originally have authorized, then it may be validated and confirmed by subsequent legislation. *Cooley*, Const. Lim. (2d Ed.) 379. But if no such contract has, in

point of fact, ever been made, then it is altogether beyond the scope of validating legislation to declare that such contract has been made and require its performance. In such a case, there is nothing to validate. The act of 1896 cannot, therefore, be regarded as an act passed in pursuance to the authority conferred upon the general assembly by the ordinance of the convention above referred to.

Under this view of the case, we have not deemed it necessary, or even proper, at this stage of the case, to consider any of the other questions presented by the exceptions, as such questions should and must be first determined in a regular trial upon the merits. The judgment of this court is that the order of the circuit judge dissolving the injunction be reversed upon the grounds stated, and that the case be remanded to the circuit court for trial on the merits, and that in the meantime the injunction heretofore granted be continued until the further order of the court.

HIERS v. RISHER et al.

(Supreme Court of South Carolina. March 20, 1899.)

APPEAL—REVIEW—EVIDENCE—REPUTATION—EXCEPTIONS—SCOPE—PARTITION—SALE.

1. A question of fact under a legal issue is not reviewable in the supreme court.

2. There being no testimony offered in support of a proposition of fact, a finding in favor of such proposition presents an error of law, rather than of fact, so as to be reviewable in the supreme court, even though the issue is a legal one.

3. An exception that no testimony was offered by plaintiff to prove a certain issue cannot be considered, since not indicating wherein the testimony offered for that purpose was incompetent.

4. Old deeds which are connecting links between transactions leading up to an alleged lost deed on which plaintiff relies as her title are admissible, not to prove title of themselves, but as connecting links.

5. Evidence of repute as to the holder of the title to certain lands is inadmissible to prove such title.

6. In an action for partition of land and for an account for rents, where the defense tendered merely the legal issue of the title to the lands, and the court found the parties to be tenants in common, it was proper to further find that the land could not be equitably divided, and to order a sale thereof.

Appeal from common pleas circuit court of Colleton county; R. C. Watts, Judge.

Action by Sallie C. Hiers against Paul W. Risher and others for partition. From a judgment for plaintiff, defendants appeal. Reversed.

Howell & Gruber, for appellants. Fishburne, Bellinger & Murphy, for respondent.

POPE, J. The plaintiff contends that her mother, Barbara E. Risher, departed this life in the year 1865, survived by her father, F. B. Risher, the elder, her two brothers, Paul W. Risher and F. B. Risher, the younger, and herself, as the heirs at law of said Barbara, who

was seised at her death of four tracts of land, to wit, one known as the "Shepherd Tract," containing 700 acres; another, known as the "Red Pond Tract," containing 625 acres; another, known as the "Alfred Spell Tract," containing 700 acres; and another, known as the "Liston Tract," containing 300 acres,—all of the four tracts being situate in Colleton county. She also contends that F. B. Risher, the elder, died testate in the year 1894, and by his will all his estate, real and personal, vested in his two sons, Paul and F. B., the younger; and that F. B. Risher, the younger, is dead, leaving, as his children, Barbara, G. W., Juliana A., and Paul W. Risher, the younger. The plaintiff demands that the land be partitioned, to the end that her one-third of two-thirds of said four tracts of land may be set apart to her. The defendants deny that the plaintiff has any interest in said four tracts of land, and they also deny that the said Barbara E. Risher, her predecessor, as grantee, was seised of said premises. And the defendants allege that these defendants' ancestor, F. B. Risher, the elder, under whom they claim, entered into possession of said four tracts of land under a claim of title, exclusive of any other right, founding such claim under a written instrument as being a conveyance of said premises; and that said F. B. Risher, Sr., held said lands under such claim for more than 10 years before the commencement of this action. The parties plaintiff and defendant waived the right to a trial of the issue of title by a jury, and consented that all the issues of law and fact should be passed upon by the master of Colleton county. Mr. Henderson, as such master, reported in favor of the plaintiff. On hearing defendants' exceptions to such report, Judge Watts confirmed the report of the master, and ordered the lands sold for partition among the parties, and adjudged that the defendants should pay all the costs of the action. An appeal has been taken by the defendants, and it now remains for us to pass upon the same.

It is very evident that the primal question involved in the issues referred to the master was that of title; and, if it should have happened that the finding of the master was adverse to the plaintiff, why, the whole case was settled so far as she was concerned,—she had no equities left. But we are not prepared to go to the length insisted upon by the defendants, viz. that the only question before the master was that of title, for it must be remembered that the plaintiff tendered two issues,—one for partition, and the other for an account for rents; while it is true the defendants contented themselves with the tender of the legal issue,—title to land. If the master became convinced that the plaintiff was entitled to one-third of two-thirds of the four tracts of land in question, it was perfectly proper for him to pass upon the other two issues as tendered by the plaintiff. It is proper, also, to remark that in the issue of title—that being a legal as distin-

guished from an equitable issue—this court cannot entertain any question involving matters of fact, but must confine itself to matters of law. We will now pass upon the grounds of appeal:

"(1) For that the presiding judge was in error in refusing to sustain and in overruling the following exception taken by the defendants to the master's report: 'For that the master was in error in finding as a matter of fact that the lands in dispute were the property of Mrs. Barbara E. Risher, and that she held the same under color of title for twenty years previous to her death, adversely to the claims of all others, and exercised all necessary acts of ownership over them, whereas there was no testimony to support such finding of fact,'—whereas the presiding judge should have decided that the master was in error as alleged in said exception, and should have sustained such exception." We are satisfied with the proposition that, there being no testimony offered in support of a proposition of fact, a finding in favor of such proposition of fact presents an error of law. To hold otherwise would involve the proposition that a jury, a master, or a circuit judge are at liberty to find a proposition as a fact proved where there is absolutely no testimony to support it. Rights of man are held too sacred in our courts to permit any such travesty of justice to go without correction. Now, whenever it is a question as to the sufficiency of testimony, this court is powerless in a law case to interfere. Was there no testimony offered which supported the proposition that Mrs. Barbara E. Risher, in her lifetime, held the lands described in the complaint for 20 years previous to her death, adversely to the claims of all others, and exercised all necessary acts of ownership over them? There is no doubt that Mrs. Barbara E. Risher departed this life intestate in the year 1865; and there is absolutely no testimony in the case which sustains the proposition that she held those lands from the year 1845, which it would be necessary to have proved in order that the 20-years adverse possession could have been sustained. We speak advisedly that no such testimony was offered. This was error, therefore.

"(2) For that the presiding judge was in error in refusing to sustain and in overruling the following exception by the defendants to the master's report: 'For that the master erred in finding that all the parties at interest claimed title to lands in dispute from the same source, to wit, Barbara E. Risher, whereas all the testimony shows that the defendants claimed title through F. B. Risher, Sr., deceased,'—whereas the presiding judge should have decided that the master was in error as alleged in said exception, and should have sustained such exception." It needs no discussion to establish the error of the master and the circuit judge in regard to holding that all parties claimed title to the lands in dispute through the same source,—Barbara E. Risher. The plaintiff wish-

ed this to be so, but the defendants, from first to last, refused any such position, and insisted that their title was not derived through their mother, but was derived through their father, F. B. Risher, the elder. This exception must be sustained.

"(3) For that the presiding judge was in error in refusing to sustain and in overruling the following exception taken by the defendants to the master's report: 'For that the master was in error in finding that the plaintiff and defendants are tenants in common of the lands in dispute, whereas there is no competent testimony to show that the plaintiff owns any interest whatever therein,'—whereas the presiding judge should have decided that the master was in error as alleged in said exception, and should have sustained such exception." The exception cannot be sustained. The simple allegation that no testimony was offered by plaintiff to show that plaintiff and defendants were tenants in common is not such an allegation of error as we can notice. It is not indicated in what the error consists; that is, wherein the testimony was incompetent. We do not mean to hold that the plaintiff's testimony offered was competent to prove the alleged tenancy in common. All we intend is to announce that the form of this third exception is faulty.

"(4) For that the presiding judge was in error in refusing to sustain and in overruling the following exception taken by defendants to the master's report: 'For that the master was in error in holding that the plaintiff was not ousted of possession of said lands until the probate of the will of F. B. Risher, Sr., November 26, 1894,'—whereas the presiding judge should have decided that the master was in error as alleged in said exception, and should have sustained such exception." We will decline to pass upon this exception. Inasmuch as, in its present form, it presents a question of fact, and as there was some testimony offered on this line, we prefer to leave such question as *res integra* when the new trial is had.

"(5) For that the presiding judge was in error in refusing to sustain and in overruling the following exception taken by the defendants to the master's report: 'For that the master was in error in finding that the lands in dispute were the property of Barbara E. Risher at the time of her death,'—whereas the presiding judge should have decided that the master was in error as alleged in said exception, and should have sustained such exception." We cannot undertake the discussion of this exception. In its form it presents a question of fact. Inasmuch as there must be a new trial, we prefer not to indicate in the slightest degree how our minds are affected by the testimony.

"(6) For that the presiding judge was in error in refusing to sustain and in overruling the following exception taken by defendants to the master's report: 'For that the master was in error in admitting in evidence Exhibit

A, for the reasons: (1) That there was no evidence showing that the lands mentioned in the paper purporting to be a deed were the same as those described in the complaint, or had any connection therewith, and the said paper contained no description thereof; (2) that the second paper annexed thereto did not purport to be a conveyance, had but one witness, and there was no connection shown between the lands referred to therein and those mentioned in the complaint, and merely purported to be the declaration of the party signing; (3) that as to the second instrument annexed thereto there was no subscribing witness at all, in addition to the objection urged against the second instrument above referred to, and as to instrument four, by its own terms it relates exclusively to personal property,—the defendants' counsel having objected to the introduction of the said exhibit upon all of the foregoing grounds,—whereas the presiding judge should have decided that the master was in error as alleged in said exception, and should have sustained such exception." We should deal frankly in regard to these instruments in writing. While they may not bear very directly upon the tenure of Mrs. Barbara E. Risher of these lands, yet, in view of the statement of a witness, B. Stokes, that he witnessed a deed from the brother of Mrs. Risher, whereby that brother conveyed certain lands to Mrs. Risher, who at that time was the widowed Mrs. Liston, and that such said deed to Mrs. Liston (who subsequently was Barbara E. Risher) is now lost or mislaid, it may have some bearing, by showing that Paul Walton Spell, as the brother of Mrs. Liston, was said to have conveyed the land now in question to the said Mrs. Liston while a widow, and that Mrs. Liston possessed these lands when she intermarried with F. B. Risher, Sr. It sometimes happens that the husband lays claim to even the land of the wife. If Mrs. Risher owned the lands in her own right before her intermarriage with F. B. Risher (which intermarriage occurred between the years 1850 and 1853), Mr. Risher could only hold them under her tenure. He could not successfully assert a right independent of her. We do not say how much force and effect should be given to these old deeds, except to say in themselves they cannot prove title, but they may be connecting links between transactions that led up to the alleged lost deed referred to by B. Stokes. We cannot say that it was error to allow these old papers to be introduced in evidence.

"(7) For that the presiding judge was in error in refusing to sustain and in overruling the following exception taken by the defendants to the master's report: 'For that the master was in error in admitting the testimony of G. A. T. Johnson and others, to the effect that the lands in dispute were reputed to be the property of Barbara E. Risher,'—whereas the presiding judge should have decided that the master was in error as alleged in said exception, and should have sustained such excep-

tion." This exception must be sustained. Title cannot be proved by neighborhood talk. Of course, what one does while in possession of land is admissible to give testimony as to the character of his possession.

"(8) For that the presiding judge was in error in finding and adjudging that the plaintiff and defendants were tenants in common of the lands described in the decree, and that the plaintiff, Sallie O. Elers, owned one-third of two-thirds, or two-ninths, of the same, whereas he should have found and decided that the said plaintiff had failed to establish any title whatever to the said lands." The form in which the exception is presented is such that no expression of opinion from the court is necessary. Without doing anything more, we will say that the question of law governing tenancy in common will be considered, no doubt, on the new trial of this cause.

"(9) For that the presiding judge was in error in finding and adjudging that the lands described in the decree could not be equitably divided among the parties in interest, and in ordering a sale thereof for partition, whereas the only issue before the master and before the court was the question as to whether or not the plaintiff owned any interest in the said lands; and no decree or judgment should have been rendered upon the question of partition until the further proceedings had been had." Under the explanation of the law which we gave at the outset before considering any one of the exceptions, it will be readily seen that we do not agree with the appellants in this matter. Of course, if the plaintiff was entitled to be regarded as a tenant in common with the defendants, then partition and accounting for rents would follow. The master and circuit judge both thought such was the condition of things. Of course, the legal question of title had to be first disposed of.

"(10) For that the presiding judge was in error in adjudging and decreeing that the costs of the case should be taxed against the defendants and in favor of the plaintiff, whereas he should have held and decided that he was without authority to make any decree with reference to the said costs, the same being governed by statute." There must be a new trial of the cause, and therefore any order as to costs will, of course, be upset.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to the circuit court for a new trial.

LOMBARD et al. v. HENDRIX.

(Supreme Court of South Carolina. March 23, 1899.)

WITNESSES—ATTORNEYS.

An attorney may testify on a hearing before the court as to what admissions he made before a master at the reference.

Appeal from common pleas circuit court of Edgefield county; D. A. Townsend, Judge.

Action by George R. Lombard (as survivor of the firm of George R. Lombard & Co.) and M. B. Sturkey against F. M. Hendrix. From a judgment partially in favor of defendant, plaintiffs appeal. Modified.

N. B. Dial, for appellants. N. G. Evans, for respondent.

POPE, J. The plaintiff M. B. Sturkey became indebted to his co-plaintiffs, George R. Lombard & Co., in September, 1893, by three notes,—one for \$176.78, due December 1, 1893, one for \$176.79, due October 1, 1894, and one for \$94, due April 1, 1894,—which notes were secured by chattel mortgages. The consideration for the three notes was machinery, such as a cotton gin, feeder, and condenser; one Heg's sawmill, shafting, and pulleys; also, one New Era cotton press. This machinery was placed in buildings located on what is known as the "Rogue Shoal Mill Tract," on Big Stephens creek, in Edgfield county, S. C. This indebtedness was not paid at its maturity, though certain partial payments were made thereon. On December 15, 1893, the plaintiff Sturkey sold to Hendrix a one-third interest in the 52 acres of land, and all machinery on the land, which Sturkey had bought from J. D. Corvett. In July, 1896, M. B. Sturkey made a contract in writing with the defendant, F. M. Hendrix, wherein it was stipulated that the 52 acres of land composing said Rogue Shoal Mill tract, together with all the machinery thereon, should be purchased by the said F. M. Hendrix, at the price of \$900, to be paid in three installments, and, in addition, that E. M. Hendrix would pay "all debts and liabilities that are now against the said property," but that title would be made upon full payment of the purchase money. Under this contract, F. M. Hendrix went into possession, and paid \$800 on his contract. On September 24, 1899, Sturkey, not having paid off his debt to his co-plaintiffs, assigned his contract with Hendrix to his said co-plaintiffs, to secure his debt to them. Hendrix made some payments to George R. Lombard & Co. upon the assignment of Sturkey, but, refusing or being unable to completely pay the debt, this action was brought to have the 52 acres of land and the machinery sold, and the proceeds applied—First, to the costs of the action; second, to the debt of Lombard & Co.; third, to the debt of Sturkey, etc. Testimony was taken by the master. Upon a hearing had before Judge Gage, by his decree he denied the plaintiffs' right to sell the one-third of the Mill tract and the machinery purchased from J. D. Corvett to pay either Lombard & Co. or M. B. Sturkey; but he did decree the sale of all the machinery purchased from Lombard & Co., and also the two-thirds interest in the Mill tract, where the title was held by M. B. Sturkey, and directed that from the proceeds of such sale the costs be first paid; then, the debt due to Lombard. "which debt the master shall ascertain from the testimony herein giv-

en"; then, for any deficiency due to Sturkey by Hendrix. This decree provided, also, that, in the event there should remain any deficiency in the full payment of Lombard's debt, he should have a judgment primarily against Hendrix for such deficiency, and, if not paid by Hendrix, a judgment against Sturkey for such deficiency still remaining; that Hendrix shall have credit on his contract debt with Sturkey for whatever sum the machinery and two-thirds of the land realize, and for any deficiency Sturkey shall have judgment against Hendrix. The circuit judge also decided that the credit, of December 15, 1895, of \$95, as reported by the master, should stand, and not be reduced to \$10, as sought by N. B. Dial, Esq., in his affidavit.

Appellants' exceptions are as follows: "Because his honor, Judge Geo. W. Gage, erred as follows, to wit: (1) In holding that Sturkey purchased the machinery from Lombard, and placed it on the land, before he sold Hendrix one-third interest therein; and erred in holding Sturkey sold Hendrix a third interest in said machinery. (2) In holding that Lombard had seized said machinery. (3) In not finding and holding that the defendant, Hendrix, assumed the payment of all claims, including that of Lombard, outstanding against the machinery, in addition to agreeing to pay Sturkey nine hundred dollars. (4) In holding that Sturkey assumed the payment of all debts against the machinery. (5) In not finding and holding that Hendrix and Sturkey intended and agreed that Hendrix's one-third interest should be pledged for the payment of \$900 to Sturkey, and for all the debts against the property. (6) In holding that Hendrix should have credit on his creditors' debts with Sturkey for whatever the machinery and two-thirds interest in the land brought, whereas he should have credit only for what the land realized. (7) In not holding that Hendrix was estopped from claiming an interest in the property until after said debts were paid. (8) In holding that N. B. Dial was incompetent to testify as to payments. (9) In holding that N. B. Dial, plaintiffs' attorney, could not testify as to his own admissions at the reference, whereby he stated there was on November 15, 1895, a credit of \$10, which the master inadvertently wrote down as \$95. (10) Because he erred in not correcting this mistake by allowing the credit for the correct amount, \$10, instead of \$95." We will dispose of these exceptions in their numerical order:

(1) It was not error in the circuit judge to hold that Sturkey purchased the machinery from Lombard & Co., and placed it on the Mill tract of land, before he sold a one-third interest in the land to Hendrix; for the record discloses, as the dates on which such machinery was purchased by Sturkey, the 3d and 30th days of September, 1893, whereas Sturkey sold to Hendrix on December 15, 1893. But it was error in the circuit judge to hold that Sturkey sold to Hendrix a one-third interest in the machinery he purchased from

Lombard & Co. The deed of conveyance for the third interest shows that the only machinery covered by that deed was such as was purchased from J. D. Corvett. Not only so, but Sturkey expressly stipulated that the machinery he was conveying to Hendrix was that upon which there was no lease of any kind whatsoever. But, even after we have so found, it will not benefit the appellant; for the simple reason that there is no ground to base any objection to the judgment actually made, by reason of this erroneous finding of fact. It is immaterial error.

(2) It seems to us that it makes little difference whether Lombard had actually seized the machinery in question. He was entitled to its possession. As a matter of fact, it was still on the premises of Hendrix. This is immaterial.

(3) We think the appellant has misconceived the decree of the circuit judge, as covered by this his third exception. The judge did hold Hendrix liable to pay the plaintiffs' claims as to the debt for the machinery as well as the payment of \$900 in money to Sturkey.

(4) The fourth exception would be sustained, if the circuit judge had held as here complained of, but he does not so find. He holds Hendrix primarily liable to pay for such machinery.

(5) The appellant is clearly in error in this exception. The facts developed at the hearing, and the papers themselves, show that Hendrix never did bind his one-third interest in the Mill tract of land, and the machinery purchased by Sturkey from J. D. Corvett, to pay the debt arising from the purchase of the machinery from Lombard & Co. The contract in writing signed by Sturkey and Hendrix in relation to the purchase by the latter from the former of the two-thirds interest held by Sturkey in the land is nothing but a contract for purchase by Hendrix, and an agreement to sell by Sturkey, with a stipulation by the latter that he would make title when the purchase price was fully paid. There is nothing akin to a mortgage on the part of Hendrix of his one-third interest in the Mill tract.

(6) We think the appellants are equally unfortunate in this exception. We think the circuit judge has been exceedingly careful of the interests of the plaintiffs, so far as Hendrix is concerned. What more could have been demanded by the plaintiffs? The decree requires him to pay his obligations to Sturkey, even when in the hands of third persons, and he is excused from no duty by reason thereof.

(7) We cannot sustain this exception. There was absolutely no ground whereby Hendrix could have been estopped from claiming his one-third interest in the Mill tract of land, and the circuit judge very properly, therefore, refused to hold to the contrary.

As to the eighth, ninth, and tenth exceptions, we think there was error. We have searched the whole record to get at the basal facts of these exceptions. It is admitted that

the credit of \$95, as of December, 1895, does not appear as a credit on the papers (the notes and mortgages); nor is that credit set out in the testimony of any witness. The master must have taken it down as an admission. But Mr. Dial explains the mistake, and insists that he gave it as \$10, instead of \$95. Of course, Mr. Dial could not have testified as to what his clients told him, but he certainly was a competent witness to state what he himself had admitted before the master. No one denies or questions Mr. Dial's statement. The decree must be modified by allowing a change in this credit from \$95 to \$10, but in all other respects the decree is affirmed.

It is the judgment of this court that the judgment of the circuit court be modified in the single particular of a change in the credit of \$95 to \$10, and in all other respects be affirmed.

PEOPLE'S LOAN & EXCHANGE BANK OF LAURENS v. GARLINGTON et al.

(Supreme Court of South Carolina. March 20, 1899.)

WILLS—CONSTRUCTION—ESTATE DEVISED—REFERENCE—MORTGAGE BY REMAINDER-MAN—FORECLOSURE—USES AND TRUST—ESTATE IN REMAINDER—CONSTITUTIONAL LAW.

1. Testator devised certain land to executors for use of his son during his natural life; he to remain in possession unless efforts were made to subject the land to his debts, in which event the executors were to take possession. At his death the land was to be divided between his surviving children, or, should he die without children, his estate was to revert for division as the residue was devised under the will, to his daughters and one G. Held, that G. was entitled to a contingent remainder.

2. Where a referee is appointed simply to take the testimony, he cannot consider a motion made to dismiss the complaint.

3. On breach of a mortgage given by a contingent remainder-man, the mortgagee may sell whatever interest the mortgagor may have in the property, without waiting until the happening of the condition on which the remainder would become vested.

4. A will devised certain property to executors in trust for testator's son during his life, and further provided that, if efforts were made to subject the land to the debts of the son, the executors should take charge. Held, that the legal title remained in the executors, that they might carry out the provisions of the will.

5. Where a will devises land in trust, with remainder over, and directs the trustees to sell after death of the life tenant, in a certain event, the statute of uses does not apply, so as to divest the trustees of title and place it in the life tenant.

6. Act 1883, providing that no estate in remainder shall be defeated by any deed of feoffment with livery of seisin, is not unconstitutional, as impairing the obligation of contracts.

7. A deed of feoffment, with livery of seisin, executed by a life tenant after the act of 1883, providing that no estate in remainder shall be defeated by any deed of feoffment, with livery of seisin, is governed by such act, and only has the effect permitted by the law in force at the time of its execution.

8. Act 1883, providing that no estate in remainder shall be defeated by any deed of feoffment, with livery of seisin, is not unconstitutional as to a contingent remainder which had not been barred at the time the act was passed,

as the only effect of the act was to forbid such future action, which was clearly within the power of the legislature.

Appeal from common pleas circuit court of Laurens county; W. O. Benet, Judge.

Action by the People's Loan & Exchange Bank of Laurens against John D. Garlington and others. Judgment for plaintiff, and defendant John G. Williams appeals. Affirmed.

The following is the case agreed upon:

This action was commenced on the 16th day of January, 1895, in the court of common pleas for Laurens county, by service of the following complaint:

"The complaint of the above-named plaintiff shows to the court: (1) That said plaintiff, the People's Loan & Exchange Bank of Laurens, South Carolina, is now, and was at the times hereinafter mentioned, a corporation duly chartered by and organized under the laws of the state of South Carolina, and is competent to sue and be sued in the courts of this state. (2) That on or about February 13, 1892, the said defendant John D. Garlington made and delivered to said plaintiff his promissory note in writing, whereby he promised to pay said plaintiff or order four hundred and eighty-four $\frac{85}{100}$ dollars on November 1st after the date thereof (1892), with interest after maturity at the rate of eight per cent. per annum. (3) That on or about the said 13th day of February, 1892, the said defendant John D. Garlington, in order to better secure the payment of said debt, executed and delivered to said plaintiff an instrument in writing, under his hand and seal, commonly called a 'mortgage,' whereby he granted, bargained, sold, and conveyed to said bank, by way of mortgage, all that lot, tract, piece, or parcel of land situate, lying, and being in said county and state, containing sixteen hundred and forty-five acres, more or less, and bounded by lands of Phoebe Y. Witherspoon, Golden, John G. Williams, et al.; also, all his interest (being one-half) in and to all that lot, tract, piece, or parcel of land containing sixteen hundred acres more or less, bounded by his other lands, by lands of the state of South Carolina and others, and known as the 'Spring Grove Place,' conditioned to pay said debt, interest, and an attorney's fee, in case the debt had to be collected by law. (4) That said mortgage was duly recorded in the office of R. M. C. for said county on the 24th day of February, 1892, in Book 12, p. 671. (5) That the tract of land first above set out has been sold under a prior mortgage, leaving no proceeds for junior liens. (6) That said plaintiff has incurred ten per cent. attorney's fee upon the amount due by said defendant, by reason of his failure to pay said debt, and by reason of this suit. (7) That on or about the 22d day of January, 1894, the said John D. Garlington, in order to better secure the payment of said debt, and in order to get indulgence thereon

to December, 1894, made and delivered to said plaintiff his other obligation in writing, under his hand and seal, commonly called a 'mortgage,' whereby he granted, bargained, sold, and conveyed to said plaintiff, by way of mortgage, all that other lot, tract, piece, or parcel of land, situate, lying, and being in said county and state, containing two hundred and seventeen acres, more or less, and bounded by lands of Dr. F. G. Fuller, Witherspoon, Bailey store lot, Mr. J. L. Young, and others, and known as his 'Milton Place,' conditioned to pay said debt, interest, and ten per cent. attorney's fee, when due. (8) That in and by said mortgage the said Garlington agreed, if said debt was not paid on December 1, 1894, that he would surrender possession of said premises to said bank, and that it should receive the rents and profits thereof thereafter. (9) That said mortgage was duly recorded in the office of R. M. C. for said county on January 22, 1894, in Book 14, p. 144. (10) That said debt is now due and owing the bank, and the conditions of said mortgages have been broken, and no part of said amount, nor interest nor attorney's fee, has been paid. (11) That the defendant John D. Garlington is insolvent, and the rents of the Milton place are in danger of being lost to plaintiff. (12) That the defendants John G. Williams and T. E. Hairston claim some interest in and to said premises, which plaintiff denies. (13) That it appears from the records in the office of clerk of the court of common pleas for said county that the defendants other than those mentioned in the last paragraph claim some interest in said property by way of junior liens. (14) Wherefore plaintiff asks that a receiver be appointed to take charge of the Milton place, and receive the rents and profits thereof, and the defendants be enjoined from disposing of the rents thereof, or from interfering therewith; that the mortgages be foreclosed, the premises sold, the proceeds be applied to the payment of said debt, interest, and costs, the defendants and all parties claiming under or through them be forever barred of their equity of redemption; and that the rights of all the parties to this action in said lands be adjudicated; and for the costs of this action, together with such other and further relief as to the court shall seem just and equitable. N. B. Dial, Plaintiff's Attorney."

Answer of John G. Williams.

"The defendant, John G. Williams, answering the complaint in the above-stated action, for a first defense: (1) Alleges that he has not information sufficient to form a belief as to the allegations of the complaint, except as to the allegation in the twelfth paragraph thereof, that this defendant claims some interest in the premises described in the complaint. In regard to that allegation, he alleges that he is the owner, and entitled to retain the possession, of Spring Grove, but he does not claim any interest in any other of the

lands described in the complaint. For a second defense: (2) Alleges that neither the plaintiff nor his alleged mortgagor has any title to or interest in Spring Grove. Norton & Stribling, Attorneys for John G. Williams."

Answer of F. W. Wagener & Co.

"The defendants F. W. Wagener & Co. answer the complaint herein as follows: (1) They have no knowledge, or information sufficient to form a belief, as to the allegations contained in the complaint. (2) They allege that they are the owners and holders of a judgment against the defendant John D. Garlington, recovered in the court of common pleas for Laurens county on the 18th day of February, 1892, which, together with the costs on the same, amounted at the time of entry to eight hundred and sixty-two and forty-eight one-hundredth dollars; that the said judgment was duly entered, docketed, and enrolled in said office on the 3d day of March, A. D. 1892. Wherefore the said defendants pray that they may have such relief as to the court may seem just and equitable. Ferguson & Featherstone, Defendants' Attorneys."

Answer of Ferguson & Featherstone.

"The defendants John W. Ferguson and C. C. Featherstone, partners practicing law under the firm name of Ferguson & Featherstone, answer the complaint herein as follows: (1) They have no knowledge, or information sufficient to form a belief, as to the allegations contained, except so much thereof as alleges that these defendants claim some interest in the premises described in the complaint, by way of lien. This they admit, but they deny that the lien claimed by them is junior to that of plaintiff. (2) The said defendants allege that on the 7th day of December, 1891, the defendant John D. Garlington confessed judgment to them in the sum of one thousand dollars, and at a cost of nine and $\frac{90}{100}$ dollars, which said judgment was on the 7th day of December, 1891, duly entered, docketed, and enrolled in the office of the clerk of court for Laurens county; that on the same day execution was duly issued on said judgment; that no part of said judgment has been paid, and these defendants are the owners and holders thereof. Wherefore defendants pray that they may have such relief as to the court shall seem just and proper. Ferguson & Featherstone, Defendants' Attorneys."

Answer of Annie H. Garlington.

"The answer of the defendant Annie H. Garlington in the above-stated cause respectfully shows to the court: (1) She has no knowledge of the facts set forth in the complaint, except those hereinafter referred to, but supposes them to be true. (2) That on the 2d day of March, 1892, she secured a judgment against the defendant J. D. Garlington, in the court of common pleas for

Laurens county, for the sum of five hundred and twenty dollars, together with ten dollars costs of suit, which was duly entered and enrolled on the same day, and no part thereof has been paid. Wherefore she demands such relief in the premises as she may be entitled. W. H. Martin, Attorney for Defendant Garlington."

It was referred to F. P. McGowan, Esq., special referee, to take the testimony.

Testimony.

"Reference held, pursuant to notice, November 19, 1897. Present for plaintiffs, Mr. Dial; Ball & Simkins, for John G. Williams; Ferguson & Featherstone, for F. W. Wagener and themselves. Counsel present the following statement: The Milton Mill tract and the White Plains place are eliminated from this proceeding, the same having been otherwise sold and disposed of. The corporate capacity of the plaintiff admitted. Plaintiff introduces in evidence note and mortgage executed by John D. Garlington to the plaintiff on February 13, 1892, in the sum of \$484.85, and marked 'Exhibit A,' and recorded in R. M. C. for Laurens February 24, 1892. The plaintiffs' attorney and attorneys for defendants agree that ten per cent. of the plaintiff's debt is a reasonable attorney's fee, as provided for in the above-named mortgage. The will of John D. Williams introduced in evidence, and the records of the common pleas for Laurens county in the case of Witherspoon v. Watts and Anderson, executors of John D. Williams et al., introduced in evidence. It is admitted by counsel that the plaintiff and the defendants all claim under John D. Williams, as the common source of title. It is also admitted that the defendant Col. John G. Williams has no children. It is admitted that Col. John G. Williams is sixty-four years of age, and his wife, Mrs. Williams, is about fifty years. Plaintiff rests his testimony. The attorneys for John G. Williams enter a motion to dismiss the complaint. Ferguson & Featherstone introduce in evidence judgment rolls of the court of common pleas for Laurens, S. C.: F. W. Wagener v. John D. Garlington (No. 2,856); also, Ferguson & Featherstone v. John D. Garlington (No. 2,830); also, executions in both of the above-named judgment rolls introduced; also, judgment of Oil & Fertilizer Company v. John D. Garlington introduced in evidence, and execution. Defendant John G. Williams objects to the introduction of the above-named records on the ground of irrelevancy, no proof being required as to the records. It is admitted that nothing was paid on any of these judgments by reason of levy or otherwise. The judgment of Annie H. Garlington v. John D. Garlington, court of common pleas for Laurens, S. C. Roll introduced in evidence. The same objection as to relevancy. As to this judgment, payment is pleaded. Johnson & Richey introduce judgment against John D. Garlington. Same objections and admissions as above stated. Ball & Simkins,

attorneys for John G. Williams, introduce in evidence deed from C. D. Barksdale, master, to John G. Williams, of an interest in the Spring Grove tract of land, bearing date December 1, 1890, and not recorded, and marked 'Exhibit B.' Object as irrelevant. Also, the records of J. H. Witherspoon and wife v. James W. Waits and William Anderson, executors of John D. Williams et al., introduced in evidence. The dower records of Mrs. Anna Williams v. The Estate of John D. Williams, in the probate court of Laurens, introduced in evidence. Ball & Simkins, attorneys for defendant Williams, introduced in evidence deed of feoffment, with livery of seisin, from John G. Williams to James T. Bozeman, bearing date of December 3, 1892, and recorded in R. M. C. for Laurens county, S. C., 4th of January, 1893, in Book 6, p. 311, marked 'Exhibit C.' Also, the memorandum on back of deed introduced in evidence. The plaintiff's and other defendants' attorneys interpose the objection of irrelevancy and incompetency. Execution of papers admitted. Attorneys of John G. Williams introduce in evidence deed of James T. Bozeman to John G. Williams, dated December 3, 1892, recorded January 4, 1893, in Book 5, p. 308. Plaintiff's attorney and attorney for other defendants object as irrelevant, and marked 'Exhibit D.'

"John G. Williams, being duly sworn, says: By Mr. Simkins: 'I know the sixteen hundred acre tract of land, Spring Grove, mentioned in the complaint. I was in possession of Spring Grove tract for more than ten years before my father's death (Col. John D. Williams), and have been in possession ever since, up till now, and am in possession now. (Objection by plaintiff's and other defendants' attorneys, as testimony is not responsive to pleadings, and is incompetent.) I was in possession of this property when this action was commenced, claiming to be the owner thereof. When the deed of feoffment was by me delivered to Mr. Bozeman, Mr. E. L. Wells and Mr. J. J. Norton were present, and it was upon the premises. (Objected to by other parties to the action on the ground that the papers are the best evidence of the facts.) There was no other person present besides the witnesses and James T. Bozeman, who was present. It is the same person named as grantee in the deed of feoffment. I delivered the deed of feoffment, with a clod of dirt off the premises, to James T. Bozeman. J. J. Norton was my attorney, at the time. Col. Ball was my local attorney. Judge J. J. Norton is now dead. It was in December 23, 1892. (Objection as above continued.)' X. by Mr. Dial: 'No notice was given to any other person claiming an interest in this land that I was going to make a deed of the land that day. I did not know that any one else had anything to do with it. Bozeman made me a deed back. He never, as I remember, delivered me a clod back. No money was passed between me and Mr. Bozeman. There was no other consideration. These transactions

were made under the advice of my attorney. (Objected to as irrelevant by Ball & Simkins.) The object was to validate my title. Did not think it would do any harm. (Objected to as irrelevant by Mr. Simkins.) I never thought anybody else had any interest in it. I had heard that other parties—my father's legatees, John D. Garlington and Mrs. Witherspoon—would claim an interest in it at my death. I did it better to protect my interest,—my own personal claim. (Objected to by Ball & Simkins as irrelevant and incompetent.)' Re-direct by Mr. Simkins: 'When deed of feoffment was delivered by me to Bozeman, the following words were used by me to Bozeman: "I deliver these to you in the name of the seisin of all the lands and tenements contained in the deed." (Objected to same as above.)'

"E. L. Wells, being duly sworn, says: By Mr. Simkins: 'I am one of the witnesses to the deed of feoffment from John G. Williams to James T. Bozeman. The transaction was at Spring Grove, and on the Spring Grove tract of land. The other witness present was J. J. Norton, who is now dead. James T. Bozeman was present at that time; also, John G. Williams. John G. Williams made a deed or title to the land, and gave Mr. Bozeman this deed. When John G. Williams delivered the deed to Mr. Bozeman, he also delivered to him a clod of dirt. I don't remember the exact words, but the ceremony, something like Colonel Williams stated in his testimony, was said or spoken.' No question on cross-examination.

"It is admitted by counsel that the only heirs at law of John D. Williams are John G. Williams, Mrs. Phoebe Y. Witherspoon, and John D. Garlington; that Mrs. Williams, the widow of said John D. Williams, died since the said John D. Williams. Testimony closed with the understanding that Mr. Martin and Mr. Richey put in the dates and amounts of their judgments and the payments made, if any shall be, in exact amount submitted. Miss Lucy Williams, daughter of testator, died unmarried and intestate soon after the death of said testator, in 1871.

"F. P. McGowan, as Special Referee."

Sections Three and Eleven of the Will of John D. Williams.

"(3) Having heretofore made large advancements of money and property to my son, John G. Williams, which, with the portion of my estate which I give to him in this clause, I consider to be a fair proportion thereof, I give and bequeath to my executors hereinafter named, for his use and benefit during his natural life, my Spring Grove tract of land, including the lands which I have added thereto, all lying on the west side of Mudlick creek, and supposed to contain about fifteen hundred acres, together with all the property which was on the said place, with the increase thereof, when he took charge of the same, to remain in his possession and enjoyment, unless efforts be made to subject the same to the

payment of his debts and liabilities, and in this event to be taken charge of by my executors, to prevent and protect the same from such liabilities, and at his death to be equally divided between such child or children as he may leave surviving him at his death, but should he leave no child or children surviving him at his death, or should all of his children die before attaining the age of twenty-one years, then to revert to my estate for division, as the residue of my estate is hereafter directed, and with the provision that no more of the woodland is to be cleared up for cultivation; hereby directing my executors, hereafter named, immediately after my death to deliver and hand over to my said son all the notes I hold on him, and also all the accounts I have against him previous to 1st January, A. D. 1869, amounting to several thousands of dollars, in lieu of all his interest in the balance of my estate."

"(11) Having specifically disposed of all the property I desire, I will and bequeath all the rest and residue of my estate—such part thereof as I have not otherwise directed—to be sold by my executors at their discretion, and the proceeds thereof to be equally divided as follows: One-fourth part to Col. James W. Watts and Dr. William Anderson, in trust for sole and separate use and benefit of my said wife during her natural life, with the power on her part of disposing of the same at her death to such persons as she may see fit; and the remaining three-fourths to be equally divided between my two daughters, Phoebe and Lucy, and grandson, John D. Garlington, so as to give my said daughters and grandson equal portions. Should either of my said daughters or grandson, John D. Garlington, die leaving no child or children, or grandchild or grandchildren, living at the death of such daughters or said grandson, John D. Garlington, the share of the one so dying I desire to be divided among the survivors, so as to equalize their shares. In the event, however, that either of my said daughters should have a husband, or my said grandson, John D. Garlington, a wife, at the death of either, and no child or children, then the husband or wife of party so dying is to take one-third part of the interest of his deceased wife or her deceased husband, given in this clause; and the remainder to revert to my estate, and to be divided between my said daughter or daughters and grandson, or the parties representing them, as I have hereinbefore directed."

Deed of Feoffment.

"The State of South Carolina. Know all men by these presents, that I, John G. Williams, of Cross Hill, in Laurens county, in the state aforesaid, in consideration of the sum of five thousand dollars to me in hand paid at and before the sealing of these presents, by James T. Bozeman, of Laurens county (the receipt whereof is hereby acknowledged), have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and re-

lease, unto the said James T. Bozeman, all that piece, parcel, or tract of land situate, lying, and being in the county and state aforesaid, on Mudlick creek, waters of Little river, waters of Saluda river, and on head waters of other branch waters of Saluda river, running towards the west, containing 1,500 acres, more or less; said tract being known as Spring Grove, and is bounded by lands of estate of Mrs. Eliza Rudd, deceased, J. D. Garlington, J. S. Hill, R. S. Griffin, B. F. Owens, and others. Together with all and singular, the rights, members, hereditaments, and appurtenances to the said premises belonging, or in any wise incident or appertaining. To have and to hold, all and singular, the said premises before mentioned unto the said James T. Bozeman, his heirs and assigns, forever. And I do hereby bind myself, and my heirs, executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said James T. Bozeman, his heirs and assigns, against myself and my heirs, and every person whomsoever, lawfully claiming or to claim the same or any part thereof. Witness my hand and seal this third day of December, A. D. 1892, in the year of our Lord one thousand eight hundred and ninety-two, and in the one hundred and seventeenth year of the sovereignty and independence of the United States of America. John G. Williams. [Seal.] Signed, sealed, and delivered in the presence of J. J. Norton, E. L. Wells.

"The State of South Carolina, Laurens County. Personally appeared before me E. L. Wells, and made oath that he saw the within-named John G. Williams sign, seal, and, as his act and deed, deliver, the within written deed, and make livery of seisin, as herein indorsed in a memorandum, and that he, with J. J. Norton, witnessed the execution thereof. E. L. Wells.

"Sworn to before me this 17th day of December, A. D. 1895. M. T. Simpson, Notary Public for S. C. [Seal.]

"Memorandum. That, on the day and year within written, full and peaceable seisin of the within-mentioned land, with its appurtenances, was granted, and, after due consideration, given, by the within-named John G. Williams to James T. Bozeman, in their proper persons, according to the tenor and effect of the within written deed. In the presence of J. J. Norton, E. L. Wells."

Deed from James T. Bozeman to John G. Williams.

"The State of South Carolina. Know all men by these presents, that I, James T. Bozeman, of Laurens county, in the state aforesaid, in consideration of the sum of five thousand dollars to me in hand paid, at and before the sealing of these presents by John G. Williams, of Cross Hill, in said county and state (the receipt whereof is hereby acknowledged), have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release unto the said John G. Williams, all that

piece, parcel, or tract of land known as 'Spring Grove,' situate, lying, and being in said county and state, on waters of Saluda river, partly running towards the east and partly running towards the west,—that running to the east running into Mudlick, which is a boundary in part, waters of Little river, waters of Saluda river aforesaid,—and bounded by lands of the estate of Mrs. Eliza Rudd, deceased, J. D. Garlington, J. S. Hill, R. S. Griffin, B. F. Owens, and others. Together with, all and singular, the rights, members, hereditaments, and appurtenances to the said premises belonging, or in any wise incident or appertaining. To have and to hold, all and singular, the said premises before mentioned, unto the said John G. Williams, his heirs and assigns, forever. And I do hereby bind myself, and my heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises unto the said John G. Williams, his heirs and assigns, against myself and my heirs, and every person whomsoever lawfully claiming or to claim the same, or any part thereof, by or through me. Witness my hand and seal this third day of December, A. D. 1892, in the year of our Lord one thousand eight hundred and ninety-two, and in the one hundred and seventeenth year of the sovereignty and independence of the United States of America. James T. Bozeman. [Seal.] Signed, sealed, and delivered in the presence of J. J. Norton, E. L. Wells."

The following are appellant's exceptions:

"John G. Williams, defendant appellant, excepts to the decree of his honor, Judge Benet, herein, because he erred (1) in not dismissing the complaint as to the defendant John G. Williams, the action as to him being premature; (2) in not holding that, the plaintiff showing no present title and right of possession to the land as against John G. Williams, the complaint, as to him, should be dismissed; (3) in assuming jurisdiction to determine between the plaintiff, a mortgagee of a mere contingent remainder-man, and this defendant, the life tenant, the question of title, that could arise only at the determination of the life estate; (4) in assuming jurisdiction to determine between the plaintiff, the assignee of a contingent remainder-man, and this defendant, the conceded life tenant, rights to the property which can arise only upon the falling in of the life estate, and which depend upon contingencies that may or may not happen by that time; (5) in holding 'that the deed of feoffment, with livery of seisin, executed by John G. Williams, is a nullity'; (6) in holding 'that the legal estate of the Spring Grove tract of land is in the executors'; (7) in holding that 'the trust is active, and the statute cannot execute the use in Williams'; (8) in holding that the act of 1883 (18 Gen. St. 430; Rev. St. § 1997) abrogated and destroyed the power and right which defendant Williams, under the common law, had to make the deed of feoffment, with livery of seisin and rendered nugatory the effects of his

attempted deed of feoffment; (9) in holding 'that the contingent remainders created by the will of John D. Williams have not been destroyed'; (10) in not holding that the life tenant, John G. Williams, by his deed of feoffment, with livery of seisin, to James T. Bozeman, barred all the contingent remainder-men, including John D. Garlington, the plaintiff's mortgagor or assignor; (11) in ordering a foreclosure of the plaintiff's mortgage, and a sale of the premises."

W. J. Stribling and Ball & Simkins, for appellant. W. B. Dial, for plaintiff. Ferguson & Featherstone, for certain defendants. W. H. Martin, for defendant Garlington. W. R. Richey, for certain creditors.

McIVER, C. J. This was an action for foreclosure of a mortgage executed by the defendant John D. Garlington upon his interest in a certain tract of land, known as "Spring Grove." So far as this appeal is concerned, the only controversy is between the plaintiff and the defendant John G. Williams, who, by his answer, "for a second defense, alleges that neither the plaintiff nor his alleged mortgagor has any title to or interest in Spring Grove"; having alleged in his first defense "that he is the owner, and entitled to retain the possession, of Spring Grove." A jury trial having been waived, the case was heard by his honor, Judge Benet, upon the testimony taken and reported by a referee, who rendered a decree, which is set out in the "case," which should be incorporated in the report of this case. It will be sufficient, therefore, to state here that the circuit judge, by his decree, adjudged that the defendant John D. Garlington was entitled to an interest in the Spring Grove tract of land, as a contingent remainder-man under the will of the late John D. Williams, and that such interest could be sold under the mortgage sought to be foreclosed in these proceedings. Accordingly judgment was rendered for the sale of the interest of the mortgagor, John D. Garlington, and that the proceeds of such sale be applied to the payment of the amount due on the mortgage debt held by plaintiff, after first paying the costs and expenses of such sale, and the costs of this action. From this judgment the defendant John G. Williams alone appeals, upon the several exceptions set out in the record, which should be likewise incorporated in the report of this case. We do not propose to consider these exceptions serialim, inasmuch as, according to our view, they raise but two general questions, viz.: (1) Whether the action was prematurely brought, as against the appellant; (2) whether the interest of John D. Garlington, as a contingent remainder-man, in the Spring Grove tract of land, was barred or destroyed by the deed of feoffment, with livery of seisin, executed by the life tenant of said land.

For a proper understanding of these ques-

tions, it may be well to state here that, under the established facts in this case, the Spring Grove tract of land formally belonged to one John D. Williams, who died on the — day of June, 1870, leaving a will, by the third clause of which he devised Spring Grove to his executors, for the use and benefit of his son, the said John G. Williams, during his natural life, "to remain in his possession and enjoyment, unless efforts be made to subject the same to the payment of his debts and liabilities, and in this event to be taken charge of by my executors, to prevent and protect the same from such liabilities, and at his death to be equally divided between such child or children as he may leave surviving at his death, or, should all his children die before attaining the age of twenty-one years, then to revert to my estate for division as the residue of my estate is hereafter directed." And by the eleventh clause of his will the testator devised the rest and residue of his estate as follows: One-fourth to certain trustees for the sole and separate use of his wife, and the remaining three-fourths to be equally divided between his two daughters, Phoebe and Lucy, and his grandson, the said John D. Garlington. There are other provisions in these two clauses of the will, which we do not deem it necessary to set out here, as they are not pertinent to the inquiry in this case. It is conceded, as we understand it, that under these two clauses of the will the mortgagor, John D. Garlington, was entitled to a contingent remainder; but, whether conceded or not, it is clear that such would be the result, under the case of *Faber v. Police*, 10 S. C. 376. It also appears that the life tenant, John G. Williams, on the 3d day of December, 1892, with the avowed purpose to bar the contingent remainders created by the will, executed a deed of feoffment, with livery of seisin, purporting to convey the absolute estate in fee in the Spring Grove tract to one James T. Bozeman, and that on the same day the said Bozeman reconveyed the same to the said John G. Williams. Both of these deeds were duly recorded. It seems, however, that prior to this transaction the mortgage which the plaintiff is seeking to foreclose was executed, to wit, on the 13th of February, 1892. In the light of the foregoing facts, which are either conceded, or established by the findings of the circuit judge, to which findings there is no exception (all the exceptions taken being to the legal points ruled by the circuit judge), we will proceed to the consideration of the first question above stated.

The appellant seems to contend that, because the contingencies upon which the estate in remainder would become vested have not yet happened, and may never happen, the plaintiff has now no cause of action, as against the appellant, and therefore the complaint, as to him, should have been dismissed. In the first place, it does not appear that any motion was submitted to his honor,

Judge Benet, or that the question which would be presented by such a motion was either considered or passed upon by him. It is stated in that portion of the "case" in which the testimony taken by the referee is set out that at the close of the testimony on the part of the plaintiff "the attorneys of John G. Williams enter a motion to dismiss the complaint," but upon what ground is not stated. Certainly the referee had no power to consider or decide the question presented by the motion, as he was appointed simply to take the testimony, and he did not undertake to do so; and the circuit judge does not appear to have done so. He states in the outset of his decree that the appellant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action as to him, which demurrer was overruled; but, as we gather from the argument here, the demurrer was overruled by his honor, Judge Aldrich, at a preceding term of the court, and not by Judge Benet. But, waiving all this, in the interest of the appellant, we will not decline to consider the question on its merits. We do not think the question was concluded by the ruling on the demurrer, as that ruling was based solely upon the facts as alleged in the complaint, and there were no allegations in the complaint upon which the question, as now presented, could have then been raised, as there was nothing in the complaint to show what was the nature or extent of the mortgagor's interest in the mortgaged premises, or the nature and extent of the appellant's claim thereto. Now, however, it does appear that the interest of the mortgagor is that of a contingent remainder-man; and the appellant claims that he is the owner of the mortgaged premises, and in his second defense he alleges that "neither the plaintiff nor his alleged mortgagor has any title to or interest in Spring Grove," the mortgaged premises. Now, if a contingent remainder in real estate can be the subject of mortgage, and if the mortgagor has such an interest in Spring Grove, we see no reason why the mortgagee, upon breach of the condition of the mortgage, may not proceed to foreclose the same, and sell whatever interest the mortgagor may have in the mortgaged premises, without waiting until the happening of the condition upon which the remainder would become vested. Especially is this so when the life tenant in possession has by his answer raised the issue whether the mortgagor has now any interest in the mortgaged premises. Of course, the sale of the interest of the contingent remainder-man cannot in any way affect the rights of the life tenant; and that is carefully provided for in the circuit decree. At such sale the purchaser will take only the interest of the mortgagor, whatever that may prove to be. In this case, the life tenant having by his answer denied that the mortgagor has any interest in the mortgaged premises, and alleged that he is the absolute owner of

the same, the issue which he has thus presented must be determined. We do not think, therefore, that the action was prematurely brought, as against John G. Williams, the life tenant in possession, who had by his deed of feoffment and by the conveyance from his feoffee, both of which were spread upon the records, asserted his claim to the land as absolute owner in fee; and we do think that the circuit court had full jurisdiction to hear and determine all the issues as to the rights of the parties presented by the pleadings. Exceptions 1, 2, 3, and 4 must therefore be overruled. We do not understand that it is questioned that a contingent remainder in real estate can be the subject of mortgage; but, if questioned, the following authorities are quite sufficient to show that such an interest in real estate may be mortgaged: 2 Story, Eq. Jur. § 1021; Allston v. Bank, 2 Hill, Eq. 235; Roddy v. Elam, 12 Rich. Eq. 343; Gilkerson v. Connor, 24 S. C. 321; and Roundtree v. Roundtree, 26 S. C. 471, 2 S. E. 474.

It only remains to consider the second question above stated, viz. whether the contingent remainders created by the will of John D. Williams in John D. Garlington and others were barred or destroyed by the deed of feoffment, with livery of seisin, relied on for that purpose. The circuit judge held that the contingent remainders were not barred, for two reasons: (1) Because the legal title to Spring Grove was in the executors, and not in the life tenant; (2) because the power of a life tenant to bar contingent remainders by a deed of feoffment, with livery of seisin, was taken away by the act of 1883 (18 St. at Large, p. 430). It seems to us that both of these reasons are sound. It is not, and cannot be, denied that, even at common law, a tenant of life could not bar contingent remainders by a deed of feoffment with livery of seisin, unless he held the legal title. It will be observed that Spring Grove is not devised to John G. Williams, directly, for his life, but to the executors, "for his use and benefit during his life"; and, if this were all, there would be no doubt that statute of uses would execute the use, and the legal title would pass to John G. Williams for his life. But this is not all, for the testator proceeds to say that the property is "to remain in his possession and enjoyment, unless efforts be made to subject the same to the payment of his debts and liabilities, and in this event to be taken charge of by my executors, to prevent and protect the same from such liabilities." This rendered it absolutely necessary that the legal title should remain in the executors, in order that they might be enabled to carry out this provision of the will; for, if the legal title passed into John G. Williams by virtue of the statute of uses, it would be impossible for the executors to take charge of the property, and protect it from the claims of the creditors of John G. Williams. See *Heath v. Bishop*, 4 Rich. Eq. 46. But

there is another reason why the legal title did not pass to the life tenant by virtue of the statute of uses. Under the eleventh clause of the will, the property known as "Spring Grove" would, in the event of the death of John G. Williams without leaving a child who should attain the age of 21 years, fall into the residue; and that the executors are directed to sell, which they could not do unless the legal title remained in them. It is therefore clear that there were duties imposed upon the executors, for the proper performance of which it was necessary that the legal title should remain in them. In such a case the rule is well settled that the statute of uses does not apply.

But the second and stronger reason why the deed of feoffment, with livery of seisin, could not bar the remainders, is that, very nearly nine years before the life tenant undertook to do so, the legislature, by the act of 1883, above referred to, expressly declared "that no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment with livery of seisin." The object of that act, as declared by its title, was "for better protection of contingent remainders"; and its manifest purpose was to prevent the accomplishment of just such an object as appellant sought to accomplish by his deed of feoffment, with livery of seisin. It is contended, however, that this act cannot be applied to this case, for two reasons: (1) Because such an application of it would render it unconstitutional; (2) because it would give the act a retroactive effect.

As to the first of these reasons, it is sufficient to say that we are not aware of any constitutional provision with which this act conflicts, and none such has been pointed out. Some allusion has been made in the argument to the provision in the constitution of this state, as well as in the constitution of the United States, forbidding the passage of any law impairing the obligation of any contract; but, as no matter of contract is involved in this case, it is impossible to conceive how the act of 1883 can be regarded as violative of these constitutional provisions. It certainly cannot be said that the effect given the act of 1883 by the circuit judge would make it retrospective, and for that reason violative of the constitution; for there is nothing in the constitution which forbids retrospective legislation, unless it have the effect of impairing the obligation of a contract, or divesting vested rights of property. See *McLure v. Melton*, 24 S. C. 559, and cases there cited. Indeed, we do not understand that appellant really relies upon the point that the act of 1883 would be unconstitutional, if applied to this case.

We proceed, then, to consider the second reason why appellant contends that this act of 1883 cannot be applied to the present case, viz. that so to apply it would give that act a retroactive effect, in violation of the well-settled rule that all acts must be construed to be prospective, and not retrospective, except when

a contrary intention is expressed or necessarily implied by the terms used in the act. In the first place, we do not consider that the act would be given a retroactive effect by applying its provisions to the present case. If the deed of feoffment had been executed prior to the passage of the act of 1883, we could then see how it could be regarded as giving the act of 1883 a retroactive effect, if the attempt should be made to apply it to a deed executed prior to its passage. But here the deed of feoffment was executed nearly nine years after the passage of the act, and such deed can only be permitted to have such effect as the law in force at the time of its execution allowed it to have. Certainly, the legislature must be regarded as having the power to make such changes in the modes of conveying real property, whether acquired after or owned before the change is made, and declaring what shall be the effect of any given mode of conveyance; and, while such changes in the law might not apply to conveyances made before, they certainly would apply to all conveyances made after, such change in the law, and such legislation could in no sense be regarded as retrospective.

It is contended, however, by appellant, that when the testator, John D. Williams, died, and his will took effect, to wit, in 1870, the appellant acquired, under the will, a life estate in Spring Grove, with the right, under the law as it then stood, to bar the contingent remainders by a deed of feoffment, with livery of seisin; and that he could not be deprived of this right, which became vested in him in 1870, by any subsequent legislation. There is no doubt that under the common law of England a tenant for life could bar contingent remainders by executing a deed of feoffment, with livery of seisin; and there is as little doubt that this portion of the common law became a part of the law of this state by virtue of the act of 1712, incorporated in the General Statutes of 1882 as section 2738. This right (or privilege, as it should be more properly termed) claimed by appellant is derived alone from the statute law of this state, and may therefore be withdrawn whenever the lawmaking power sees fit to do so, provided, always, that in so doing the constitution is not violated. A citizen cannot be said to have a vested right in statutory privileges or exemptions. Cooley, Const. Lim. (2d Ed.) 383. Upon this principle it has been held in *Stoddard v. Owings*, 42 S. C. 92, 20 S. E. 25, that the legislature may change the periods prescribed by statute as a limitation to actions,—as well in reference to antecedent as subsequent contracts. In that case the following language used by the Massachusetts court in *Bigelow v. Bemis*, 2 Allen, 496, is quoted with approval: "It is well settled that it is competent for the legislature to change statutes prescribing a limitation to actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction upon the exercise of this power is that the legislature cannot remove a bar which has already become complete, and that no new

limitation shall be made to affect existing claims, without allowing a reasonable time for parties to bring actions before their claims are absolutely barred by a new enactment." The case of *Blackman v. Gordon*, first reported in 1 Rich. Eq. 61, and again, upon a petition for rehearing, in 2 Rich. Eq. 43, is very much like this case in principle, and, as it seems to us, conclusive of this case. - There, the testator, who died in 1839, provided by his will that his executors, after a certain event happened, should transport all of his slaves "to the nearest nonslaveholding state in the United States, to the free colony in Africa." Before this provision of the will was executed the act of 1841 was passed, whereby it was declared that every bequest providing for the removal of any slaves without the limits of this state should be void. *Held*, that the act avoided this provision of the will, and that the executor must account to the next of kin of the testator for the slaves. Harper, Ch., in delivering the opinion of the court at the last hearing, uses this language: "The act [of 1841] declares, in general terms, that every bequest directing slaves to be carried out of the state, with a view to their emancipation, shall be void. This, in plain and explicit terms, applies to every bequest, whether made before the passing of the act, or to be made subsequently." Again he says: "If the executor had actually sent the slaves out of the state, and the legislature had then passed an act declaring that he should be liable for their value, this would have been a retrospective act, or might have been called an act *ex post facto*. * * * The act of emancipation was to be in future, and the act of the legislature has intervened to forbid that future action. How, then, can it be regarded as retrospective, any more than if the testator himself had expressed an intention of liberating his slaves, and before his execution of that intention an act of the legislature had forbidden it?" The principles laid down by this language are entirely applicable to the present case. The act of 1883 declares, in general terms, that "no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment with livery of seisin." This, in plain and explicit terms, applies to every contingent remainder, whether created before or after the passing of the act. If the deed of feoffment had been executed, and the contingent remainder had thereby been barred, and the legislature had then passed an act declaring that the contingent remainder should not be thereby barred, such an act would clearly not only be a retrospective act, but would probably be regarded as void as an attempt to divest vested rights of property. But here the contingent remainder had not been barred at the time the act of 1883 was passed, and could only be barred by the future action of the life tenant, and the effect of the act was simply to forbid such future action, which was clearly within the competency of the legislature. Again, this doctrine that a life tenant may, by a deed of

feoffment, with livery of seisin, bar contingent remainders, which had its origin under the feudal system, seems very generally to be regarded as a means of doing a wrong to the contingent remainder-man, and always defeats the intention of the testator, where such remainders are created by will; and, as is said in 20 Am. & Eng. Enc. Law (1st Ed.) p. 888, note, this power to do such wrong is strictissimi juris, and can never expect favor, or anything beyond mere support, and a court of equity, viewing it in the light of a wrong, "seizes every occasion, and makes every possible stretch, for extending its protection against it." To use the language of Mr. Justice Goldsmith in *Hoffman v. Hoffman*, 28 Ala. 544, quoted in a note on page 944, 6 Am. & Eng. Enc. Law (2d Ed.), which, though there applied to a different matter, is equally applicable here: "Whenever a statute is leveled against an abuse, or in furtherance of an acknowledged principle of right and justice, every reason exists for its most liberal application; and in such cases it may fairly be presumed that it was the intention of the legislature that the boon of the statute should be extended to every case which its words could properly include." In addition to this, the quotation from *Endlich*, *Interp. St.* § 281, in the decree of the circuit judge, shows that inchoate rights depending for their existence upon the statute law may, at the pleasure of the legislature, be abrogated or modified, where such rights have not been exercised at the time of the enactment. The same doctrine is held in the case of *Randall v. Kreiger*, 23 Wail. 137, cited by counsel for respondent, in which case Mr. Justice Swayne, in delivering the opinion of the court, used this expressive and pertinent language: "There can be no vested right to do wrong." In this case the right of appellant to bar contingent remainders in the mode adopted by him for that purpose, under the law as it stood at the time the will took effect, cannot be regarded as anything more than a mere inchoate right, which he had never attempted to exercise until after he had been deprived of such right by statute; nor can it be said that he had a vested right to do a wrong to the contingent remainder-man, by defeating the expressly-declared intention of the testator.

We are entirely satisfied, therefore, that, in no view of the case can any of the exceptions be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

Ex parte RANSEY.

In re CHAFEE.

(Supreme Court of South Carolina. March 27, 1890.)

EXEMPTIONS—HOMESTEAD—EXCEPTIONS TO APPRAISERS RETURN—FILING.

Gen. St. §§ 1904, 1905 (Rev. St. 1893, §§ 2126, 2127), relating to the appraisement of a

debtor's homestead, provide that, if no complaint be made by either creditor or debtor within 30 days after the appraisers' return is filed, the proceedings shall be final, and that, if exceptions thereto be filed within that time, the court may, on cause shown, order a reappraisal, but, if no exceptions are filed within that time, or if the return has been finally approved, it may be recorded by the debtor. *Held*, that personal service of the exceptions on the debtor was insufficient, but that they must be filed.

Appeal from common pleas circuit court of Aiken county; Ernest Gary, Judge.

In the matter of the appraisement of the homestead of Gasper T. Ransey. From a judgment dismissing exceptions to the report of appraisers, G. K. Chafee appeals. Affirmed.

G. W. Croft & Son, for appellant. Thomas R. Morgan, for respondent.

JONES, J. The sole question presented by this appeal is whether the circuit court erred in dismissing exceptions to the return of homestead appraisers on the ground that said exceptions had not been filed in the office of the clerk of the court within 30 days after the filing of the return, although said exceptions were served on the judgment debtor personally within said time. We think there was no error. Section 1994 of the General Statutes, appearing substantially as section 2126, Rev. St. 1893, contains the provision: "Said appraisers shall make return of their action in the premises under their hands and seals to the sheriff or other officer, within thirty days after they shall have been appointed as aforesaid, for record in the office of the clerk of said court, giving the metes and bounds, as well as the value of the homestead set off, for which purpose they shall be authorized to call in the aid of a surveyor, if they, or a majority of them, deem it necessary. If no complaint shall be made by either creditor or debtor within thirty days after the return of the appraisers has been filed, the proceedings in the case shall be final: provided, that if exceptions thereto be filed by either creditor or debtor within thirty days after filing the return of said appraisers, the court out of which the process issued, upon good cause being shown, may order a reappraisal and reassignment of the homestead by other appraisers appointed by the court." Section 1995, Gen. St., appearing as section 2127, Rev. St., provides: "When thirty days shall have elapsed after the filing of the return of said appraisers, setting off a homestead to any debtor according to the provisions of the preceding section, and no exceptions have been filed against such return, or if such return has been finally heard and approved, such debtor may have such return recorded in the office of the register of mesne conveyances of the county in which the same is located; and upon such return being recorded in forty days after the proceedings have become final, the title to the homestead so set off and assigned shall be forever

discharged from all debts of said debtor then existing or thereafter contracted." These are the statutory provisions bearing on the question, and we think it is clear therefrom that, in order to assail the return of appraisers in homestead proceedings, exceptions to such return must be filed in the clerk's office within 30 days after said return has been there filed. It is of no avail to argue that personal service of the exceptions on the judgment debtor accomplishes all the purposes of notice, and is better than mere filing. The proceedings in assigning homestead is prescribed by statute, and the statutory method is the one to be followed. If exceptions be not filed with the clerk in the required time, the statute gives the judgment debtor the right to have the return recorded as final, and thus discharge said homestead from his debts then existing or thereafter contracted. The object in requiring the filing of the exceptions is not merely to give the judgment debtor or the judgment creditors notice, but to afford the clerk the means to ascertain his duty in reference to recording such return, and in reference to placing the cause on calendar for trial. In the case of *Ex parte Ellis*, 20 S. C. 344, this court held that notice of exceptions filed by creditors to an appraisal of homestead need not be served on the judgment debtor, and in determining that question the court said: "The act, in prescribing the mode of proceeding in cases like this, nowhere requires that any notice of the exceptions filed by the creditor should be served upon the judgment debtor. All that is required is that the exceptions shall be filed within thirty days after the filing of the return of the appraisers." As the service of the exceptions in this case on the judgment debtor was wholly unnecessary, because the statute only required filing thereof with the clerk, manifestly such service cannot be allowed to take the place of the filing required by the statute. The judgment of the circuit court is affirmed.

GENTRY v. LANNEAU et al.

(Supreme Court of South Carolina. March 25, 1899.)

FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITOR—EVIDENCE—SUFFICIENCY.

1. It cannot be conclusively presumed that because a deed was without consideration, and the grantor insolvent, it is fraudulent as to subsequent creditors having constructive notice thereof.

2. There must be proof of actual fraud to invalidate a deed as to subsequent creditors.

3. A grantor of a voluntary deed to his wife and son at the time of its execution honestly believed that he was abundantly able to pay his debts, independent of the property conveyed, and a banker, acquainted with his property and liabilities, regarded him solvent. He was then doing a prosperous business, but, owing to a disastrous panic a few years thereafter, his business property was sold for about one-half its cost. All his debts existing at the time of the transfer had been paid, and, prior to contracting

a subsequent debt, the deed was duly recorded. Held not fraudulent as to subsequent creditors.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Action by Samuel C. Gentry against Charles H. Lanneau and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Shuman & Dean, for appellant. Cothran, Wells, Ansel & Cothran, for respondents.

JONES, J. In this action a subsequent creditor seeks to set aside a voluntary deed by a debtor to his wife and son, which was duly recorded prior to the contraction of the debt. The general rule on this subject is thus stated in *Jackson v. Plyler*, 38 S. C. 498, 17 S. E. 255, by Chief Justice McIver, speaking for the court: "While it is unquestionably true that the mere fact that a deed is without consideration—a voluntary deed—will not render it fraudulent as to subsequent creditors, especially when they have notice, yet if, in addition to its being voluntary, it was made with a view to future indebtedness, or attended with some circumstances of fraud other than what arises from its being voluntary, then it may be declared null and void for fraud, even at the instance of subsequent creditors. While, therefore, an existing creditor may assail a voluntary deed, even though executed without any evil intent or fraudulent purpose whatever, and even if the motive which prompted the act should be of the most praiseworthy character, yet a subsequent creditor is not permitted to do so without showing some actual moral fraud." *Walker v. Bollmann*, 22 S. C. 529, and cases therein cited. In other words, when a subsequent creditor with notice attacks the voluntary deed of his debtor, there is no irrebuttable presumption of fraud arising from the fact that the transfer is without consideration and the fact of indebtedness at the time, but all the circumstances must be weighed by the court or jury trying the issue for the purpose of ascertaining whether fraud, actual and positive, as distinguished from what is called "legal fraud," really existed at the time. The master whose judgment is reversed by the circuit court rested his conclusion that the deed was fraudulent in this case on this as one of his conclusions of law: "A voluntary conveyance by one insolvent or largely indebted at the time will be deemed fraudulent, and presumed to be made with intent to hinder, delay, or defraud creditors, and, being void as to existing creditors, is void as to all the subsequent as well as prior." It is thus manifest that the master overlooked the distinction between existing and subsequent creditors, and gave the fact that the deed was without consideration, and the grantor insolvent or largely indebted, the probative force such facts have in case existing creditors were attacking the transfer. These certainly were facts to be considered in ascertaining the existence of actual fraud, but such facts do not raise a conclusive pre-

sumption of law that the transfer is fraudulent as to subsequent creditors. It is true that the evidence shows that the defendant Lanneau was largely indebted at the time of the transfer, but it also shows that he honestly believed he has abundant means to pay his debts, estimating his property outside of the premises conveyed to be worth over \$30,000 more than his liabilities. His belief that his creditors were amply provided for by the remaining property was not unreasonable, for a banker acquainted with his property and liabilities regarded him solvent outside of the property conveyed. At the time of the transfer, September 23, 1891, he was operating a cotton mill, which he owned, and it is not disputed that he was then doing a prosperous business. This mill, which had been recently built, was comparatively new, and cost him \$50,500. Owing to the disastrous panic of 1893, he closed the mill in July of that year. The mill was sold in October, 1894, and, such property having depreciated in value, it was sold for \$25,000. All of the debts existing at the time of the transfer have been settled, and no existing creditor is therefore complaining or interested in this controversy. The master did not find as a fact that Lanneau made the conveyance with any actual intent to hinder, delay, or defraud his existing creditors, nor did he find as a fact that he intended to hinder, delay, and defraud his subsequent creditors by contracting future debts, and avoiding their payment by means of the deed to his wife and son; and there was no exception taken to the failure of the master to so find. Without, therefore, going into any extended examination of the circumstances, we may assume that the plaintiff has failed to establish the existence of actual fraud. This being so, he has no standing in court, and it is wholly unnecessary to consider in detail the numerous grounds of appeal. We may say, however, that we concur with the circuit court that the circumstances do not warrant an inference that the deed in question was executed with intent to defraud. The judgment of the circuit court is affirmed.

5456.44v

NOHRDEN v. NORTHEASTERN R. CO.
(Supreme Court of South Carolina. March 25, 1899.)

DEATH BY WRONGFUL ACT—PLEADING—BENEFICIARIES—EXEMPLARY DAMAGES—STATUTES—AMENDMENT—RETROACTIVE EFFECT.

1. An amendment of a statute declaring the parties who can recover damages for causing a death, does not apply to a cause of action arising before the amendment was adopted.

2. In an action brought for the benefit of the father of deceased alone, under 1 Rev. St. 1893, § 2316, providing that an action for damages for death by wrongful act shall be for the benefit of deceased's wife, husband, parent, and children, the complaint must allege that the father is the only person for whose benefit the action could be brought.

3. In an action for damages for death by wrongful act, brought for the benefit of de-

ceased's father alone, an allegation that deceased "left surviving him his father, who has been injured," etc., is not sufficient to show that such father is the only person for whose benefit the action could be brought.

4. Where a city ordinance is pleaded merely for the purpose of showing defendant's negligence, the title, date, substance, and authority for passage and publication of such ordinance need not be alleged.

5. Where a complaint in an action by an administrator shows that plaintiff was appointed as administrator only six days before the action was brought, and it is not shown that he has since been discharged, it need not be alleged that he is still qualified to act as administrator.

6. Exemplary damages cannot be recovered in an action for death by wrongful act.

Appeal from common pleas circuit court of Charleston county; W. C. Benet, Judge.

Action by William C. Nohrden, as administrator, against the Northeastern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Fitzsimons & Moffett, for appellant. Murphy & Legare, for respondent.

McIVER, C. J. This action was commenced on the 27th of January, 1898, to recover damages sustained by reason of the death of plaintiff's intestate, caused, as alleged, by the negligence of the defendant company on the 8th day of September, 1897. The action is therefore brought under the provisions of the statute commonly called "Lord Campbell's Act," now incorporated in the Revised Statutes of 1893 (volume 1) as sections 2315-2318. The provisions of section 2316, as amended by the act of 1893 (21 St. at Large, p. 523) are as follows: "Every such action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been so caused; and if there be none such, then for the benefit of the heirs at law or distributees of the person whose death shall have been so caused as may be dependent on him for a support; * * * and the amount so recovered shall be divided among the before mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate." In *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 932, it was held that, unless it is alleged in the complaint that the parties for whose benefit the action is brought bear the relationship to the intestate above mentioned, the complaint states no cause of action, and is demurrable. In *Reed v. Railroad Co.*, 37 S. C. 42, 16 S. E. 289, it was alleged that the intestate died, leaving surviving him his father (who has since died), his mother, his wife, and four minor children, naming them (one of whom has since died), and that the action was brought for the benefit of the wife and the three surviving children and the mother of said intestate. The court held that, although the mother was improperly included among the beneficiaries, that error could be corrected by striking out her name, and overruling the

demurrer so far as based upon that error. That case shows that in ascertaining who are the beneficiaries in a given case the language in the latter part of section 2316, 1 Rev. St., declaring that the amount recovered "shall be divided among the before mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate," must not be overlooked; in other words, that only those of the classes mentioned in the first part of the section—"wife, husband, and children"—can share in the distribution of the amount recovered, who would have been entitled, under the statute of distributions, to share in the personal estate of the intestate. Hence where, in the Reed Case, the intestate died, leaving a widow and children, neither his father nor his mother could be included among those for whose benefit the action was authorized to be brought. It is scarcely necessary to say that, though this section has been further amended by an act approved Feb. 11, 1898 (22 St. at Large, p. 788), such amendment cannot be applied to this case, as it was not adopted until after the cause of action arose, and after this action was commenced.

The first question presented by this appeal which we propose to consider is whether it was error to refuse the motion to make the complaint more definite and certain by stating whether the intestate "left a wife surviving him, or whether the alleged parent, William C. Nohrden, for whose benefit alone this action is brought, is the only party beneficially entitled under section 2316 [volume 1] of the Revised Statutes of 1893 of South Carolina." Under the law as above stated, it seems to us clear that the plaintiff should have been required to amend his complaint by incorporating therein such a statement of facts as would show that he was the only person for whose benefit the action could be brought. The only allegation in the complaint upon this subject, repeated in totidem verbis in the statement of the several causes of action set forth in the complaint, is as follows: "That the said Harrold William Nohrden left surviving him his father, William C. Nohrden, who has been injured by his death to his damage five thousand dollars, for whom and for whose benefit this action is brought." This allegation is far from showing definitely and certainly that the plaintiff is a person for whose benefit such an action as this may be brought, and most unquestionably it does not show that he is the only person for whose benefit the action may be brought; for while it is, no doubt, true that the plaintiff did survive his son, yet, if the intestate died, leaving also a wife and child or children him surviving, then the complaint fails to show, definitely and certainly, that the person for whose benefit the action is alleged to have been brought is the person entitled to such benefit. It may be, and probably is, the fact that the plaintiff is the only person entitled to the

benefit of the action, yet, as the complaint does not state that fact,—certainly not definitely and clearly,—there was error in refusing the motion to require the plaintiff to make his complaint more definite and certain in this respect. But we do not deem it necessary to say anything more on this point, as it is of but little importance, inasmuch as the plaintiff can very easily amend his complaint in this respect before the new trial, which will be ordered on another ground, can be had; and he is hereby given leave to do so.

The second ground upon which this motion is based, or, rather, the second defect in the statements of the complaint relied on to support the motion,—the failure to state, in paragraph 2 of the third cause of action, certain facts,—cannot be sustained. The defect relied on is the failure to state "the title, date, and authority for passage and publication of the alleged Revised Ordinances of the city of Charleston, and the substance of the alleged section 605 thereof; and the same with regard to the alleged amendment thereto, referred to" in said paragraph. This is not an action to enforce the performance of any duty imposed by an ordinance of the city of Charleston, or to enforce the payment of any tax or penalty imposed by such ordinance, but the cause of action here is the negligence of the defendant company resulting in the death of the intestate; and the ordinances of the city are only referred to as showing such negligence. The case of City Council of Charleston v. Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845, relied on by counsel for appellant, does not, therefore, apply to this case.

The third feature in which the complaint is claimed to be defective is in failing to allege that the plaintiff is now the duly-qualified administrator of the intestate. A sufficient answer to this point will be found in the allegation in the complaint as follows: "That letters of administration have been granted by the probate court of Charleston county unto the plaintiff, William C. Nohrden, on the 21st day of January, A. D. 1898, who thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office." If the plaintiff was appointed and qualified as administrator only six days before the action was commenced, and less than a month before the motion was heard, it seems idle to say that there would be any doubt that he was still the administrator when the action was commenced and when the motion was heard, for, as matter of law, he could not complete his duties as administrator, so as to become entitled to his discharge within that time, and there is not the slightest intimation, even in the argument, that his letters of administration have ever been revoked.

Our next inquiry is whether there was error in overruling the demurrer to the third cause of action set out in the complaint, based upon the omission to set out the title or sub-

stance of the ordinance of the city council of Charleston referred to in paragraph 2 of the third cause of action; and also upon the ground that there is no allegation that said ordinance authorized an action of a civil nature for its violation, or that said ordinance contained no provision for its enforcement, or remedy for its violation. This has been disposed of by what we have already said in considering the motion to make the complaint more definite and certain. There was no error in overruling the demurrer.

The only remaining question which we propose to consider is that presented by the sixth and seventh exceptions, in which error is imputed to the circuit judge in refusing to charge, as requested, that "no exemplary, primitive, or vindictive damages can be recovered in this case," and in charging, on the contrary, that such damages could be recovered in this action if the injury complained of was done "wantonly, willfully, or through gross negligence." This question has been conclusively determined in the very recent case of *Garrick v. Railroad Co.* (S. C.) 31 S. E. 334, where this court, after able and elaborate argument, and upon full and careful consideration, determined that in an action like this exemplary damages cannot be recovered; and we have not seen or heard anything, since that decision was made, sufficient to warrant a reconsideration of the question. These exceptions must, therefore, be sustained. As to the other questions presented by the exceptions, we do not deem it necessary or profitable to consider them, as they may not arise on the new trial which must be ordered. The judgment of this court is that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial, with leave to the plaintiff to amend his complaint as hereinabove indicated.

**SALLEY v. MANCHESTER & A. R. CO.
ZEIGLER v. SAME.**

(Supreme Court of South Carolina. March 23, 1899.)

ANIMALS—PROPERTY IN DOGS.

The owner of a dog has such a property therein as to entitle him to recover for a wrongful injury thereto.

Appeals from common pleas circuit court of Orangeburg county; R. O. Watts, Judge.

Actions by David J. Salley and John A. Zeigler against the Manchester & Augusta Railroad Company. From orders sustaining demurrers to the complaints, both plaintiffs appeal. Reversed.

H. H. Brunson and I. W. Bowman, for appellants. Moss & Lide, for respondent.

JONES, J. These actions were to recover damages for the negligent running over and killing of plaintiffs' dogs by the cars of the defendant company. The appeals are from

an order sustaining a demurrer in each case that the complaint did not state facts sufficient to constitute a cause of action, in that there is not such property in dogs that a railroad company is liable for killing upon its track. The only question presented is whether this ruling was error.

There is no doubt that by the common law one may have such property in a dog as the law will protect by a civil action. Blackstone said: "As to these animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny." 4 Bl. Comm. 235. Kent says: "Animals *feræ naturæ*, so long as they are reclaimed by the art or power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner." In the case of *Sentell v. Railroad Co.*, 17 Sup. Ct. 694, the supreme court of the United States said: "By the common law, as well as by the law of most, if not all, of the states, dogs are so far recognized as property that an action will lie for their conversion or injury,"—citing cases. Whether dogs in this state may be the subject of such complete property as will make the stealing of them larceny, or whether dogs are within the words "or other personal property, the goods and chattels of another," in the statute punishing malicious mischief to certain animals, has not yet been expressly decided. As to larceny of a dog, see *State v. Wheeler*, 15 Rich. Law, 362; and as to malicious mischief, see *State v. Trapp*, 14 Rich. Law, 203. It is unnecessary to a discussion of this case that we should now express an opinion on these matters, since a qualified property in dogs will support a civil action under the common law, and this principle is recognized as undisputed in both cases cited. The circuit's ruling was based on the case of *Wilson v. Railroad Co.*, 10 Rich. Law, 52, but that case merely decides that the rule in *Danners' Case*, 4 Rich. Law, 329, that a *prima facie* case of negligence is made against a railroad company where it is shown that cattle pasturing on uninclosed land are killed by the train of the company does not apply where the animal killed is a dog. That case, it is clear, does not touch the question whether there is such property in dogs as will support a civil action for their injury or loss, but relates merely to the burden of proof on the question of negligence. In this case the complaint alleged negligence, which the demurrer admits; hence the rule of evi-

dence in establishing negligence in killing plaintiffs' dogs is not involved in this question. In this connection it may be also noted that the demurrer admits the allegation of plaintiff's ownership and possession of the fox and deer hound of the value of \$70 at the time of the negligent killing thereof by defendant. So, under the pleadings, defendant's negligence has deprived plaintiff, without his fault, of a thing of value. Is it possible that, in such case, there is no redress? Section 1702, Gen. St., recognizes ownership in dogs by providing that the owner or custodian shall pay for sheep killed by his dogs, and in section 1701 any person is permitted to kill any dog in the act of worrying or destroying sheep, and for such killing there is no redress, civil or criminal; but the implication is that there may be an unlawful killing of a dog, otherwise such legislation is absolutely useless. But the most potent fact, in reference to the question whether in this state there is any statutory recognition of property in dogs, is the fact that they are taxed by the state for revenue. Under the tax act dogs must be assessed as personal property, according to their number and value. There is a practice of assessing each dog at \$5 as their value. Here, then, is legislative recognition of dogs as personal property capable of valuation. What the law taxes as personal property it will protect as such. Without pursuing the subject further, we cite the following cases in support of the conclusion of this court that there is such a species of property in dogs as will support a civil action for their injury or loss. The cases are so numerous and uniform in this direction that it is rare to find a discordant note. While in Georgia it was decided that an action would not lie against a railroad for the mere negligent and unintentional killing of a dog (*Jemison v. Railroad Co.*, 75 Ga. 444), yet in *Graham v. Smith*, 28 S. E. 225, it was held that the owner of a dog has such property in it as will enable him to maintain an action for trover for its recovery; and in *Wilcox v. State*, 28 S. E. 981, it was held that a dog is a domestic animal, under a clause of the Georgia constitution like that in section 1, art. 10, of our constitution, authorizing a tax upon such domestic animals as, from their nature and habits, are destructive to other property. In Alabama, where it is held that a dog is not such personal property as to make it the subject of larceny (*Ward v. State*, 48 Ala. 161), it is nevertheless a species of property, for injury to which a civil action would lie (*Parker v. Mise*, 27 Ala. 480). See, further, *Jenkins v. Ballantyne* (Utah) 30 Pac. 760; *Nehr v. State* (Neb.) 53 N. W. 589; *Railway Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, and 37 *Lawy. Rep. Ann.* 659, and note; *Railway Co. v. Hanks* (Tex. Sup.) 14 S. W. 691; *Heiligmann v. Rose* (Tex. Sup.) 16 S. W. 331; *Mayor, etc., v. Meigs*, 1 *McArthur*, 53; *Mayer v. People*, 80 N. Y. 365, quoted in note to *State v. Brown*, 40 Am. Rep. 81; *Brent v.*

Kimball, 60 Ill. 211; *Harrington v. Miles*, 11 Kan. 480; *State v. McDuffie*, 34 N. H. 523; *Wheatley v. Harris*, 4 Sneed, 468; *Heisrodt v. Hackett*, 34 Mich. 283; *Ten Hopen v. Walker*, 96 Mich. 236, 55 N. W. 657; *State v. Lymus*, 20 Am. Rep. 772 (which, while holding that a dog is not the subject of larceny, recognizes such right of property therein as is protected by civil remedies). To this list may also be added *Indiana*, *Pennsylvania*, and *Massachusetts*. *Kinsman v. State*, 77 Ind. 132; *Lentz v. Stroh*, 6 Serg. & R. 34; *Findlay v. Bear*, 8 Serg. & R. 571; *Cummings v. Perham*, 1 Metc. (Mass.) 555. The judgment of the circuit court is reversed, and the case remanded for further proceedings.

McCLELLAN v. TAYLOR.

(Supreme Court of South Carolina. March 21, 1890.)

INJUNCTION FOR TRESPASS—LICENSE—WHEAT CONSTITUTES.

1. A trespass which is being continuously repeated, and which defendant threatens to continue indefinitely, will be restrained by injunction.

2. A grant of the use of a boat landing and wharf site for receiving and repairing boats and loading and unloading freight, and a right of way to the landing over adjacent lands, in consideration of a stipulated annual rental to be enjoyed by the grantee and his sons as long as the title to certain real property remains in the name of his wife,—grantors stipulating that they will not prevent the use of the landing for carrying freight to or from the boats of the grantee, unless they in like manner prevent all other persons from using such landing for that purpose,—is a license, revocable at will, and not an easement.

Pope, J., dissenting.

Appeal from common pleas circuit court of Charleston county; Ernest Gary, Judge.

Action by Lawrence P. McClellan against George T. Taylor for injunction. There was a decree for defendant, and plaintiff appeals. Reversed.

Defendant claimed an easement in the premises on which the trespass herein attempted to be enjoined was committed, by virtue of the following agreement:

"Articles of agreement for compromise of landing question at McClellanville between George T. Taylor and the heirs of Archibald J. McClellan:

"First. It is agreed that George T. Taylor shall have the privilege to use the said landing, together with 100 feet of the shore line, including the wharf site, for the purpose of beaching his boats for the object of repair, whenever required, provided that in said user the wharf or wharf site shall not be obstructed, and also for the purpose of securing and delivering freight; and, further, that said Taylor shall have a right of way to and from said landing either in front or in rear of the lots now owned by A. H. Du Pree, said rights not to be exclusive, for which said privileges the said Taylor shall pay an annual rent of

\$3.00. Second. Also agreed that said privileges shall be enjoyed by said Taylor and his sons, William and Daniel, so long as the title of the lot now standing in the name of the wife of the said George Taylor shall remain in her during his life, or as long as he and his sons shall own or occupy the said lot. Third. It is provided that if J. Palmer McClellan, or, in case of his death, the next living representative of the estate of A. J. McClellan, shall prevent any person or persons using said right of said way to said landing for the purpose of carrying or receiving freight to or from the boats of said Taylor, then it is agreed that the said J. P. McClellan, or the representative of the estate of A. J. McClellan for the time being, shall in like manner stop and prevent all other persons from using a right of way to said landing for the purpose of taking or receiving freight from any other boat or boats, subject, however, to the power of said Taylor and McClellan jointly to permit any person or persons to use said right of way for above purposes: provided, however, that said third paragraph of this agreement shall not apply to the said Taylor individually, and his boat hands, his sons and wife, nor to said J. Palmer McClellan and family, A. H. Du Pree and family, L. P. McClellan and family, and W. B. McClellan and family.

"All differences as to matters of wharfage, in case McClellan puts wharf and keeps it up, to be settled by B. H. Rutledge and Julian Mitchell."

The report of G. H. Sass, master, is as follows:

"A large mass of testimony has been taken, both oral and documentary, and the same is filed with this report. I have carefully considered the same, and find the facts to be as follows:

"Findings of Fact.

"That the plaintiff is now the owner of lots 3 and 5, containing the Limekiln landing and seashore, and part of the way claimed; lot 3 having been sold to him by the heirs of A. J. McClellan, and lot 5 having been sold to him by Laura V. McClellan, the wife of Palmer McClellan, to whom it had been conveyed by the heirs of McClellan after the date of the agreement. That the annual sum due by Taylor under the agreement has not been paid, not more than \$6 having been paid by him altogether since the date of the agreement. That on the 10th of May, 1894, the plaintiff demanded payment from Taylor of \$36 rent of landing from October, 1881, to October, 1893; and same not being paid on July 18, 1894, he notified the defendant, in writing, that privilege allowed him under the agreement was revoked, and that he was thereby forbidden to enter upon the said lands for any purpose whatever; and subsequently, on the 23d July, 1894, he renewed said notice, and further notified him of his intention to apply to the courts in the matter. That Taylor disregarded the said notice, and continued to

enter upon the land, and that, when the way was obstructed by the plaintiff, Taylor forcibly removed the obstructions. I find further, as matter of fact, that the testimony does not support the claim as to the public character of the Limekiln landing and the way leading thereto, but that, on the contrary, the weight of the evidence sustains the plaintiff's position that the landing and the way are the private property of the plaintiff. That no sufficient evidence of any such user by the public as would give a right by prescription has been produced; nor is there satisfactory evidence of any intention on the part of McClellan or his heirs to make a dedication to public use of said way and landing by writing or by declaration, or by acts indicating such intention, but that, on the contrary, the weight of the evidence is in favor of the view that such use was altogether permissive. And I further find that no adverse continuous use for twenty years has been proved.

"As matters of law, I find:

"Findings of Law.

"(1) That the agreement creates no easement in Taylor, because an easement or incorporeal hereditament can only be created and conveyed by a grant or conveyance under seal, or by long user, from which such conveyance is presumed to have been made (*Cagle v. Parker* [N. C.] 2 S. E. 76), and cannot be conferred by parol, and that this agreement is not under seal, and, as to several of the signatures, is even unwitnessed.

"(2) That the agreement is not a lease, because 'an instrument that merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land, and is not a lease, but a mere license.' *Wood, Landl. & Ten.* § 227, and cases quoted in note. The agreement does not use words of demise, and it specially provides that the privileges granted shall not be exclusive in Taylor, and that the heirs of McClellan reserved the right to confer similar privileges upon others, provided they did not interfere with those granted to Taylor. No interest in the land is conferred by the agreement. The distinction between a lease and a license is thus stated in *McAdam, Landl. & Ten.* p. 51: 'Where the intention of the parties, as expressed in the instrument, is that the one shall divest himself of the exclusive possession of the subject-matter, and the other come into it for a determinate period, that is a lease. *Reg. v. Morrish*, 32 L. J. M. Cas. 245. But if the intention of the parties is that the instrument should operate as a mere license, and that exclusive possession should not be given, then it is not a lease, although it may contain the usual words of demise. *Taylor v. Caldwell*, 3 Best & S. 826, etc. Nor does the fact that a definite period is stated in the agreement, during which the license is to continue, viz. 'so long as the title to the lot now standing

in the name of the wife of the said George Taylor shall remain in her, during his life, or as long as he and his sons shall own and occupy the said lot,' avall, of itself, to convert the agreement into a lease. There must be also a parting with the possession by the grantors, to work such a result. In Bainbridge's Law of Mines and Minerals it is said (page 301): 'It has certainly been determined that the intention of the parties may constitute an actual demise, whether the words be in the form of a license or a covenant or an agreement. But it must sufficiently appear from the construction of the granting part that it is clearly the intention of the parties that the one should divest himself of the possession, and that the other should come into it, for a determined time.' I hold, therefore, as matter of law that the agreement is not a lease, and, further, that the agreement is a license, and is revocable. In Wallis v. Harrison, 4 Mees. & W. 543, Lord Abinger, C. B., said: 'A mere parol license to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed that if a man, out of kindness to a neighbor, allows him to pass over his land, the transferee of that land is bound to do so likewise.' And Parke, B., concurring, said: 'I take it to be clear that a parol executory license is countermandable at any time, and if the owner of land grants to another a license to go over or do any act upon his close, and then convey away that close, there is an end to the license; for it is an authority only with respect to the soil of the grantor, and, if the close ceases to be his soil, the authority is instantly gone.' See, also, McAdam, Landl. & Ten. pp. 52, 53, and cases quoted, and Bainb. Mines, p. 306.

"(3) Nor is there any weight to be attached to the equitable defense invoked by the defendant. There is no evidence that Taylor has been put to any expense with regard to the license, nor that the license has been so far executed that its revocation would work a great wrong to the licensee. Meetze v. Railroad Co., 23 S. C. 19. I fail to perceive on what ground the equitable jurisdiction of the court can be invoked on his behalf.

"(4) Looking at the matter independently of the agreement, the evidence having failed to show, as heretofore found, any dedication or adverse use, it is manifest that the defense on those grounds cannot be maintained.

"I therefore recommend that the prayer of the complaint be granted, and that judgment be entered against the defendant in conformity thereto."

Benj. H. Rutledge and Lord & Burke, for appellant. Murphy & Legare, for respondent.

GARY, A. J. The facts of this case are clearly set forth in the report of the master, which will be published by the reporter. The action was for perpetual injunction on ac-

count of repeated and threatened trespasses to the plaintiff's private landing. So much of the complaint as relates to the alleged trespasses is as follows: "(4) That on 20th July, 1894, plaintiff gave notice to defendant that he revoked his license or privilege of entering upon said land, or any part thereof, and notified him not to enter upon the same. (5) That on same day last aforesaid plaintiff closed the gate on his private way leading to said landing, and on 23d July the defendant forcibly and willfully broke down the fence across the private way leading to the landing, and also another part of plaintiff's fence around said premises, and entered and trespassed upon said premises; that on the afternoon of the same day plaintiff repaired and restored the fences; that on 24th July, 1894, the defendant again broke down the said fence, willfully and forcibly, near the said landing, and entered and trespassed upon said premises; that in the afternoon of the same day plaintiff again put up the fence, in the presence of defendant; as soon as he had finished, defendant again broke it down, and threatened to do so as often as it should be put up, and since that time the said defendant has been continually engaged in acts of trespass and annoyance on said premises, to the great disturbance of plaintiff and his family. (6) That the plaintiff has no adequate remedy by a simple action of damages for said trespasses; that defendant threatens to continue them indefinitely; that he will be driven to a multitude of suits to maintain his rights, unless defendant be restrained from such further trespasses; that his dwelling house, where he resides with his family, is immediately adjacent to the said landing, and to the place where said trespasses are committed and threatened to be committed; and that said acts of defendant have been a source of great annoyance to the plaintiff and his family, and tend greatly to provoke a breach of the peace. Wherefore plaintiff prays judgment against the defendant that he be perpetually enjoined from any entry upon the said premises of plaintiff, by himself, his agents or servants, and from committing any and all trespasses thereon." The master recommended that the prayer of the complaint be granted, but the circuit judge, while concurring with the master in his findings of fact, reversed his conclusions of law, and ordered that the writ for a permanent injunction be refused. The plaintiff appealed upon several exceptions, which need not be considered in detail, as the practical question raised by them is whether the allegations of the complaint, which were sustained by the testimony, entitled the plaintiff to equitable relief by injunction.

The doctrine is thus stated in section 1357, Pom. Eq. Jur.: "If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The principle determining

the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: (1) If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable (that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money), then the wrong will be prevented or stopped by injunction. (2) If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act, if it stood alone, then, also, the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy. All the cases, English and American, have professed to adopt the inadequacy of legal remedies as the test and limit of the injunctive jurisdiction; but, in applying this criterion, the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable, and the legal remedy inadequate, in many instances and under many circumstances, where Chancellor Kent would probably have refused to interfere. It is certain that many trespasses are now enjoined, which, if committed, would fall far short of destroying the property, or rendering its restoration to its original condition impossible. The injunction is granted, not merely because the injury is essentially destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages. * * * In the case of *Allen v. Martin*, L. R. 20 Eq. 467, the following language from the case of *Goodson v. Richardson*, 9 Ch. App. 226, is quoted with approval: "The defendant in this case is admittedly a trespasser, and he proposes to continue that trespass from day to day. * * * It is said that we ought to allow this to be done; that we ought in fact to dismiss the plaintiff from this court, and tell him to find his way to another court, in which he is to bring an action for the wrong, for which there is no defense whatever. * * * I do not know whether more than one will be required. And then, having succeeded in one action, or two actions, or perhaps three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him, he is to come back to this court, and obtain a perpetual injunction, on the ground of repeated vexation and repeated actions. I do not think that there is any principle in this court which will compel us to drive the plaintiff to go through all that litigation, before he is entitled to that relief which he would ultimately get when he had gone through it." Mr. Spelling, in his work entitled *Extraordinary Relief*, at sec-

tion 342, says: "It is apparent to one giving careful study to the subject that the line of distinction between the two accepted grounds of relief, namely, irreparable injury and multiplicity of suits, is often not discernible, and that the real ground of equitable jurisdiction in trespass may be most properly referred to the general head of the inadequacy of legal remedies. Where numerous acts are being committed, and their continuance threatened, by one person on the land of another, which acts constitute trespass, and the injury resulting from such acts is or would be trifling in amount, as compared with the expense of prosecuting actions of law to recover damages therefor, injunction will lie to restrain the trespass, not alone because of the irreparable nature of the general course of wrong, nor yet for the sole reason that a multiplicity of suits or protracted or vexatious litigation would result, but for both reasons; in other words, because a law court furnishes no adequate means for complete redress, while in equity not only may the whole matter of compensation be settled, but the present and future rights of the parties determined and adjudicated in the same proceeding." Many other authorities could be cited, but the foregoing are ample to show that the allegations of the complaint sufficiently set forth a cause of action on the equity side of the court.

The respondent gave notice, in pursuance of the proper practice, that he would ask the court, in case it was necessary, to sustain the judgment of the circuit court upon the additional grounds set forth in the case. This court concurs with the master that the defendant held under a mere license, and that it was revoked. Having reached the conclusion hereinbefore expressed, that the repeated and threatened acts of trespass called forth the exercise by the court of its equitable powers, by granting an injunction, and that the respondent was a mere licensee, whose privilege had been revoked, the questions presented by these additional grounds become purely speculative, and need not be considered. It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for such further proceedings as may be necessary to carry into effect the conclusions herein announced.

POPE, J. I dissent. The disposition in courts to carry injunctions into matters affecting the issue of title to land should not be sustained.

NOTE. This case was argued at the April, 1898, term of this court; but leave was granted Hon. W. P. Murphy, one of respondent's attorneys, to file an additional argument within 60 days thereafter, but he died before the expiration of that time. At the recent term of this court, respondent's attorneys announced that they did not desire to file an additional argument. These facts are stated to explain the apparent delay in filing the opinion in said case.

NEWTON v. WOODLEY.

(Supreme Court of South Carolina. March 23, 1899.)

USURY—WHAT CONSTITUTES.

Where a note provides for interest in advance at the rate of 8 per cent. per annum, and that unpaid interest shall draw interest at the same rate, the agreement is not usurious, under Rev. St. § 1390, providing that no greater rate of interest can be charged, by written agreement, than 8 per cent. By divided court.

McIver, C. J., and Gary, A. J., dissenting.

Appeal from common pleas circuit court of Marlboro county; George W. Gage, Judge.

Action by Katie M. Newton, as assignee, against Jonathan Woodley. Judgment for plaintiff. Defendant appeals. Affirmed by divided court.

T. W. Bouchier and J. H. Hudson, for appellant. Knox Livingston, for respondent.

POPE, J. On the 21st day of November, 1890, the defendant executed and delivered to C. S. McCall the following promissory note or agreement, to wit: "\$6,827.60. Bennettsville, S. C., 21st Nov., 1890. On the first day of November, 1895, for value received, I promise to pay to the order of C. S. McCall the principal sum of six thousand eight hundred and twenty-seven and $\frac{60}{100}$ dollars, with interest, to be calculated from this date, at the rate of eight per cent. per annum, both before and after maturity, discounted and payable annually on the first day in November in every year, including the present; unpaid interest to draw interest at the same rate as principal; both principal and interest payable at the Bank of Marlboro; payments to be made in United States gold coin of the present standard of weight and fineness, or its equivalent, at the option of the payee. It is further agreed that if default be made in the payment of any of the installments of interest aforesaid, at the time and place aforesaid, when and where the same comes due and payable, then and in that event the said principal sum of six thousand eight hundred and twenty-seven and $\frac{60}{100}$ dollars shall, at the election of the legal holder thereof, at once become and be due and payable, anything heretofore contained to the contrary notwithstanding; such election to be made without notice. This note is secured by mortgage of even date herewith, duly recorded. [Signed] Jonathan Woodley." A mortgage of lands was on the same day executed by Woodley to McCall to secure the aforesaid obligation, which mortgage is in full force until to-day. The note and mortgage were both made payable to Mrs. Katie M. Newton, without recourse, by C. S. McCall. The following partial payments are indorsed on the note: "Received on this note twelve hundred and twenty dollars, December 18, 1890." "Received on this note, as of December 18, 1890, two hundred and seventy-five dollars. * * * \$270. Received from Jonathan

Woodley two hundred and seventy dollars, * * * November 23, 1891." "\$275. Received two hundred and seventy-five dollars on this note, November 28, 1892." "\$273. Received on this note two hundred and seventy-three dollars, this December 30, 1893." "Received five hundred and fifty dollars on this note, November 23, 1895." "\$1,930. Received nineteen hundred and thirty dollars, * * * Dec. 28, 1896." On the 30th January, 1897, the attorney in fact for the plaintiff prepared a statement or calculation which showed that the defendant owed the plaintiff \$1,949.63 on the 28th December, 1896. Defendant had a calculation made by Mr. Stemberger, which showed his indebtedness less than plaintiff's statement. Then his attorney, Mr. T. W. Bouchier, made a calculation, by which the sum of \$1,769.32 was found due. This amount of \$1,769.32 was tendered to the attorney in fact for the plaintiff, in gold coin, in full payment of debt and interest, on the 10th February, 1897. While the amount was delivered in full payment, it was offered to take the amount as a credit on the mortgage, which offer the defendant declined. The receipt tendered by plaintiff's attorney in fact was in these words: "\$1,769.32. Received from Jonathan Woodley seventeen hundred and sixty-nine and $\frac{32}{100}$ dollars on mortgage debt to my wife, K. M. Newton, and, if there be no more due on them, I am to cancel them. If there be any more due, he is to pay it, after proper calculation by any one competent to make it. H. H. Newton. Feb'y 10, 1897." Action was commenced by plaintiff against defendant on the 24th day of March, 1897, to foreclose the mortgage and procure a decree establishing true indebtedness of defendant to plaintiff, which she alleged at that date to be \$2,877, with interest thereon at the rate of 8 per cent. per annum from the 18th day of December, 1896; and in the complaint the foregoing facts were substantially set forth. The answer of the defendant really is pointed against the contract, as tainted with usury, in these words: "(1) That by the terms of the said note * * * the plaintiff, as assignee, has received and accepted usurious interest, by charging * * * eight per cent. interest on the principal sum, and also discount and interest on the interest due in advance; and by the terms of said note or agreement the assignor of the plaintiff has made a contract with the defendant to charge him usurious interest, and in pursuance of the same has collected and accepted same," etc. Defendant seeks to collect double the amount of \$1,500, which he alleges he has paid as usurious interest; also seeks to have the mortgage declared satisfied by reason of the tender of over \$1,700 on February 10, 1897. Plaintiff replied. At the trial it was in evidence: That the defendant had been indebted for some years to Col. C. S. McCall for over \$6,000, which was secured by mortgage of land, and which indebtedness bore 10 per cent. per annum. The defendant applied to McCall for

a reduction in the interest. McCall, being a merchant, did not wish to do so, but said to Woodley, the defendant, that he thought Mr. H. H. Newton could do so,—lend the money at lower interest. When Mr. Newton was applied to, he said his wife could loan the money at the lower rate of interest. That the note now sued upon was drawn by Mr. Newton as the attorney for his wife, and the transaction of the 21st of November, 1890, although carried out in the name of C. S. McCall, was really that of Mrs. Katie M. Newton, the plaintiff. Also, that Woodley had the papers read over to him before he signed them, and that he is a gentleman of intelligence. Really, the contention between these parties is in a nutshell. It all turns on the power of a lender of money to contract for the loan of money at 8 per cent. per annum, interest each year to be paid in advance, just as a discount, and, if it is not so paid, to bear interest at 8 per cent. per annum. When the circuit judge heard the case, he decreed that it was a legal contract between plaintiff and defendant, that it was free from usury, that the tender would therefore fail, and that the counterclaim for double the excess of interest would also fail. He referred the case to the referee, to compute the interest.

Defendant now appeals, raising substantially these questions: First. That the circuit judge erred in not sustaining the question raised by defendant, that the rate sued upon was usurious, (a) because said note by its terms calls for annually 9, instead of 8, per cent. interest; (b) that the law does not allow greater interest than 8 per cent., whether by discount or otherwise; (c) because it is not lawful to contract for the payment of the highest interest in advance, and for the payment of interest on unearned interest unless paid in advance; (d) because the purpose of the lender was to receive more than the highest interest allowed by law. Second. Because the contract called for the payment of interest at 8 per cent. per annum for 21 days in advance of the loan, and such was usury. Third. Because the counterclaim was not allowed. Fourth. Because defendant should not have been refused the right to amend his answer by alleging that the tender of payment made by defendant was a full tender of what was then due, and was made unconditionally, and was refused. It was the duty of the circuit judge to construe the contract, it being in writing; he did so; and his construction is not appealed from. He held: "It is agreed on all hands that the character of the transaction in this cause must be judged by the written obligation. That instrument is practically free from ambiguity. It is dated 21st November, 1890, and provides for the payment of \$6,827.60 on 1st November, 1895, with interest to be calculated from this date at the rate of eight per cent. per annum, both before and after maturity, *discounted* and payable annually on the 1st day of November in every year, including the present; *unpaid* interest

to draw interest at same rate as principal. (*Italics mine.*) The mortgage embodies the following language, 'with interest discounted at eight per cent. per annum, payable annually,' which is practically that used in the obligation. The words italicized are not entirely apt. The first is manifestly used to express past-due interest. The second refers to a day of payment already past, and must be held to refer in this case to 21st November, 1890. The first expresses a repugnancy, to wit, interest discounted, but the meaning is manifest. Upon the whole, I take it to be reasonably clear that the contract stipulates for the payment of interest at the rate of eight per cent. per annum on \$6,827.60; that interest for the first year should be due and payable on the day the obligation was made,—that is to say, in advance, and so on for each successive year; that, in the event of the non-payment of the interest as stipulated, it should thereafter bear interest at the same contract rate." It seems to us that the circuit judge has grasped the meaning of the terms employed in setting forth the contract of these parties.

Now, to pass upon the question of usury in the different phases of that question as presented by the grounds of appeal, we must first recall the language of our statute (Rev. St. § 1390), which is: "No greater rate of interest than seven (7) per centum per annum shall be charged, taken, agreed upon, or allowed upon any contract arising in this state for the hiring, lending, or use of money or other commodity, except upon written contracts, wherein by express agreement a rate of interest not exceeding eight per cent. may be charged. No person or corporation lending or advancing money or other commodity upon a greater rate of interest shall be allowed to recover in any court of this state any portion of the interest so unlawfully charged; and the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this state to be the true legal debt, or measure of damages * * * to be recovered. * * *" This language of our statute has been uniformly construed by our courts to permit the charging and receipt, at the date of the loan, of the annual interest on the principal loaned, no matter what might be the interest allowed by law,—whether 7 or 8 or 10 per cent. For illustration: One lends \$1,000 for 12 months at 8 per cent. per annum; the interest for one year is \$80; and when the borrower receives his \$1,000, it is diminished by \$80, taken by the lender as his interest. Now, if this amount of interest so taken out of the \$1,000 is placed at interest at 8 per cent., it will yield \$6.40; thus showing that the borrower has not only received \$920, when he is paying interest on \$1,000, but that the interest on the \$80, which was taken from his \$1,000 as the annual interest paid in advance, yielded, up to the maturity of his loan, \$6.40 as the interest. We repeat it, that all the decisions of

our courts sanction the collection of the interest in advance of its being earned. It may have started with the banks in the first instance, but it is now general. If the interest may be deducted in cash, why may the contract stipulate for such deduction, and the borrower settle the cash for interest by his note? Thus, suppose \$1,000 is loaned, and the borrower agrees to pay interest in advance at 8 per cent., which is \$80, and the lender agrees to allow the borrower to give him his separate note for \$80 at 8 per cent. interest; is not this legal? Does the actual payment of the annual interest in cash, in advance, make any distinction, in law, between the illustrations? We cannot see it. If, then, it is legal to deduct the annual interest in advance and on the date of the loan, and if it is also legal to give a note for such annual interest in advance at the same rate of interest the principal bears, why may not the borrower and lender contract in the same instrument that the interest shall be payable in advance, and, if not so paid, said annual interest shall bear interest until paid at the rate of 8 per cent. per annum? The case at bar presents this very question, and it seems to us that the very recent case decided by this court, to wit, *Bank v. Parrott*, 30 S. C. 61, 8 S. E. 199, is decisive of this question. It was decided in December, 1888, and held that, inasmuch as the note in that case provided for annual interest at 10 per cent., but did not provide that the interest on the interest should run at 10 per cent., it was usurious to charge such 10 per cent. interest on the interest. It is very apparent that the only reason given in this decision why the interest on the interest at 10 per cent. was not collectible was the absence of such a stipulation in the paper writing itself. Our citizens have a right to base their dealings with each other upon the declarations of this court, especially in the matter of the proper construction of our statute law. In order that there may be no doubt as to what *Bank v. Parrott*, supra, held, we will quote the exact language on that point: "But did the bank have the right to discount the interest at 10 per cent.? We think not. The usury law before cited is very positive and peremptory, that 'no greater rate of interest than 7 per cent. shall be charged,' etc., except upon a written contract, wherein, by express agreement, a rate of 'interest not exceeding ten per cent. may be charged,' etc. The note in this case, in writing, did contain an 'express agreement' that the interest should run to the maturity of the note at the rate of 10 per cent. per annum; but we do not find in it any express agreement that the interest on the interest should run at 10 per cent. [Italics ours.] The contract rather excludes that idea; for it is to pay \$2,000, with interest from date at the rate of 10 per cent., without any mention whatever of interest on interest, which, in legal effect, was not to bear interest at all until the maturity of the note, and then, as part

of the principal, to bear interest only at 7 per cent. *It seems to us that, in the absence of such 'express written agreement,' the bank was without authority to charge a discount of 10 per cent. upon the interest, and that such charge, at least to the extent of three per cent., the excess over seven, the lawful interest, was usurious. [Italics ours.]*"

In the case at bar, Mrs. Newton has placed herself squarely upon this construction of the statute as to usury, and has stipulated in the express written agreement that the interest should bear interest at 8 per cent. If this conclusion be correct, does it not dispose of all the questions raised by the appeal? If it was not usurious, the borrower would not hold, nor could there be, any counterclaim for excess of interest. My opinion is that the judgment of this court should be, "It is the judgment of this court that the judgment of the circuit court be affirmed, and that the action be remanded to the circuit court." But the members of the court are equally divided. Therefore, under the constitution, the circuit court judgment stands affirmed.

GARY, A. J., dissenting.

JONES, J. (concurring). If, as seems to have been assumed on all sides, the contract in question be really one providing for the payment of interest annually in advance, with first installment of interest due at the execution of the contract, and, if not then paid, such interest shall bear interest, I concur in the opinion of Mr. Justice POPE. But it seems to me the true construction of the contract has been missed. The parties do not stipulate to pay any interest in advance. They do stipulate that interest may be discounted, doubtless to bring it within the principle announced in *Bank v. Parrott*, 30 S. C. 64, 8 S. E. 199; but there was no discounting in this case, as I understand the whole principal sum specified was delivered to the defendant, and no interest was reserved by the lender or paid by the borrower at the time of the loan. The language of the note is, "With interest to be calculated from this date [November 21, 1890, the date of the contract] at the rate of eight per cent. per annum, both before and after maturity, discounted and payable annually on the first day in November in every year, including the present." By these terms, interest does not begin to run until November 21, 1890. Therefore it is impossible that "first day in November in every year, including the present," can mean November 1, 1890, because that date had passed, and antedated the period when it was expressly stipulated the interest should begin to run. The parties did not contemplate that the interest should be paid at the execution of the note, for the time of payment is expressly November 1st, and there is no suggestion that this was a mistake, and the time really meant was November 21st. The term, "every year, including the present,"

does not mean, in the light of the foregoing, the then calendar year, but it must be taken as meaning the interest year, as provided in the note, viz. from November 21, 1890, to November 21, 1891. Hence, the first installment of interest, by the terms of the contract, became due November 1, 1891, from which time such interest, in default of payment, should bear interest at 8 per cent. It is not contended such a contract would be usurious. I concur, therefore, in the result.

McIVER, C. J. (dissenting). I cannot concur in the conclusion reached by Mr. Justice POPE in this case, as I am satisfied the contract sued on was usurious, and should be so held. I cannot now spare the time for anything like an extended discussion of the question involved, and must content myself with indicating some of the grounds of my dissent.

It is not, and cannot be, denied that, if the contract is enforced according to its terms, the practical result will be that the plaintiff will receive more than the interest allowed by law upon the amount of money which she loaned to the defendant; and that is exactly what the usury law forbids. While I do not for a moment suppose that either the plaintiff or her husband, who acted for her in this matter, had any intention to violate the law, or was actuated by any corrupt or improper motive in making this contract, yet that is not necessary to show that this was a usurious transaction. As is said in the case of *Thompson v. Nesbit*, 2 Rich. Law, 75, "No proof of a corrupt agreement is necessary, for the contract may be usurious, though the parties did not know that it was against law." But it cannot be denied that Mr. Newton intended and expected that his wife, under the terms of the contract, should and would realize something more than 8 per cent. for the use of her money, for he substantially says so in his testimony; and this result he no doubt honestly believed he could accomplish without violating the usury laws. The question here is a purely legal question,—as to the proper construction of the terms of the written contract. Inasmuch as it is quite clear that the practical result of this contract is to give the lender a greater rate of interest than that allowed by law, it would seem to follow necessarily that there must be something in the terms of the contract which provides for or permits such a result. If so, that is quite sufficient to render this contract usurious. It is contended, however, that the only provision in this contract which enables the lender to receive interest at a greater rate than 8 per cent. is that whereby the borrower stipulates for the payment of each year's interest, during the currency of the contract, in advance, and, if not paid in advance, then that such interest shall bear interest at the same rate from the time it begins to accrue, and that it has been held that the lender may require the interest in advance without any violation of the usury

laws. In 3 Pars. Cont. 131, it is said: "The practice of discounting bills or notes, by discounting from their face the interest for the whole time they had to run, began with our banks, and was soon so firmly established that it was sanctioned by the courts, almost of necessity." The author goes on to say that this practice, originating with banking corporations, was gradually extended to individuals who loaned money. But he adds that there is a strong disposition to limit this practice to paper having but a short time to run, and not to allow it to be applied to long loans or discounts. The author cites the case of *Marsh v. Martindale*, 3 Bos. & P. 154, to show that this practice was, and should be, confined to commercial transactions, and allowed only in the interests of trade. That case was decided as far back as 1802, and, in delivering the opinion of the court, Lord Alvanley, C. J., emphasizes the necessity of confining the practice to such transactions, and refused to apply it to the case in hand, because the transaction amounted to a mere loan of money, and as such was usurious, even though the lender had no intention to violate the law. That case, it seems to me, is, in principle, very much like the case now under consideration. This practice on the part of banks may be sustained as legal upon another ground. Usually, if not universally, banks, by their charters, are authorized to discount bills and notes; and this necessarily carries with it the right to demand and receive the payment of interest in advance, for that is the very meaning of the word "discount." As is said by Mr. Justice Story in *Fleckner v. Bank*, 8 Wheat. 364: "It has always been supposed that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word 'discount' is to be interpreted." But there is another (and, as it seems to me, a still better) reason, which has been suggested to me by a remark made by the circuit judge in his decree, why the taking of interest in advance will not make the transaction usurious. His language is as follows: "The truth is, the statute has not said at what time the hire must be paid,—whether at the beginning, midway, or at the end of the year; it has only fixed the amount of the hire." This is true; and, to apply this language practically, the statute does not forbid the taking of interest in advance, but simply fixes a limit to the amount which may be taken as interest, without making any provision whatever as to the time when such amount shall or may be paid, leaving that matter entirely to the agreement of the parties. If, therefore, the lender, when applied to for a loan of money for a stipulated time, chooses to exact from the borrower the pay-

ment of interest, at a lawful rate, on the amount loaned for the time agreed upon, and the borrower pays in advance such interest, there is nothing in such a transaction that would conflict with any provision of the usury law. But I cannot assent to the inference drawn by the circuit judge, "If it be lawful to pay the interest a year in advance, it must be lawful to agree to so pay it," as that would be losing sight of the marked distinction between an executed and an executory transaction.

When the lender asks the aid of the court to enforce a contract for the payment of the money which he has loaned, the court will closely scrutinize the terms of the contract, and, if it is found to contain any provision by which the lender would be entitled to demand and receive interest to a greater amount than that allowed by law, such provision will taint the contract with usury, no matter how honest the intention of the lender may have been in making the contract. It is unquestionable that, under the terms of the contract which the court is here called upon to enforce, the borrower is required to pay interest on the sum loaned at a greater rate than that allowed by law; and this result is accomplished by the provision in the contract requiring the borrower to pay interest on the amount of each year's interest before a single cent of such interest has accrued. This case is very different from that of the very common contract whereby a person promises to pay a specified sum of money, say, five years after the date of the contract, with interest from date payable annually, under which it is said (incorrectly, as I think) that the practical result is that the creditor is entitled to receive a greater rate of interest on the original amount of the debt than that which is allowed by law. But it is not true that the creditor, under such a contract, becomes entitled to receive a greater rate of interest on the original amount of the debt than that which is allowed by law. Let us see: Suppose S. borrows from B. the sum of \$1,000, and gives his note for that amount, payable 3, 5, or 10 years after date, with interest from date, payable annually. Under such a contract the lender never would be entitled to receive interest on the sum loaned, \$1,000, at a greater rate of interest than 7 per cent., though he would become entitled to interest at the same rate upon the new debt of \$70 from the date of its accrual, to wit, at the end of the first year, unless it was then paid, and so on from year to year. At the end of each year a new debt would accrue, which would be entitled to bear interest at the same rate from the date of its accrual until it was paid. It is therefore incorrect to say that the lender becomes entitled to receive interest on the sum loaned at a greater rate of interest than that allowed by law, although he does become entitled to interest on each new debt, as it accrues, at the rate allowed by law. Such a contract cannot, therefore, be regarded as any violation of the

usury law. But in the contract now under consideration the borrower is required to pay, and promises to pay, interest on a debt before it has accrued. Such a promise would be without any consideration, unless it rests upon the promise to repay the principal sum loaned, with interest as provided for in the contract; and, if so, that would taint the whole contract with usury, as it would enable the lender to recover interest on the sum loaned at a greater rate of interest than that allowed by law.

The case of *Bank v. Parrott*, 30 S. C. 61, 8 S. E. 199, which is relied upon to sustain the judgment below, is not applicable to the question which this court is now called upon to determine. I do not see that any such question was decided, or even considered, in that case. It was nothing but the ordinary case of a discount of a note by a bank, and the vice in the transaction was that the bank charged discount at a greater rate than was allowed by law, or provided for in the contract; and that was all that was practically decided in that case.

It seems to me, therefore, that, in any view which may be taken, this contract, which is certainly novel in its form,—as I have not been able to find any case, and none has been cited, in which such a contract has come before the court for construction,—must be regarded as usurious, and that to hold otherwise would practically emasculate the usury law, and enable money lenders to receive a greater rate of interest than that which is allowed by law.

STEMMERMANN et al. v. LILIENTHAL et al.

(Supreme Court of South Carolina. March 21, 1899.)

BENEFICIAL ASSOCIATIONS—ACTIONS—PARTIES—PLEADING—PRINCIPAL AND SURETY—LIABILITY OF SURETIES—APPEAL.

1. The members of an unincorporated beneficial association have such an interest in the property of the association as to entitle them to sue on the bond of the treasurer of the association to recover the amount of a defalcation, though title to the property is in the association, regarded as a unit, or in officers thereof.

2. Under Code, § 140, providing that when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, a few members of a voluntary beneficial association, the membership of which is over 200, may sue for themselves, and all the other members, on the treasurer's bond, to recover the amount of a defalcation.

3. Where several members of a voluntary beneficial association sue for themselves and the other members to recover property of the association, the complaint need not allege the authority of plaintiffs to sue.

4. The sureties on the bond of the treasurer of a beneficial association are not relieved from liability for a defalcation because the association accepted the treasurer's resignation, where a new treasurer was immediately elected and installed, and a demand made on the former one for the funds.

5. Where the bond of the treasurer of a beneficial association is conditioned that he shall faithfully account for all moneys received by him, and shall, on his ceasing to be such treasurer from any cause whatsoever, deliver up to his successor all moneys found due and owing by him, the sureties are liable for a refusal of the treasurer to deliver moneys to his successor after he had resigned.

6. Where it does not appear that defendant, on his demurrer to the complaint being overruled, applied for leave to answer over, error cannot be attributed to the trial court in failing to make provision therefor.

Appeal from common pleas circuit court of Charleston county; Ernest Gary, Judge.

Action by Albert Stemmermann and others, members and shareholders of the Deutscher Artillerie Unterstuetzungs Verein, suing in behalf of themselves and all other members and shareholders, against J. Fred Lillenthal, treasurer of said association, and J. C. Blohme and H. Pauls, sureties on his bond. From an order overruling their demurrer to the complaint, the sureties appeal. Affirmed.

Trenholm, Rhett & Miller, for appellants. Murphy & Legare, for respondents.

POPE, J. The appeal here is from an order of his honor, Judge Ernest Gary, overruling the demurrer of the two defendants J. C. Blohme and H. Pauls to the plaintiffs' complaint. It will be well proper, therefore, to reproduce the complaint, which is as follows:

"The plaintiffs above named, complaining on behalf of themselves and all others, members and shareholders in the association conducted under the name of the Deutscher Artillerie Unterstuetzungs Verein, allege: (1) That the plaintiffs above named, together with others, to wit, more than two hundred in number, now are, and were at the time hereinafter mentioned, members and shareholders in a certain association conducting its business under the name of the Deutscher Artillerie Unterstuetzungs Verein. (2) That the object and purpose of said association was, and is, to provide a fund for and to pay the burial expenses of a deceased member and of the wife of a member, to pay annuities to the widows of deceased members, and for the payment of weekly allowances to sick members, and for other like purposes. (3) That for the orderly conduct of its affairs and the transaction of its business said association has adopted certain rules and regulations, and, among other things, provides for the election of managing officers and committees, and for the appointment and election of a treasurer, who is intrusted with the safe-keeping of the funds of said association; the said treasurer being required to enter into bond, with sufficient sureties, for the faithful performance of his duties, the same to be made in the name of the said association, to wit, the Deutscher Artillerie Unterstuetzungs Verein, but nevertheless for the benefit and protection of the members of the said association, and for the safe-keeping of their funds. (4) That the defendant J. Fred Lillen-

thal, having been elected treasurer of said association and society, and as such the custodian of its funds, the property of plaintiffs and other members of the said association and society, on the 27th day of April, A. D. 1895, made and delivered unto the plaintiffs and other members of said society his certain bond in writing and under seal, dated on that day, with his co-defendants J. C. Blohme and H. Pauls as sureties, the same being in the penal sum of ten thousand dollars, conditioned that if the said J. Fred Lillenthal did and should well and faithfully perform all and singular the duties of treasurer of the plaintiffs, according to its constitution and by-laws and any amendments that might be made thereto for and during the term he should continue treasurer as aforesaid by virtue of the election by which he then held said office, or any subsequent successive election or elections thereto, and until he should faithfully deliver all moneys or property which he had then or might thereafter receive as such treasurer to his successor in such office, or to such other persons as the plaintiffs, or the authorized officers thereof, should direct; and should faithfully account for all moneys and properties theretofore received by him as such treasurer, or which he might thereafter receive as such, and should keep true and just accounts of all property belonging to the plaintiffs that might come into his hands; and should exhibit and submit to the plaintiffs, or to the person thereunto appointed by the same, his accounts and the vouchers therefor, whenever he should be properly requested; and should, on his ceasing to be such treasurer, from any cause whatever, deliver up to his successor in office all of the moneys and property of the plaintiffs which might be found to remain, or which ought to be in his hands, and all that might be found due and owing by him, and his books of accounts, and the vouchers thereto belonging,—then the said obligation to be null and void, or otherwise it should remain in full force and virtue. A copy of which bond is hereto annexed as a part of this complaint, and to which reference is craved. (5) That, notwithstanding the fact that the said bond was made payable to the Deutscher Artillerie Unterstuetzungs Verein, it was intended to secure the funds and money of the plaintiffs and the other members of the said association and society, and these plaintiffs are advised the same inures to the benefit of the plaintiffs and the other members of this society and association. (6) That the defendant J. Fred Lillenthal resigned his office as treasurer as aforesaid on the 30th day of September, A. D. 1896, and thereupon his resignation was duly accepted, and William C. F. Heskamp, one of the plaintiffs above named, was duly elected and appointed to the office of treasurer, as successor of the said J. Fred Lillenthal as aforesaid, and that he duly qualified and entered upon the duties of his said office. (7) That at the time of the resigna-

tion of the said J. Fred Lilienthal, by virtue of his office as treasurer as aforesaid, he had in his hands of the moneys and funds of the plaintiffs and other members of the said society four thousand three hundred and thirty-four $\frac{22}{100}$ dollars, no part of which has been paid. (8) That the condition of said bond has been broken: (a) In that the defendant J. Fred Lilienthal, after his said resignation, and before the commencement of this action, upon his being, in writing, required by the committee representing said society and association and these plaintiffs and the other members as aforesaid, neglected and refused to pay over the money and funds in his hands as treasurer as aforesaid. (b) In that the said J. Fred Lilienthal has defaulted under said bond, and has neglected and refused to turn over to his successor as treasurer, for the plaintiffs and other members aforesaid, the funds and money in his hands as aforesaid, for which a demand was duly made upon him. (9) That the members and shareholders in said society and association are very numerous, to wit, more than two hundred in number, and that it is impracticable, therefore, to bring them all before the court in this action; wherefore the plaintiffs above named sue for the benefit of all. Wherefore the plaintiffs pray judgment against the defendants: (1) That the conditions of said bond are broken, and that they have judgment against the defendants jointly and severally for four thousand three hundred and thirty-four dollars and sixty-two cents, together with the costs and disbursements of this action."

The defendant J. Fred Lilienthal made no answer or appearance. The other defendants submitted this demurrer:

"The defendant J. C. Blohme demurs to the complaint herein for grounds that will appear upon the face of the complaint: (1) That there is a defect of parties plaintiff in the omission of the *Deutscher Artillerie Unterstuetzungs Verein*, and all of the members and shareholders thereof. (2) That the complaint does not state facts sufficient to constitute a cause of action as to this defendant."

Judge Gary handed down the following order:

"The plaintiffs in this action are members of a voluntary association, and bring this action for the benefit of themselves and the other members of the association, to recover from the said Lilienthal and the sureties on his bond certain funds they allege are in his hands as the treasurer of the association. The defendant Lilienthal does not answer the complaint, but his co-defendants and sureties as aforesaid demur to the complaint upon two grounds: (1) That this action cannot be maintained by one or more of the members of said association for the benefit of all, and that, in order to maintain this action, all of the members of the association should be made parties. (2) That the complaint shows

on its face that the defendant Lilienthal resigned his office as treasurer of said association prior to the commencement of this action, and, his resignation having been formally accepted by the association, his sureties on his bond as treasurer thereof are therefore relieved from any liability on said bond.' The section of the Code under which this action is brought is 140, and need not be quoted here at length. I think the test stated by Mr. Pomeroy truly states what actions may be maintained by one or more for the benefit of all. In his work on Code Practice he says: 'The test would be to suppose an action in which all of numerous persons were actually made plaintiffs or defendants, and, if it could be maintained in that form, those ones might sue or be sued, on behalf of the others; but, if such an actual joinder would be improper, the suit by or against one or a representative would be improper, notwithstanding the permission contained in this section of the statute.' It would seem from this test that these plaintiffs have the right to maintain the action. The very contention of the defendants is that the action is not brought in the name of all of the plaintiffs. It certainly could have been brought in the name of all. I therefore overrule this ground of demurrer.

"The second ground of demurrer must also be overruled. The complaint alleges that the condition of the defendant's bond is: 'That if the said J. Fred Lilienthal will and shall well and faithfully perform all and singular the duties of the treasurer of the said plaintiffs according to the constitution and by-laws and any amendments that might be made thereto for and during the term he should continue as treasurer as aforesaid by virtue of the election by which he held said office, and until he should faithfully deliver all moneys or property which he had then or might thereafter receive as such treasurer to his successors in such office, or to such other person as the plaintiffs or the authorized officers thereof should direct; and should faithfully account for all moneys and properties theretofore received by him as such treasurer, or which he might thereafter receive as such; and should keep true and just accounts of all property belonging to the plaintiffs that might come into his hands; and should exhibit and submit to the plaintiffs, or to the person thereunto appointed by the same, his accounts and the vouchers therefor, whenever he should be properly requested, and should, on his ceasing to be such treasurer, from any cause whatsoever, deliver up to his successor in office all of the moneys and property of the plaintiffs which might be found to remain or which ought to be in his hands, and all that may be found due and owing by him and his books of accounts, and the vouchers thereto belonging,—then the said obligation to be null and void, or otherwise it should remain in full force and effect.' The complaint alleges that there is money in the hands of Lilienthal, belonging to said association, which

he has failed to turn over after a written demand; that the conditions of his bond have been violated. In deciding this ground of demurrer we must assume these allegations to be true. Such being the case, I fail to see wherein his bondsmen claim that they are relieved from liability when the conditions expressed in their obligations have been broken. The complaint alleges that they have failed to carry out the express conditions, and that the same has been breached. This being the case, their liability would attach. It is therefore ordered that the demurrer be overruled."

The following were the grounds of appeal:

"(1) Because it appeared upon the face of the complaint that the plaintiffs, as members and shareholders of said association, possessed no several interest in the funds of the association, and were not entitled to share therein, or distribute the same among themselves. That they possessed no title to the fund, and nothing transmissible to their heirs or legal representatives. (2) Because, if this be so, then the right to maintain an action for the recovery of the funds, damages for a breach of the bond, the property of the association, was either in the managing officers and committees alleged in the complaint to exist, or in all of the members of the association as a unit. (3) Because section 140 of the Code is inapplicable to a case such as this, and, even if applicable, it appears on the face of the complaint that it is not impracticable to make all members of the association parties, but merely inconvenient, which is not sufficient, as a matter of law, to permit the adoption of this Code provision for the pleading. (4) Because the complaint failed to allege the authority of the plaintiffs of record to sue.

"Second exception: The presiding judge further erred in overruling the demurrer of the defendants H. Pauls and J. C. Blohme to the complaint in this action, in that it appeared from the face of the complaint that the allegations thereof did not allege sufficient facts to constitute a cause of action against said defendants; the several grounds of error on the part of the presiding judge being the following: (1) Because it appears from said complaint that, without the knowledge of defendant's sureties, the association accepted the resignation of Lillenthal as treasurer, and allowed him to retain the funds of the association in his individual capacity, and not as an officer of the association, thereby varying the responsibility of the said principal, and operating to discharge the defendants as sureties. (2) Because no breach of bond is alleged as occurring previous to such acceptance of resignation, the default alleged being the refusal of Lillenthal, after his resignation, to turn over the funds, and the action being grounded upon such alleged breach of bond.

"Third exception: That the presiding judge erred in omitting from his order overruling the demurrers herein permission to defend-

ants to plead over to the complaint herein upon such terms as might be just."

Let us pass upon these exceptions in their order:

Exception 1 is divided into four subdivisions, as follows: Subdivision 1: It seems to us that the relation of the 200 shareholders or members of this voluntary association to such body and to each other is not difficult of apprehension. These gentlemen, when they first came together, were governed by an act of incorporation from our general assembly. Their aims were most praiseworthy, —to care for the sick, bury the dead, etc., among their membership. After a while they were careless, and did not ask the legislature for a renewal of their charter, but their aims were the same, whether acting under a charter or without one. Certainly, if all the members should consent, a dissolution of such body might be had, and a division of the funds among the membership. This would show that in the last analysis of the relation of each individual member to the association, individual several rights might exist. Unquestionably, after their charter expired, each member possessed some title to whatever property was held and owned by the association. Subdivision 2: We will suppose it be admitted that the title to the money and other property owned by this association did reside in the whole membership, and, from one standpoint, such whole membership should be regarded as a unit; or suppose it be admitted that the title was in certain officers of the association. Such admissions would not destroy a right of action for the recovery of any property improperly taken from the association in and by the members of such association. It must always be remembered that an officer of an association is but the agent of the principal, to wit, the whole membership of the association. Subdivision 3: We think if there ever was a case where the wisdom of section 140 of the Code was illustrated, it is just this case. The idea of 200 members being made plaintiffs in an action to have a defaulting treasurer and his sureties make whole a fund of money set apart to be applied to objects of mercy, when a half dozen bring the suit for themselves and all others! The very object of the section of the Code is fully met when 7 bring the suit for themselves and the other 200. And as to subdivision 4, we must overrule it. There is no law which sanctions this proposition.

Second exception: Subdivision 1: Surely the appellants cannot be in earnest in advancing the proposition that the acceptance of the resignation of an officer by their principal without notice to the sureties is an invasion of such sureties' rights, and works a release to such sureties from the bond of their principal. We cannot regard the law as sustaining any such contention. But the appellants suggest that thereby the association made the retiring treasurer to hold the funds in his individual capacity, and thus freed the sureties.

The complaint says the association accepted the resignation, and elected a new treasurer, naming him. It also set out that a demand for the funds belonging to the association has been made by such new treasurer, and also by a committee, both of which demands have been ignored by Lillenthal and his sureties; and more than \$4,000 of the funds of this association are withheld from it by Lillenthal. So, as to subdivision 2, we see no merit in it. Now as to the third exception: The case fails to disclose that any application was made to Judge Gary for leave to answer over. While we will not attribute error to Judge Gary in not allowing the two sureties to answer over, in the abundance of caution we will provide for permission for the sureties to answer, provided the answers are put in 20 days after the remittitur reaches the circuit court.

It is the judgment of this court that the order of the circuit court be affirmed, with leave, however, to the defendants Blohme and Pauls to answer the original complaint within 20 days after the remittitur reaches the circuit court; but, if they fail to answer, then the circuit court shall grant judgment against all three defendants.

MILLAN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. March 25, 1899.)

PLEADING—ANSWER—AMENDMENT—INCONSISTENT DEFENSES—REVIEW—QUESTION NOT RAISED BELOW.

1. On motion for leave to amend the answer, the requirement of an affidavit that the proposed amendments are meritorious, or based on facts existing when the original answer was prepared, or that failure to include them in the original answer did not arise from negligence, is within the discretion of the court; Code, § 194, permitting an amendment before or after judgment in furtherance of justice, and on such terms as may be proper.

2. The right of defendant, under the Code, to plead all defenses to the causes of action set out in the complaint, entitles him to plead separate defenses, regardless of their inconsistency, provided that each would, if established, defeat plaintiff's claim in whole or in part.

3. An objection that the court below relied on a verbal statement of facts by counsel in support of a motion to amend a pleading cannot be made for the first time on appeal.

4. Code, § 171, subd. 2, providing that the answer may contain as many separate defenses and counter defenses as defendant may have, whether legal or equitable, permits a defendant to separately plead as many defenses in the answer as he may have, though they are inconsistent.

Appeal from common pleas circuit court of Newberry county; J. C. Klugh, Judge.

Action by Robert R. Millan against the Southern Railway Company. From an order allowing the order to be amended, plaintiff appeals. Affirmed.

Johnstone & Welch, for appellant. B. L. Abney and Duncan & Sanders, for respondent.

POPE, J. The complaint alleged three causes of action against the defendant, claiming \$1,000 damages. Service of summons and complaint was made on the 4th February, 1898. On the 12th February, 1898, carefully prepared notices were served to require plaintiff to elect upon which cause of action he would rely; to make the complaint more definite and certain; also to set out a bill of lading; and also for more time to answer. These notices were heard by Judge Benet at chambers, on the 21st of February, 1898, and were decided on the same day (at night). The answer was served on the 24th of February, 1898, under protest. On the 16th of June, 1898, a notice of a motion before his honor, Judge Klugh, at chambers, for leave to file an amended answer, accompanied by such proposed amended answer, was served. On the 6th day of July an order was made by his honor, Judge Klugh, allowing the answer to be amended as directed. From this order the plaintiff now appeals.

The following is the order made by Judge Klugh: "This is a motion to be allowed to amend the answer of the defendant so as to allow it to set up the defense of negligence of the plaintiff in not watering and feeding the horses which it is alleged were injured by defendant's neglect in this particular; and also the defense that the plaintiff, by his acts and conduct, has waived any right he may have had to bring this action, and is now estopped from complaining of the defendant. The motion is made upon the entire record herein, and is resisted on the grounds (1) that there is no affidavit showing merit in the additional defenses, or want of knowledge on the part of the defendant of their existence at the time the original answer was served, or, at least, some reasonable grounds why they were not set up in the original answer; and (2) that the defense of contributory negligence of the defendant is denied; and also (3) that, as the defense of waiver and estoppel had not been alleged or pleaded in the original answer, the defendant must now be deemed to have waived it. It may be true that it is always better to make a motion of this kind upon affidavits showing that the proposed amendment is material, and that some reasons exist why it was not set up in the original answer. But where it appears that no delay or other injury can come to the plaintiff, and that the additional defense asked for, if established to the satisfaction of the jury, would defeat the plaintiff's claim, either in whole or in part, I do not think that an affidavit is absolutely necessary before the amendment should be allowed. Nor do I think that an affidavit should be required stating the reason why the proposed new facts were not alleged in the original answer, where it appears, as it does in this case from the record itself, and as stated by counsel, the answer was in the first instance hurriedly prepared; as in such cases it frequently happens that counsel leaves out matter that more

mature deliberation convinces them is material. Neither do I think that the amendments should be refused on either of the other grounds urged against them. Code, § 171, subd. 2, permits a defendant to set forth in his answer as many defenses as he may have. Even though they may be inconsistent with each other, they should be stated and set forth in separate paragraphs. And, as the defendant asks to be allowed to do this, the motion will be granted."

The grounds of appeal are as follows: "(1) That his honor, Judge J. C. Klugh, erred in holding that it was not necessary in the motion before him to show by affidavit—First, that there was merit in the proposed amendments; second, that the existence of the fact or facts which gave rise to the proposed amendments was unknown to the defendant at the time it served its original answer; third, that if these facts were within the knowledge of the defendant at the time of the service of its original answer, some reasonable excuse for not having stated or pleaded them. (2) That his honor, Judge J. C. Klugh, erred in allowing the defense of contributory negligence as an amendment to the original answer of the defendant, because the original answer of the defendant was a single defense, composed of several allegations, one of which was a general denial, and was therefore utterly inconsistent with the proposed amendment, which was one of confession and avoidance on the part of the defendant. (3) That his honor, Judge J. C. Klugh, erred in holding that it was a sufficient showing wherein it was made to appear that the 'additional defense' is such a defense per se, and irrespective of the facts upon which it is founded, that, if established, would defeat the plaintiff's claim in whole or in part, to entitle the defendant to amend his answer. (4) That his honor, Judge J. C. Klugh, erred in holding that an affidavit should not be required stating the reason why the proposed new facts were not alleged in the original answer, when it appears, as it does in this case, from the record itself and from the statement of counsel, the answer in the first instance was hurriedly prepared. (5) That his honor, Judge J. C. Klugh, erred in holding that 'the Code, in section 171, subd. 2, permits a defendant to set up as many defenses in his answer as he may have, even though they may be inconsistent with each other. They should be stated in separate paragraphs, and, as the defendant asks to be allowed to do this, the motion will be granted.'"

We will examine them in their numerical order.

1. We have been careful to reproduce the text of the order of the circuit judge, and also the grounds of appeal therefrom, because the question as to the form of an application to amend an answer before trial is for the first time presented to us for consideration. The right to grant amendment of pleadings is set out, in its different phases, in section 194 of our Code of Procedure. It is in these words:

"Sec. 194. The court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, * * * or by inserting other allegations material to the case. * * *". Thus, the law clothes the circuit judge with the right, before or after judgment, to allow an amendment to an answer in furtherance of justice and on such terms as may be proper. The discretion is that of the circuit judge, and unless some statutory provision, or rule of court in consonance with the law, guides the judge as to the method to be pursued in presenting such question to him, it would seem that he was master of the situation, and is only to be guided by the furtherance of justice and by such terms as he may deem proper. After reflection and reading, we must say that both our statutes and our rules of court lay no restriction upon the application to the circuit judge for an amendment, so far as their form is concerned. If the circuit judge should, on such an application to amend an answer, require an affidavit from the movant that the proposed amendments are meritorious, or that such amendments are based upon facts existing at the time the original answer was prepared, or that the failure to have the original answer embody the proposed amendments did not arise from negligence or carelessness, under such circumstances we are obliged to hold that this ground of attack cannot be sustained.

2. It does not seem to us that the circuit judge was in error in permitting the amendment to the answer, in which amendment it was set out that the defense of contributory negligence was relied on. If this defense could be substantiated, it would defeat plaintiff's right of recovery. The theory of the Code is that in a complaint the plaintiff should be allowed to set out as many causes of action as he may have arising out of the same transaction, and that the defendant should be permitted to include in his answer all the defenses to the plaintiff's causes of action set out in the plaintiff's complaint, and in pleading in the answer such separate answers there need be no care that such separate defenses are consistent with each other. The requirement must be that such separate defenses are in answer to plaintiff's single or several causes of action, as set out in his complaint.

3. Our answer to the second ground of appeal is sufficient as to the third.

4. We think that counsel for appellant are cut off from raising any objection now to the reliance placed by the circuit judge upon the bare statement of respondent's counsel that their original answer was prepared in great haste, or hurriedly prepared; because when such statement of counsel was made, as appears from the "case" for appeal, no objection was interposed by appellant's counsel to that method of presenting facts to the circuit judge. If attorneys object to a verbal statement of facts by opposing counsel, they should do the circuit judge the kindness of objecting thereto

then and there, and not wait to do so until an appeal is taken. We might remark that the relation of the circuit judge to his brethren at the bar, and also that of counsel among themselves is such, all of them being of such high character, that unless an objection to a verbal statement of a fact by an attorney is objected to at the time it is the most natural thing in the world to accept it. No doubt, as the circuit judge remarked in the case at bar, it would be better to have all statements of fact, upon which motions to amend shall be predicated, presented in affidavits, but such a course is not indispensable.

5. We cannot hold the circuit judge in error as complained in the fifth ground of appeal. The language of section 171 of the Code is: " * * * The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished." We apprehend that the appellant relies upon the fact that section 171, *supra*, seems to be intended to embrace counterclaims, to bring home error to the circuit judge. Primarily, the view of the appellant of this section of the Code seems to be correct, but an examination of the text of the section shows that the special regulations as to counterclaims alone have already been presented therein. But, after that, language employed shows that a broader, more comprehensive discretion is wished to be given; hence the language employed is: "The defendant may set forth by answer as many defenses and counterclaims as he may have," etc. We must overrule all these grounds of appeal. It is the judgment of this court that the order of the circuit court appealed from be affirmed, and the action be remanded to the circuit court.

ATLANTA ELEVATOR CO. v. FULTON BAG & COTTON MILLS.

(Supreme Court of Georgia. Feb. 3, 1899.)

SPLITTING CAUSE OF ACTION — ACTION FOR DAMAGES.

1. A creditor cannot bring an action against his debtor for an amount admitted to be due upon an account resulting from a single contract, the whole debt being mature, thus enforce payment of that amount, and afterwards maintain a second action against the defendant for a balance alleged to be due on the same account in excess of the amount originally sued for; and this is true, although the petition filed in the first case recited that the plaintiff reserved the right to bring such second action.

2. Nor is a second action of the nature above indicated maintainable for the recovery of damages arising from alleged bad faith and litigiousness on the part of the defendant in refusing to pay, in the first instance, the full amount due to the plaintiff.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Atlanta Elevator Company against the Fulton Bag & Cotton Mills. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Petitioner sued for \$75 principal and \$100 attorney's fees, alleging that in 1895 plaintiff contracted to build two elevators for defendant for \$1,143.75; that defendant paid, in the early part of 1896, \$640.25, and in December, 1896, \$473.30, but refuses to pay balance, alleged to be \$75; that defendant's refusal to pay was in bad faith; that plaintiff had been compelled to sue for the \$473.30 paid in December, 1896; that said suit was defended until the defendant was required to swear to the truth of his defenses; that payment was then made and suit dismissed; that said defenses were filed for delay and vexation, and were intended to constrain the plaintiff, because of its need of money, to accept less than was due to it; that defendant, although abundantly able to pay, resorted to every possible pretext to hinder and delay the plaintiff, and, to increase the plaintiff's embarrassment, the defendant procured the creditors of plaintiff to issue garnishments against it, by means of which plaintiff was damaged \$100. Plaintiff amended his petition, and alleged that in the suit referred to in the original petition he had sued for only the balance that was admitted to be due, and had expressly reserved the right to sue for balance claimed, and that the amount so sued for was paid without conditions. The petition as amended was dismissed on demurrer.

Alexander & Lambdin, for plaintiff in error. Glenn, Slaton & Phillips, for defendant in error.

LUMPKIN, P. J. The Atlanta Elevator Company brought an action against the Fulton Bag & Cotton Mills, which was dismissed on demurrer, and the plaintiff excepted. The substance of the plaintiff's petition, the amendment thereto, and the demurrer appears in the official report.

We have no difficulty in reaching the conclusion that the judgment complained of was correct. Nothing is better settled than that the measure of damages for refusing to pay money due to another is the interest lawfully accrued. Another well-settled principle is that, "If a contract be entire, but one suit can be maintained for a breach thereof." Civ. Code, § 3793. And see, in this connection, *Desverger v. Willis*, 58 Ga. 388; *Evans v. Collier*, 79 Ga. 319, 4 S. E. 266; *Thompson v. McDonald*, 84 Ga. 5, 10 S. E. 448, holding that "an account resulting from a single contract cannot be split into two causes of action, the whole being mature when the first action was brought"; *Allen v. Stephens*, 102 Ga. 596, 29 S. E. 443; *Broxton v. Nelson*, 103 Ga. 327, 30 S. E. 38. The mere fact that a creditor is

poor, and, on account of his distressed circumstances, needs money due him, gives him no more right to sue a debtor for an amount admitted to be due upon a single account, reserving the right to sue for a balance in dispute, than would have a millionaire to arbitrarily cut up and bring separate suits upon a single cause of action against a debtor of the latter.

It was earnestly insisted in the argument made here for the plaintiff in error that, inasmuch as the original action had been voluntarily dismissed without having been carried to judgment, the fact that it had been brought presented no legal obstacle to the bringing of the second action, the one now under review. If the first action had been totally unproductive,—that is, had been merely brought and dismissed,—the plaintiff might very well have begun another suit, and therein have claimed a larger amount than that named in the first one. But we are not dealing with a case of that kind. Taking in view all the allegations of the present petition and the amendment thereto, it plainly appears that the plaintiff accomplished all it sought to do by bringing the original action. It sued for a specified amount of money. The defendant tendered, and the plaintiff accepted, this identical amount, practically, if not professedly, in full settlement of all it claimed in that action. This was an end of the matter. After receiving full payment of all it had sought to recover, and in the absence of any agreement as to what disposition or direction should thereupon be given to the case, no other course was left to the plaintiff except to dismiss. The result, therefore, was, to all intents and purposes, just the same as would have been reached had a judgment been rendered in the plaintiff's favor, and subsequently paid off. The first suit was as much *functus officio* as it would have been had it taken the direction just indicated. We therefore feel warranted in dealing with the case now before us precisely as we would do had the plaintiff enforced by judgment the collection of the amount for which it sued in the first instance.

The foregoing disposes of the plaintiff's present action, in so far as it relates to the balance alleged to be due to it upon account. The action for such balance not being maintainable, for the reasons stated, it follows that the plaintiff cannot recover therein damages on account of alleged bad faith and litigiousness on the part of the defendant growing out of the transactions between them. Any claim arising on this account could and should have been asserted in the first action. Judgment affirmed. All the justices concurring.

CHEWNING v. BRYSON.

(Supreme Court of Georgia. March 15, 1899.)

BOUNDARIES BY ACQUISCENCE.

1. Highways may, by agreement and acquiescence for seven years by acts or declarations,

become established dividing lines between co-terminous landowners, although never run and marked for that purpose.

2. The judgment of the trial judge, who, by consent, decided all issues in this case without a jury, is supported by the great preponderance of the evidence, and it is therefore affirmed.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action between R. A. Chewning and Mrs. H. E. Bryson, administratrix. From the judgment, Chewning brings error. Affirmed.

Alonzo Field, for plaintiff in error. Hunt & Gollightly, for defendant in error.

PER CURIAM. Judgment affirmed.

ANDERSON v. SWIFT et al.

(Supreme Court of Georgia. March 15, 1899.)

LEASE—CONSTRUCTION—INDEFINITENESS—BREACH OF COVENANT—DAMAGES.

1. A stipulation in a written contract of lease that the lessee should have the privilege of erecting houses on the premises, "to be removed by [him] at the expiration of his lease, or sold to the [lessors] at 8 per cent. less the costs of buildings," is not sufficiently certain and reciprocal to support an action by the former against the latter for such cost of the houses, when the plaintiff relies for a recovery solely on the provision in the contract above quoted, and upon the fact that the lessor refused to purchase the buildings when the lease had expired.

2. When a landlord, in his contract of lease with a tenant, agrees to use an effort to remove from the leased premises a certain nuisance, expressly stipulating, however, that, if such effort proved unsuccessful, the tenant should be satisfied to keep the premises and pay full rent therefor, an action for damages growing out of a failure to use such effort will not lie unless the plaintiff expressly alleges that such effort on the part of the landlord would have been availing. Especially is this true when the contract contemplated work to be first done by the tenant looking to an abatement of the nuisance, which he never actually performed or offered to perform.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by T. E. Anderson against Elizabeth and Annie Ray Swift. Judgment for defendants, and plaintiff brings error. Affirmed.

R. W. Milner and W. W. Braswell, for plaintiff in error. Candler & Thomson, for defendants in error.

LEWIS, J. T. E. Anderson entered into a contract with Elizabeth and Annie Ray Swift, by virtue of which he agreed to rent from them a certain lot of land and houses thereon for a term of one year, at a stipulated rent, with the privilege of occupying the premises for five years at the same rate. The owners of the premises agreed to try to expel bats from the walls of a house on the lot, and remove accumulations and odor there-

from, and to replaster two rooms of the house if necessary to remove the bats, the tenant agreeing on his part to remove the present plastering. It was further stipulated that, if successive efforts to exterminate the bats were unavailing, then the tenant "agrees to be satisfied and to pay full rent for house and lot." In the contract the privilege was granted to the lessee of building other houses on the leased premises, "to be removed by [him] at the expiration of his lease, or to be sold to the [lessors] at 8 per cent. less than the costs of buildings." In this connection, it was further agreed that the lessee should "remove, at his expense, all houses he builds, or sell said houses to party of the first part at 8 per cent. less the first cost, and to replace all fencing that was removed to build said houses." It appears from the record that the lessee occupied the premises for the full term of five years, paying therefor the rent agreed upon, and during his occupancy of the premises he erected thereon nine houses. Just before the expiration of his lease, he offered to sell these houses to his landlords on the terms specified in the contract. They declined to buy, saying they did not wish the houses. No effort was made by them to expel the bats, nor does it appear that the tenant, after entering into this contract, ever did, or offered to do, the work of removing the plastering from certain rooms mentioned therein, nor did he make any complaint to the owners in regard to any nuisance or trouble caused by the bats. These facts appear from the petition brought by the tenant against his landlords after the expiration of his lease, for the purpose of recovering from them the cost of erecting the houses, less the discount mentioned in the contract, and also damages resulting from a failure on their part to expel the bats from the rented premises. The petition was dismissed on general demurrer, and to this judgment of the court the plaintiff excepted.

1. It is impossible to gather from the terms of the contract sued on in this case what was the real intention of the parties with reference to the houses which were erected by the plaintiff on the premises. The contract simply declares that the tenant should remove, at his expense, all houses he might build, or sell the houses to the owners of the premises at 8 per cent. less than the first cost. It would have been a difficult matter to have made language more ambiguous. The plaintiff, on the one hand, might have entertained the idea when he entered into the agreement that he had the option either to remove the buildings erected by him, or compel the lessors to purchase them on the terms mentioned. On the other hand, the language used would, to say the least of it, with as much force sustain the position of the defendants that they had the option of purchasing the houses or not, as they saw proper. The action is based solely upon the stipulation contained in this written contract. There is no

pretense that there was any understanding between the parties outside of what is contained in their written agreement. Nor is there any allegation in the petition that the contract as written was understood by the defendants, as well as by the plaintiff, to mean what he contends, and no foundation whatever is laid for the introduction of extrinsic evidence to explain the ambiguity in the written instrument. It is not only necessary that a plaintiff in his petition should clearly and distinctly set forth his cause of action, but it is equally as important that the facts upon which he relies for a recovery should clearly and distinctly show that he has a legal cause of action. This burden in pleading being upon the plaintiff, and he having failed to carry it by any allegation showing an obligation on the part of the defendants to pay for the houses in question, we think the demurrer, as to this count in the declaration, was properly sustained.

It is true that the plaintiff alleges in his petition that some of the houses erected by him had been, since the expiration of his lease, occupied and rented out by the defendants; but this was not an action to recover anything for the use and occupation of the houses, even if such an action was maintainable under the facts appearing. The suit is to recover the value of the houses themselves, estimated upon the basis stipulated in the contract. The defendants expressly declined to purchase, and any use they might make of the houses after being left upon their premises could not be construed into an implied contract to pay for them.

2. Complaint is further made in the petition that the defendants failed to make any effort whatever to remove the bats, their accumulations or odor, from any of the rooms of the house located on the premises when the same were rented, and that in consequence of such failure two of the rooms were so full of this offensive odor as to be uninhabitable, to the injury and damage of the plaintiff in the sum of \$100. There is, however, no allegation that, even if a reasonable effort had been made by the defendants to abate this nuisance, it would probably have proven successful. In view of the express terms of the contract to the effect that no right of action would exist in the event such an effort should prove unavailing, we think such an allegation was indispensable. Pleadings should be construed most strongly against the pleader. It is fairly inferable from the facts disclosed by the petition, that the nuisance was caused by bats getting within the walls of the house, and the only remedy which the contract seems to contemplate, in order to get rid of them, was by a removal of the plastering. This work had to be done first, and, under the terms of the contract, the duty of removing the plastering devolved exclusively upon the plaintiff himself. So far as appears, he never did, or offered to do, this preliminary work, nor does it appear that

he ever, during his occupancy of the premises, complained of the nuisance, or called upon his landlords to make an effort to abate it. In view of the peculiar terms of the contract, it would require somewhat careful and refined pleading to state a good cause of action in this respect; and certainly the plaintiff does not, in the petition filed by him, make it appear that he has just cause of complaint because of the failure of his landlords to make what the parties evidently regarded as nothing more than an experiment, the success of which was so doubtful that they expressly stipulated to the effect that its failure would not relieve the tenant from the obligation of paying full rent. Judgment affirmed. All the justices concurring.

CHEWNING et al. v. SHUMATE et al.
(Supreme Court of Georgia. March 15, 1899.)

WILLS—CONSTRUCTION—VESTED REMAINDER.

1. Where a will, which was probated in 1870, devised certain realty to the testator's wife for life, provided that at her demise the property should be equally divided among the testator's three daughters and two grandchildren, and declared: "The property given to my three daughters named above is for their own use and the heirs of their bodies, and, if any of them should die without leaving any children, my will is that their part of my estate be equally divided among my other legatees, and in no case is any to be taken to pay their husband's debts; and, furthermore, my will is that, if my two grandsons named above should die in their minority, that their portion of my estate revert back to my other legatees." *Held*, that each daughter took a vested remainder in fee in her share of the estate, subject to be devested by her dying without leaving issue.

2. This case, upon its facts, is controlled by the law as above announced, and there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by Mrs. E. G. Chewning and others against Charles Shumate and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Alonzo Field and J. N. Bateman, for plaintiffs in error. Candler & Thomson, J. N. Glenn, and Jones & Morrison, for defendants in error.

SIMMONS, C. J. 1. Perkins made and executed a will, which was probated in 1870. By that will he devised and bequeathed his whole estate to his wife for and during her natural life, and after her death to his three daughters and two grandsons; the will declaring: "The property given to my three daughters named above is for their own use and the heirs of their bodies, and, if any of them should die without leaving any children, my will is that their part of my estate be equally divided among my other legatees, and in no case is any to be taken to pay their husbands' debts; and, furthermore, my will is that, if my two grandsons named above

should die in their minority, that their portion of my estate revert back to my other legatees." It appears from the record that one of these three daughters was Mrs. Ayers, who died before the death of her mother, the life tenant, leaving several children. The record further discloses that Mrs. Ayers, during her life, sold and conveyed her interest in the land to Shumate, one of the defendants in the present case. The petitioners alleged that they were the children of Mrs. Ayers, and entitled to recover an undivided interest in the land devised to her. Under the terms of the will, as above set out, each of the daughters of the testator took a vested remainder in the estate of their father, subject to be devested by her death without leaving issue. The words "and the heirs of their bodies" are words of limitation, and not of purchase. Mrs. Ayers, being one of the daughters, and having a vested remainder in the land, had the right to dispose of her remainder as soon as the will went into effect. The question as to the meaning of "bodily heirs" and such expressions in such a will as this has been so often discussed by this court that we deem it unnecessary to do more than refer to the able discussion and reasoning of Mr. Chief Justice Bleckley in the case of *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. 554, where he deals, in part of his opinion, with the identical question now before the court, and decided that these words are words of limitation, and not of purchase, and that the first taker takes an absolute fee. See, also, the case of *Whitley v. Barker*, 79 Ga. 790, 4 S. E. 387; *Craig v. Ambrose*, 90 Ga. 134, 4 S. E. 1; *Griffin v. Stewart*, 101 Ga. 720, 29 S. E. 29.

2. The above being the controlling question in the case, and it following therefrom that the plaintiffs had no right to recover, it is unnecessary to rule upon the other questions made in the record. The grant of a nonsuit was right, even considering the evidence which was ruled out. Judgment affirmed. All the justices concurring.

BRAGAW v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR.

(Supreme Court of North Carolina. March 14, 1899.)

NOTICE BY MAIL—EVIDENCE—INSTRUCTIONS.

An instruction that deposit in the post office of a prepaid and properly addressed notice is presumptive service of it repeatedly contained the words, "Was this notice served on C? Did he receive it? This is the question." *Held*, that it was error, since it left the impression that receipt of the notice must be shown.

Appeal from superior court, Beaufort county; Hoke, Judge.

Action by J. G. Bragaw against the Supreme Lodge of Knights and Ladies of Honor. There was a judgment for plaintiff, and defendant appeals. Reversed.

Charles F. Warren and J. L. Bridgers, for appellant. John H. Small, for appellee.

FURCHES, J. While the law may have been properly stated in the charge of the court, it was done in such a way as to mislead the jury. The case turned upon the question as to whether the local lodge had been served with notice of its suspension by the grand lodge; and this seems to be the view taken by his honor who tried the case. There was no evidence that such notice had been actually received by the local lodge, and the defendant relied on constructive notice. The defendant contended that it properly mailed a notice of suspension, and that this was constructive service upon the subordinate lodge, and that plaintiff had offered no evidence to rebut this presumption. This seems to have been the way the court understood the law. But the evidence as to mailing the notice was not such as authorized the court to charge the jury that, if they believed the evidence, the notice had been mailed, as the law required it should be, to create the presumption of service. And we think this question was properly left with the jury to find whether it was mailed or not. It seems to us that the court, in one part of the charge, sufficiently instructed the jury that, if the notice was properly addressed and put in the post office with postage paid, then the law would presume a service. But in a long charge, answering a great many prayers for instructions, he repeatedly said: "Was this notice served on Cherry [the secretary]? Did he receive it? This is the question." In this way, it seems to us, the jury were most likely left with the impression that it was necessary for the defendant to show that Cherry actually received the notice. For this reason there ought to be a new trial. New trial.

FAIRCLOTH, C. J. (concurring). The defendant was duly incorporated by the laws of the state of Kentucky, to promote benevolence and charity, by establishing a relief fund for the relief of its members, and paying stipulated sums to their families in the event of death, when they have complied with the lawful requirements of the supreme lodge. It is authorized to permit the establishment of grand and subordinate lodges in different states, with power to prescribe by-laws and regulations for such lodges, to make assessments, and receive dues from such lodges for the "relief fund." It has the power to suspend these subordinate lodges when they fail to comply with its laws and regulations. The organization and procedure of these lodges are prescribed in detail by the supreme lodge, and copies thereof furnished each lodge for its guidance; and among these it is provided that when the lodge receives money from its members in payment of assessments, and in all acts performed in complying with the laws of the relief fund, the subordinate lodge and its officers are the agents of the members, and not the agents of the supreme lodge. The subordinate lodges

are required to hold frequent meetings, and to report their acts and doings, and to remit assessed dues promptly to the supreme lodge on pain of suspension for failure to perform the duties required by the regulations. Pamlico Lodge, No. 715, organized at Washington, N. C., elected its officers; among them, one Cherry as its secretary and financial secretary. The plaintiff and his wife, Annie C., were members, and paid their dues regularly to the said Cherry until her death, July 5, 1895. The plaintiff now sues for the amount of her policy. According to the uncontradicted deposition of the supreme secretary of the supreme lodge, on November 1, 1889, assessments Nos. 256 and 257 were sent to the Pamlico Lodge, pursuant to the regulations. These assessments were never paid, nor any since. About December 20, 1889, in consequence of such failure, Pamlico Lodge, pursuant to regulations, was suspended by the supreme lodge, and notice thereof was caused to be issued and mailed to the secretary of said Pamlico Lodge, No. 715. This suspension is authorized by the laws and regulations (section 12 [3], p. 36) for nonpayment of assessments; but the charter or dispensation shall not be forfeited until the subordinate lodge shall have been notified of its offense by the supreme or grand secretary. The supreme secretary of the supreme lodge says in his deposition: "I did cause a suspension notice to be issued and mailed to the secretary of said Pamlico Lodge, No. 715."

The case, with the evidence, was submitted to the jury, and his honor charged the jury at length. On reading the evidence introduced by both parties, it is manifest that the members of Pamlico Lodge were guilty of negligence in failing to perform their duties as required by the regulations, and in failing to require their secretary to make reports to them. The financial secretary of Pamlico Lodge (Cherry) was guilty of gross negligence in failing to report and forward the moneys he had collected to the supreme lodge, and of gross negligence and bad faith to the members of his lodge in receiving their money and failing to account for it to either lodge. C. M. Brown, plaintiff's witness, and a member of the lodge, testified: "Cherry left here a day or two after Mrs. Bragaw's death. No books were kept by him that I saw. No reports were made by him. No trustees supervised his conduct or received his reports. It was left pretty much to Cherry to run it. We supposed he was accounting. He absconded, and has not been found. * * * After Cherry fled, I looked for the books of the lodge at his place of business, and failed to find them. No books of the lodge could be found in the hands of any one. If there was any examination of Cherry's books and accounts for several years prior to the death of Mrs. Bragaw, I do not know it. I don't know that Cherry gave any bond in that lodge."

The third issue was: "Was there a valid and proper suspension of the rights of Pamlico

Lodge to share in relief fund at the time of the death of Annie C. Bragaw?" At the trial the question of notice of suspension became important and material. His honor, after stating the contentions of the parties, told the jury: "In order to create a valid and proper suspension under this plan of organization, and under the by-laws of the company, three things were necessary to be established on the part of the defendant. It must show that there was default on the part of the local lodge in its operation. It must show that suspension of the local lodge was declared by the supreme lodge before it becomes effective. Service by mail in this case is sufficient, provided it was received by Cherry or the local lodge. By reason of the default, and in order to make it efficient, it must show that a notice was served upon the subordinate lodge." He then said, if the evidence is believed, there was a default, and suspension had been declared, and proceeds: "So that the question of the suspension of the local lodge—its valid suspension—would turn on the question as to whether there had been a proper notice of that suspension, and action of the supreme lodge served upon this local lodge." His honor stated that it is a principle that if the paper was properly addressed, with postage prepaid, and was put in the office, there is a presumption that it reached the party to whom it was addressed, and that there would be no evidence here to show that he did not receive it; and further: "But, with this fact in view, I leave the jury to say whether this notice was received by the company or not. The language of the deposition is that he caused notice of the suspension to be mailed to the secretary of Pamlico Lodge, No. 715. Was it served on Cherry? It is not sufficient for them to issue notice. It is incumbent in making suspension that they not only issue, but cause it to be served on the local lodge. * * * On the other hand, if defendant has not satisfied you that this notice was received, and has failed to satisfy you that this notice was served, then, as heretofore explained in this charge, you should answer this issue, 'No,' that there was no proper suspension of this lodge."

It appears throughout this charge that the jury must be satisfied, not only that the notice was duly mailed, but also that it was received by the addressee. So that the jury might be satisfied that it was duly mailed, and still say that it was not received; whereas there is not a scintilla of proof that it was not received. When a letter is duly mailed, it is presumed that it reaches its destination, and is received by the party to whom it is addressed. This is a presumption of fact, and may be rebutted by evidence, to be considered by the jury. This presumption is an inference of fact, founded on the probability that the government officials will do their duty, and the usual course of business. When a person absents himself for seven years, and is not heard of, the presumption arises that he died at some

time during the seven years; and, if nothing appears to the contrary, the presumption stands, and is acted on in the course of business. *Spencer v. Roper*, 35 N. C. 333. "The depositing of a letter in the post office, addressed to a merchant at his place of business, is prima facie evidence that he received it in the ordinary course of the mails; and, where there is no other evidence, the jury should be so instructed." *Huntley v. Whittier*, 105 Mass. 391. This principle is sustained in several cases by opinions written by Parsons, C. J., Parker, C. J., Shaw, C. J., and others. The same proposition is laid down in *Dana v. Kemble*, 19 Pick. 112; *Starr v. Torrey*, 22 N. J. Law, 190; *Howard v. Daly*, 61 N. Y. 362; *Austin v. Holland*, 69 N. Y. 571.

The error in the charge was in allowing the jury to find as a fact that the suspension of the lodge was not valid and proper, for the reason that no notice thereof was received by the lodge or its secretary. Under the charge, the jury might be satisfied that the notice was duly mailed, and still find that it was not received, although there was a total absence of such proof, and thus deprive the defendant of the benefit of the presumption in its favor. We cannot say that the jury did so; but we can see that they had the opportunity to do so without disregarding their instructions. There are numerous other exceptions, but, as we must order another trial, it is unnecessary to consider them. New trial.

FARMERS' BANK OF ROXBORO v.

HUNT et al.

(Supreme Court of North Carolina. March 14, 1899.)

PRINCIPAL AND SURETY—NOTICE—AGENCY—PROMISSORY NOTES—BONA FIDE PURCHASERS.

1. Where a bank, before discounting a note, told the maker that three certain persons would be sufficient security thereon, the fact that it was informed that one of the three refused to sign does not charge it with constructive notice of an agreement between the signing sureties and the maker that the latter was not to use the note without procuring the signature of the other proposed surety.

2. Though a note was signed by two sureties under an agreement with the maker that he would not use it, unless he procured the signature of a third surety, and the agreement was violated, it is binding on them, as against a bona fide purchaser.

3. The fact that the proceeds of a note were applied to the payment of the maker's debt to the purchaser thereof does not charge the latter, on the theory that the former was his agent in procuring the note, with knowledge of an agreement between sureties on the note and the maker that the note was not to be used until the signature of an additional surety was procured.

Appeal from superior court, Person county; Timberlake, Judge.

Action by the Farmers' Bank of Roxboro against L. H. Hunt and others. Judgment for plaintiff, and defendants appeal. No error.

Boone & Bryant, for appellants. John W. Graham, for appellee.

MONTGOMERY, J. This action was brought for the recovery of the amount due upon a promissory note made by the defendants to the plaintiff. The defendants Hunt and Paylor, the principal debtors, made no defense. The defendants James and Mitchell, the sureties, in their answer averred that in November, 1896, Hunt and Paylor, doing business as Hunt, Paylor & Co., desired to borrow money from the plaintiff to be used in their business, and proposed to the plaintiff to give as sureties to secure the note the defendants James and Mitchell, and also one S. P. Williams; that Paylor came to the defendants James and Mitchell, and secured their signatures to a note, blank as to amount, date, time of maturity, and names of obligors; that the note was, by agreement with Paylor, not to be used or discounted until it was signed by Williams; that, after the note was signed by the defendants, it was taken to the plaintiff, who was then notified of the conditions under which the defendants had executed it; and that, notwithstanding the refusal of Williams to sign the note, the plaintiff, aware of all the facts, accepted it in payment of a debt due by Hunt, Paylor & Co. to the plaintiff, or discounted the same for their account. On the trial the defendant Mitchell testified that Paylor brought the note to him, in blank as to date, amount, time of maturity, and name of obligors; that he signed it, and at that time there was the name of no other obligor to the note; that Paylor stated to him that the note was to be in the sum of \$1,000, and would be signed by Mrs. James, the other defendant, and also by S. P. Williams, as sureties, and that that would be done before it was used in the bank; that the witnesses signed with that understanding with Paylor; that he lived 18 miles from Roxboro, the residence of both the plaintiff and Williams. Upon cross-examination the witness stated that he had had no conversation or agreement or understanding with the plaintiff in regard to the note, or any agreement with the plaintiff that the note would not be discounted in the event that Williams did not sign it. Mrs. James testified that, when she signed the note, Paylor made the same statements to her that he made to Mitchell, and that Mitchell and Williams would sign the note as sureties with her. She testified further that she had had no agreement with the bank about the manner of the execution of the note, or of its discount. The issues submitted to the jury were: (1) Were defendants Mrs. E. J. James and R. L. Mitchell sureties to the note sued on? (2) Did Mrs. E. J. James and R. L. Mitchell sign the note sued on with the agreement or understanding that the same was not to be discounted by the Farmers' Bank until and unless S. P. Williams also signed the same? (3) Did the Farmers' Bank have notice of said agreement or condition?

His honor instructed the jury that, if they believed the evidence, to answer the first and second issues "Yes," and the third issue "No." To the holding that there was not sufficient evidence of knowledge of the agreement on the part of the plaintiff, and to the instruction to answer the third issue "No," if they believed the evidence, the defendants excepted. The execution of the note by the defendants James and Mitchell was admitted by them. The burden of proof was then upon them to make good the matters which they had set up in avoidance in their answer. There was not a scintilla of evidence that the plaintiff had actual knowledge of the agreement and understanding which the defendants Mitchell and James testified that they had had with Paylor when they signed the note. But it was urged by the defendants' counsel that the testimony of the defendant Paylor tended to prove that the plaintiff had constructive notice of the understanding between Paylor and the defendants James and Mitchell, derived through a conversation with Paylor when he delivered the note to the plaintiff and had it discounted. We can see nothing in Paylor's testimony that tends to show constructive notice on the part of the plaintiff as to what was done or said at the time of the signing of the note by the defendants James and Mitchell. All of the defendants in this action, together with Williams, owed a debt of \$500, by note, to the plaintiff; and the defendants Hunt and Paylor owed more by their overdrafts, and wished still further accommodations. The plaintiff wished that matter settled, and informed Hunt and Paylor that they must arrange to get the money. The cashier of the plaintiff's bank was asked by Paylor if a note signed like the first one would be sufficient, and he was told that it would be. The note sued on, for \$1,000, was brought to the bank of the plaintiff, with the blanks properly filled in, signed by Hunt and Paylor, and by the defendants James and Mitchell as sureties, with the statement by Paylor that Williams would sign it as additional surety. Williams refused to sign the note, and his refusal was communicated to the plaintiff. Thereupon Paylor said that the note was good for the amount as it was, and the cashier of the bank said he thought so, and the note was discounted. There was nothing suspicious about that transaction; nothing about it calculated to put the plaintiff upon inquiry as to why Williams had not signed the note. Paylor had not intimated that there was any agreement or understanding between himself and James and Mitchell that Williams should sign the note before it was used at the bank. The officers of the bank had simply said in the beginning that the three (James, Mitchell, and Williams) would be sufficient security upon the note; and that, at the instance of Paylor himself. When Williams refused to sign the note, the plaintiff thought it good without his signature, and discounted it. The transaction seems to be open and fair, and, so far

as the evidence goes, there were no suspicious circumstances attending the execution of the note which ever came to the knowledge of the plaintiff. The plaintiff then had neither actual nor constructive notice of the alleged agreement between Paylor with the other defendants, James and Mitchell. The question then is, is the note binding on the defendants James and Mitchell, the sureties, who signed the note under an agreement with one of the principals that he was not to use it with the plaintiff, unless he procured the signature of Williams also? We are of the opinion that they are liable upon the note. The precise point was before the court in *Gwyn v. Patterson*, 72 N. C. 189. In the opinion in that case is quoted with approval the point decided in *Millett v. Parker*, 2 Metc. (Ky.) 608: "One who signs a covenant as surety upon the conditions and agreement between him and his principal that it is not to be binding upon him, or delivered to the covenantee, unless another person should also sign it as surety, is bound thereby, although the principal, to whom he intrusted it, delivered it to the covenantee without a compliance with such a condition, of which and its breach the latter had had no notice." To the same effect is the decision in *State v. Lewis*, 73 N. C. 138. The defendant cited us to several decided cases, like that of *Pawling v. U. S.*, 4 Cranch, 219, in which it was held that, where a surety signed a bond in which was written the name of another person, who was to sign the bond, but who failed to do so, the sureties who did sign were released, and not liable. In the case of *State v. Lewis*, supra, it was said of the decision in *Pawlings v. U. S.*, supra, that it might "perhaps be supported on the ground that the appearance in the body of the bond of the names of persons who had not signed was of itself notice that the instrument was incomplete, and its delivery by the principal obligor alone was unauthorized." But such a case as that last referred to is not before us, and we are not called upon to make a decision upon it, to decide the point. This may be a hard case on the defendants James and Mitchell, but it will be a still harder case on the plaintiff, if it should be subjected to the loss of its money lent in good faith upon a note perfect in form, and with nothing about the matter to excite suspicion or to put it on inquiry. From the statements of the defendants James and Mitchell, they gave to Paylor their confidence, and it was misplaced. Loss has ensued on account of this breach of confidence, and it must fall upon those who reposed the confidence, rather than on an innocent person.

The counsel for the defendants argued that as a part of the money derived from the discount of the note went towards the payment, not only of the \$500 note, but to certain overdrafts of the defendants Hunt, Paylor & Co., Paylor became the agent of the plaintiff in the transaction by which the \$1,000 note was procured, and that thereby the plaintiff is fixed with the knowledge of the agreement made

with James and Mitchell. We do not take that view of the matter. The burden of proof being on the defendants to show the matters pleaded in avoidance, they having admitted the execution of the note, and no proof having been offered tending to prove such matters, it was in the province of the judge to direct the answer to the third issue as he did. No error.

STATE v. TAYLOR.

(Supreme Court of North Carolina. March 21, 1899.)

CRIMINAL LAW—APPEAL—REMAND.

Where, on conviction, defendant is sentenced to fine and imprisonment, instead of fine or imprisonment, the case will be remanded for proper sentence.

Appeal from superior court, Lenoir county.

D. G. Taylor was convicted, under Code, § 1006, of carrying concealed weapons, and sentenced to the common jail for four months, and to pay a fine of \$200, and appeals. Remanded for sentence.

Simmons, Pou & Ward, for appellant. The Attorney General, for the State.

PER CURIAM. Remanded for proper sentence. *State v. Walters*, 97 N. C. 489, 2 S. E. 539; *State v. Johnson*, 94 N. C. 803; *State v. Kearney*, 8 N. C. 53.

DILLON v. CITY OF RALEIGH.

(Supreme Court of North Carolina. March 21, 1899.)

MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREET—NEGLECT—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE OF INJURY—EVIDENCE.

1. Under section 3803 of the Code, providing that the commissioners of towns and cities "shall provide for keeping in proper repair the streets and bridges of the town, in the manner and to the extent they deem best," and section 3802, empowering them to abate nuisances, a city is liable for injuries caused by an obstruction erected in a street by a railroad with the permission of the city.

2. In an action to recover for injuries caused by an obstruction in a city street, evidence that such obstruction has been removed since the accident is inadmissible to prove the character of the obstruction.

3. In an action to recover for injuries caused by an obstruction in a city street, evidence that such obstruction has been removed since the accident is admissible to show that such obstruction was unnecessary.

4. When plaintiff's horse, which became frightened and ran into an obstruction in defendant's street, was gentle, and the cause of its fright is unknown, plaintiff cannot be presumed to have been negligent.

5. Where the horse which plaintiff was driving became frightened, and ran into an obstruction in defendant's street, and plaintiff was injured, and no negligence on plaintiff's part is shown, the obstruction, and not the running of the horse, is the proximate cause of the injury.

Appeal from superior court. Wake county; Bryan, Judge.

Action by Hattie N. Dillon against the city of Raleigh. Judgment for plaintiff, and defendant appeals. Affirmed.

Perrin Busbee and Douglass & Simms, for appellant. Argo & Snow, for appellee.

FAIRCLOTH, C. J. This action is based on the alleged omission of duty on the part of the defendant, in failing to keep its streets in repair, and removing obstructions therefrom, in consequence of which the plaintiff sustained personal injuries. There is practically no disagreement as to the facts. Many years ago the city was duly organized as a municipal corporation, with proper municipal officers; and it was laid out in squares and streets, and has so continued to the present time. One of its principal streets leads from the capitol building southward to the corporate limits, and there connects with a public county road, along which street and road the public were accustomed to travel, and on which street the injury occurred. By its charter (Acts 1848-49, c. 82) the North Carolina Railroad was permitted to enter the corporate limits of defendant city, and to cross its streets, and it did cross said street about 15 feet above the level of the street. The railroad runs diagonally across the street, and its stringers are supported by four sets of upright posts or benches standing in the street. These benches are 10 or 12 feet long, and about 12 feet apart. They stand at right angles with the railroad stringers, and form an acute angle of 45 degrees with the direct course of the street. The existence and presence of these upright benches in the street were known to the municipal authorities of the city at and before the date of the injury alleged in the complaint. In January, 1896, the plaintiff, with another lady, was driving a gentle horse along said street, in the direction of the railroad crossing, when suddenly the horse became frightened, without any known cause, and dashed through said benches, and the buggy struck the far-off corner of one of them, and the injury complained of was the result. The issues submitted were: "(1) Was plaintiff injured through the negligence of defendant? Ans. Yes. (2) What damage, if any, is the plaintiff entitled to recover? Ans. \$3,000."

The defendant caused the railroad company to be made a party defendant, and filed a "cross complaint," under section 424 of the Code, against said railroad company,—to which a demurrer was filed, and the cross complaint was dismissed,—alleging that said road was primarily liable for any injury sustained by the plaintiff. While we do not propose to discuss the liability or nonliability of the railroad company, we see no error in the judgment, as no good cause of action was stated in the cross complaint.

In the charter of said railroad company, allowing it to pass through the city limits and

cross its streets, section 26 provides "that the said company [railroad] shall not obstruct any public road without constructing another equally as good and as convenient," etc. The main question presented to this court is, is the city defendant liable in damages to the plaintiff for alleged injury? In some jurisdictions, liability in such cases is implied at common law; but in many of the different states, perhaps in all, we find the matter regulated by special or general statutory provisions. In our state the Code (section 3803) enacts that the commissioners of towns and cities "shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best," etc. And section 3802 says, "They may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens." The duty and power of the municipality thus appear to be ample and complete. If any person shall unlawfully erect an obstruction or nuisance in the streets of a city, and the town authorities shall permit it to remain an unreasonable length of time, the town and tortfeasor are jointly and severally liable to the traveler for an injury resulting therefrom without any fault on his part. The question of primary and secondary liability is for the offending parties to adjust between themselves. The injured party shall have his remedy against either, as they fall under the rule as to joint tortfeasors. Busw. Pers. Inj. § 190.

The evidence that the benches had since been removed was incompetent to prove the character of the obstruction, but was admissible to show that the obstruction was unnecessary. It was in evidence that travelers could and did pass through the bridge safely, when driving a gentle horse, by changing their course to conform to the diagonal direction of the benches. No contributory negligence on the part of the plaintiff is found, nor is there any evidence to support such an issue. The cause of the horse's becoming frightened is unknown. It was gentle and roadworthy, and we cannot, without some proof, impute carelessness in the driver, under such circumstances. The plaintiff evidently lost control of the horse in its flight.

The defendant contends that, as the injury was the result of at least two causes (i. e. the running of the horse, and the presence of the benches in the street), the proximate cause cannot be ascertained, and therefore the plaintiff cannot recover. This is a question of some difficulty, and we believe it has never been passed on by this court. It has, however, been considered frequently in other jurisdictions. It seems to be settled by authority and reason that, when both parties have been equally negligent, the plaintiff cannot recover, unless in cases of continuing negligence. It is still more complicated when the parties have been negligent in different degrees. When it appears that the defendant has been negligent and the plaintiff has not, the plaintiff may recover, although the injury is produced

by the concurrent acts of both parties. It is the duty of corporate authorities to remove dangerous and unnecessary obstructions from the streets, and, "in determining what is proximate cause, the rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." *West Mahanoy Tp. v. Watson*, 112 Pa. St. 574, 3 Atl. 866. "When two causes combine to produce an injury to a traveler on a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for such defect." *Ring v. City of Cohoes*, 77 N. Y. 83. The town cannot be exonerated because other causes co-operate with the obstruction or defect, for under such a rule it never would be liable. The true principle is that the wrongdoer, either by commission or omission, must be held responsible. In *Bunch v. Town of Edenton*, 90 N. C. 431, the duties and liabilities of towns and cities were discussed by Merriam, J. The case was that an adjoining lot owner made an excavation to the line of the sidewalk, and that a footman walking on the sidewalk at night fell into the excavation, and was injured, without any undue care on his part. The excavation was known to the defendant, and there was no railing or guard on the line of the excavation. The court held the defendant liable, and that the negligence of the lot owner, if any, was no defense for the town. On the same subject, see *Russell v. Town of Monroe*, 116 N. C. 720, 21 S. E. 550. Upon this view of the case, it seems unnecessary to express any opinion on the numerous exceptions made, and we see no error in the record. Affirmed.

TROXLER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. March 21, 1899.)

INJURY TO BRAKEMAN — AUTOMATIC COUPLER — FAILURE TO USE — NEGLIGENCE.

1. Failure of a railroad to use automatic couplers in general use, on its freight cars, is negligence per se.
2. The extension by congress of the time within which all interstate railroads are required to use automatic couplers or suffer penalty does not affect a company's common-law liability to its employes for negligence in failing to use equipments for coupling which have come into general use.

Appeal from superior court, Guilford county; Timberlake, Judge.

Action by S. H. Troxler against the Southern Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

F. H. Busbee, for appellant. C. M. Stedman and D. Schenck, Jr., for appellee.

CLARK, J. The plaintiff was injured in attempting to couple cars of the defendant on which there were no automatic car couplers, but in lieu thereof skeleton drawheads, of unequal height. The court below held that the absence of automatic couplers, in general use, was negligence per se, and refused to submit an issue whether the injury was not caused by the negligence of a fellow servant, and refused to instruct the jury, as prayed, that the plaintiff was guilty of contributory negligence if he could, by proper care, have coupled the cars by hand without accident.

The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence cannot be attributed to the negligence of a fellow servant. *Troxler v. Railway Co.*, 122 N. C. 902, 30 S. E. 117; *Wright v. Railway Co.*, 122 N. C. 959, 30 S. E. 348. It has been heretofore held, in *Greenlee v. Railway Co.*, 122 N. C. 977, 30 S. E. 115, that failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence per se, continuing up to the time of an injury sustained by an employe in coupling cars by hand, and renders the company liable, whether such employe was negligent in the manner of making the coupling or not. The same ruling had been previously made as to the duty of furnishing automatic car couplers on passenger trains in *Mason v. Railroad Co.* (1892) 111 N. C. 482, 16 S. E. 698. Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, when the use of such appliances would have prevented the possibility of the injury), there can be no contributory negligence which will discharge the master's liability. This has been repeatedly and uniformly held. *Norton's Case*, 122 N. C. 911, 29 S. E. 886; *McLamb's Case*, 122 N. C. 873, 29 S. E. 894; *Cone v. Railroad Co.*, 81 N. Y. 206. The failure to provide the necessary appliances is the causa causans. The defendant, however, frankly asks us to reconsider and overrule *Greenlee's Case*. That case was the expression of no new doctrine, but the affirmation of one as old as the law, and founded on the soundest principles of justice and reason, to wit: That when safer appliances have been invented, tested, and have come into general use, it is negligence per se for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers. *Witsell v. Railway Co.*, 120 N. C. 557, 27 S. E. 125. This must be so, if masters owe any duties to their employes, and unless economy of expenditures on the part of the railroad management is to be deemed superior to the conservation of the lives and limbs of those employed in their operation. In the twelfth annual report of the Interstate commerce commission (1898), published by authority of the United States government, upon returns made by the railroad companies themselves, it is

stated (at page 88): "Since the enactment of the law in 1893 [requiring automatic couplers] there has been a decreasing number of casualties. There were 1,034 fewer employes killed, and 4,062 fewer injured, during the year ending June 30, 1897, than during the same period in 1893. The importance of this subject will be realized when the yearly casualties to railway employes are compared with those which occurred during the recent war. In the Spanish-American war there were 298 killed and 1,645 wounded. In 1897, there were 1,693 men killed and 27,667 injured, from all causes, in railway service. From coupling and uncoupling cars alone 219 less were killed, and 4,994 less were injured, in 1897 than in 1893, when the law was enacted. The number of such employes killed has been reduced one-half, and the number of injured, also, practically reduced one-half. The reduction in the number of accidents from all causes largely exceeded (by nearly three to one), in a single year, the entire casualties resulting from the prosecution of the late war." Thus, in four years from 1893 to 1897, notwithstanding the increase of thousands of miles of railways, and over 100,000 of employes, and the further fact that the railroad corporations have been able to procure from the interstate commerce commission an extension of the time at which the law of congress imposing a penalty for operating any cars without self-couplers will come into force, the shadow of the law has procured so general an attachment of these self-couplers that 5,213 fewer employes were killed and wounded in coupling and uncoupling cars in 1897 than in 1893. Can it, therefore, be seriously contended that the absence of such safety appliances is not a negligence per se, rendering the railroad company liable for damages? As these appliances have been patented and more or less in use for over 30 years, it should not have required an act of congress to enforce their universal adoption. Failure to adopt them, after being so long and widely known and used, was negligence in the defendant upon the principles of the common law. *Witsell's Case*, supra. The act of congress imposing a penalty for failure to add the appliances, after January 1, 1898, in no wise affected the right of any employe to recover for damages sustained by the negligence of any railroad company to attach them. The action of the interstate commerce commission in extending the date at which such act should come into force (by virtue of authority given in the act) could not set aside the principle of law that failure to adopt such appliances was negligence per se, nor have any other effect than to postpone the date at which the United States government would impose the prescribed penalty upon all railroads engaged in interstate commerce failing to equip all their cars with automatic couplers,—a penalty which is imposed irrespective of whether any accidents occur from such failure or not. The indifference of railroad companies shown in not

adopting these life and limb saving appliances is all the greater since their cost is comparatively small. Indeed the interstate commerce commission, in the above cited report (page 89), state that, considering the less expense required in repairs, they are an actual saving. They say: "Figures submitted by one of the leading railroad companies indicate that the adoption of the automatic coupler will result in saving a very large sum annually, in comparison with the expense incurred in former years in applying and maintaining the link and pin type; and this does not take into account the reduced cost to the roads which must result from fewer suits for damages by injured employes." And, further, that, there being too much slack in the old pin and link for the brake to act economically or successfully, the automatic coupler "makes the requirements of railroad operation better, as well as minimizes the danger to employes." In *Witsell v. Railway Co.*, 120 N. C. 557, 562, 27 S. E. 127, it is said: "If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But not only, as above, the use of self-couplers would be an actual economy to the defendant; but that it is amply able to put on these appliances, if it was not, is shown by the published report of the defendant company that its gross earnings for the year 1896 (when this injury was inflicted) were over \$17,000,000, and its net earnings, over and above all expenses, were more than \$5,000,000 (*Poor, R. R. Manual*, 1898, p. 792),—figures which, for the year just past, have risen to over \$21,000,000 gross earnings and over \$7,300,000 net earnings. With such an array as above of the terrible cost of life and limb by failure to use appliances to avoid coupling and uncoupling cars by hand (in doing which the plaintiff was injured), the small expense—nay, actual economy—of adopting them, and the ample means the defendant possesses, we cannot reverse our ruling in *Greenlee's Case*, that it is negligence per se in any railroad company to cause one of its employes to risk his life or limb in making couplings which can be made automatically without risk.

This matter of requiring these great corporations to protect the traveling public, and their employes as well, by the adoption of all safety appliances which have come into general use, is so important that we have gone into the subject at this length. Ordinarily owned by great syndicates out of the state in which they operate, and their management, at all events, removed from any subjection to that sound public opinion which is so great a check upon the conduct of individuals, and of government itself, the sole protection left to the traveler and the employe alike is the application of that law which is administered impartially, and which can lay its hand fearlessly upon the most powerful combination, and protect with its care the humblest individual in the land. The subject is one of

transcendent importance; for, notwithstanding the partial adoption of these appliances, and consequent reduction in casualties, the twelfth annual report of the Interstate commerce commission shows (page 77) that for the year ending June 30, 1897, on the railroads engaged in interstate commerce (which alone report to that commission), there were still 43,168 casualties, of which 6,437 resulted in death. Of these, 1,693 killed, and 27,667 wounded, were railroad employes, among whom 214 were killed and 6,283 wounded in coupling or uncoupling cars. In our own state, the report of the North Carolina railroad commission for 1898 (pages 250, 251) shows that for the year ending June 30, 1898, the railroads reported 879 persons killed and wounded (of whom 99 were killed), and of these 23 of the killed, and 599 of the wounded, were employes,—total, 622. As, of the 9,000 employes reported in this state, 4,000 (according to the usual ratio) were employes engaged in the actual operation of the trains, it follows that in this state 1 such employe in every 6½ was in that year injured or killed. In view of such mortality, rivaling that of the bloodiest wars, this court cannot reverse its declaration heretofore, which is sustained by every sentiment of justice and humanity, that where a life and limb saving appliance, like automatic car couplers, has come into general use, and its partial adoption has in four years, notwithstanding the increase in railroad mileage and employes, decreased the injuries and deaths from coupling cars one-half, the failure to adopt and use it is negligence per se. Considering the economy in money of using such appliances, as well as the ample revenues of the defendant, it is passing strange that it, or any other railroad company, should have delayed till now, or even till 1895, to protect the lives and limbs of their employes in this particular, or that there should have been need of an act of congress or the verdict of a jury to stimulate considerations of humanity towards their patrons and their employes. Counsel for the defendant read, as part of his argument, a clipping from a newspaper, and repeats in his brief, that a noble English lord, who was a railroad manager as well as an hereditary member of parliament, had changed his party affiliations because the one to which he had belonged had advocated the enforced adoption of self-couplers upon English railways. That simply shows that one such manager, at least, possesses a lordly disregard for the thousands of deaths and injuries of employes yearly caused by the lack of safety appliances; and it may be there are others who entertain sentiments of higher allegiance to the net earnings of the syndicates that employ them than to those great principles which every political party professes to advocate as being for the best interests of the public. But the hostility of one or more railway managers towards the matter cannot affect the impartial enforcement of the sound le-

gal principle that employes and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience, and which have come into general use. In the present case, the defendant has the less excuse because there was uncontradicted testimony, not only that automatic car couplers were in general use at the time of the injury (March, 1895), but that the skeleton drawheads, in attempting to make a coupling with which the plaintiff was injured, were defective in that they were of different heights from the ground, and evidence that the cars could not have been coupled with a stick, or in any other manner, except by hand. No error.

STATE et al. v. WARREN.

(Supreme Court of North Carolina. March 21, 1899.)

BASTARDY—EVIDENCE.

Evidence tending to establish intercourse with another than defendant, about the time the child was begotten, is admissible. .

Appeal from superior court, Sampson county; Robinson, Judge.

Action by the state and one Cannon against William J. Warren. From the judgment, the defendant appeals. Reversed.

F. R. Cooper, for appellant. The Attorney General, for the State.

FUROHES, J. This is a proceeding in bastardy involving the paternity of the child. The mother testified that the defendant was the father, while the defendant testified that he was not. The mother, upon her cross-examination, testified that she never had criminal intercourse with any one but the defendant and one Bagget, who was the father of a former child, but not of this one. The defendant then offered to prove by Bagget that he had sexual intercourse with the mother, the prosecuting witness, about the time she says the child was begotten, and about the time when it must have been begotten, according to the law of gestation. This evidence, upon the objection of the state, was ruled out, and the defendant excepted.

The only issue presented was as to whether the defendant was the father of the child. This was to be found by the jury, but only upon competent evidence. This question has been before the court several times, and the opinions do not seem to be in entire harmony, as is said in *State v. Perkins*, 117 N. C. 698, 23 S. E. 274. In *State v. Patterson*, 74 N. C. 157, it is held that where the prosecuting witness had testified upon cross-examination, as in this case, evidence offered to show that she had had sexual intercourse with another person, for the purpose of contradicting the prosecutrix, was incompetent, and properly excluded. This decision is put upon the ground that

her answer was called out by the defendant, was collateral to the issue, and the defendant was bound by it. This opinion is approved by the court and followed in *State v. Parish*, 83 N. C. 613. In *State v. Bennett*, 75 N. C. 305, the exact point is presented, and the opinion of the court in that case sustains the ruling of the court below in this case. In *State v. Britt*, 78 N. C. 439, the same question was substantially presented that was presented in *State v. Bennett*. But the court undertakes to distinguish *Britt's Case* from *Bennett's Case*, and holds that the evidence was competent. Whether this distinction is very clearly drawn or not, this holding of the court that the evidence was competent has since been followed in the case of *State v. Perkins*, 117 N. C. 698, 23 S. E. 274. These cases are the latest expressions of the court upon the question involved, and, if they are adhered to, there was error in ruling out this evidence.

It seems to us, upon a review of the cases and the "reason of the thing," that this evidence was competent, and should have been admitted. It was incompetent for the purpose of contradicting the prosecutrix, as was held in *Patterson's Case*, *supra*. It was incompetent as corroborative evidence of the defendant, or of *Martin Galney*, as there was no connection between what defendant swore and what *Galney* swore and the fact as to whether *Bagget* ever had intercourse with the prosecutrix or not. To corroborate is to give strength to the testimony of the witness corroborated. Such evidence as that offered may tend to prove the issue, as we think, but it does not give strength to the testimony of defendant or of *Bagget*. Corroborative evidence is always secondary, and is never primary.

But the issue is the paternity of the child, and whatever tends to prove or to disprove the affirmative of this issue is competent. It would not be competent to show that the prosecutrix, years before the birth of the child, had intercourse with some one else. Nor would it have been competent to prove that the prosecutrix at some other time had such intercourse, when it was apparent, from the laws of nature, that the child could not be the result of such intercourse. This would be incompetent, because it did not tend to prove or disprove the affirmative of the issue. To admit such evidence would only be to allow the defendant to attack the character of the prosecutrix in a way not allowed by law. But it seems to us that when the defendant offered to prove that another man had intercourse with the prosecutrix, at the time when, by the course of nature, the child must have been begotten, this evidence bears directly upon the issue, and is competent. It is true that it may not establish the negative of the issue, but, in our opinion, it tends to do so, and that the jury ought to have the right to consider it. It is common on the trial of such issues to allow the child to be exhibited to the jury. *State v. Woodruff*, 67 N. C. 89. This is done by the state, when it is thought it favors the defend-

ant, and by the defendant, when he thinks it favors some one else. And if it is competent to offer the baby as evidence to prove that some one else is the father, why is it not competent to offer the father to show that he is its father? Suppose the mother is a white woman and the defendant is a white man, and the defendant offers a colored man to show that he is the father,—that is, to show that he had intercourse with the prosecutrix at the time when the child must have been begotten by some one,—and the evidence is objected to; and ruled out; the defendant then produces the baby, and it is a mulatto (*Warlick v. White*, 76 N. C. 175),—this is competent; and why not the father? It is true this evidence would differ in its weight; the evidence of a colored child would be stronger (conclusive), while the other might not satisfy the jury, because the evidence might not be true, and, if true, yet the defendant be the father. But still it seems to us that it is such evidence as the jury should be allowed to consider. It seems to us there is an analogy between the cases supposed and this case that tends to sustain the competency of the evidence rejected. There was a motion in arrest of judgment, but this cannot be sustained. Error. New trial.

STATE v. LUCAS.

(Supreme Court of North Carolina. March 21, 1899.)

HIGHWAYS—PUBLIC MAINTENANCE—OBSTRUCTION—INDICTMENT.

1. An indictment charging that defendant, on a certain day, with force and arms, in said county, a certain road, leading to and from a certain church, etc., did willfully and unlawfully obstruct, by putting his fence in said road, against the form of the statute, etc., sufficiently charges a public offense, within Code, § 2065, making it a misdemeanor to "willfully * * * obstruct any highway * * * or road leading from or to any church," etc.

2. A way used for more than 40 years by the general public as a neighborhood road, but never established by legal proceedings or dedication, and not maintained at public expense, is not a public highway, for the obstruction of which by an adjoining property owner an indictment will lie.

Appeal from superior court, Sampson county; Robinson, Judge.

J. H. Lucas was convicted of obstructing a public road, and he appeals. Reversed.

Criminal action for obstructing a road, tried upon the following indictment: "The jurors for the state upon their oaths present, that J. H. Lucas, late of the county of Sampson, on the 20th day of May, 1898, with force and arms, at and in said county, a certain road leading to and from Bethel Church, in Little Coharie township, Sampson county, known as the 'Old Church Road,' leading from the Wilmington and Raleigh road, known as the 'Negro Head Road,' to said church, did willfully and unlawfully obstruct, by putting his fence in the said road, against the form of the statute in such case made and provided,

and against the peace and dignity of the state." The following evidence was not controverted: That the road, the obstruction of which was admitted by the defendant, has been continuously used as an ordinary neighborhood road for many years by the general public, before the erection of Bethel Church, which was in 1856, and after the erection of the church many residents of the neighborhood continued to pass over that part of the road, which defendant has now obstructed, in going to and from said church, but the road was never a public charge. No hands were ever assigned to work it, nor had it ever been laid off or kept up by any court, county, or township authority; nor was it ever laid off, dedicated, set apart, or acquired in any way by any one as a public or church road, except by its use as above stated, and it was not kept open by any one in particular, but was kept open by such residents of the neighborhood as had occasion to use it, and saw proper to do so. The court charged the jury that, if they believed the evidence, the defendant was guilty, to which the defendant excepted. Verdict of guilty. Defendant moved in arrest of judgment, for that the indictment does not charge a criminal offense. Motion denied. Judgment and appeal.

F. R. Cooper, for appellant. The Attorney General, for the State.

CLARK, J. The motion in arrest of judgment was properly overruled. The indictment follows the language of the statute (Code, § 2065), which makes it a misdemeanor to "willfully alter, change, or obstruct any highway, cart-way, mill-road or road leading from or to any church or other place of public worship, whether the right of way thereto be secured in the manner herein provided for or by purchase, donation or otherwise."

As to the exception to the charge, the law is clearly and succinctly stated thus by Reade, J., in *Boyden v. Achenbach*, 79 N. C. 539: "Where the public has used a way as a public road or cartway, just as if it had been laid off by order of court,—as if it had had an overseer and hands, and been worked and kept in order,—for more than 20 years, it will be presumed that it was so laid off, or that the owner of the land had dedicated it to the public; but the mere user of footpaths and neighborhood roads without such accompanying circumstances will raise no such presumption, however long the time. In *State v. McDaniel*, 53 N. C. 284, the jury found a special verdict that the road had been used by the neighborhood for 60 years, in going to church, to mill, and to public highways, on foot, on horseback, and in vehicles, and yet it was not held to be a public road which it was indictable to obstruct." To like purport, *State v. Gross*, 119 N. C. 868, 26 S. E. 91; *Kennedy v. Williams*, 87 N. C. 6; *State v. Johnson*, 33 N. C. 647. It is true that in *McDaniel's Case*, supra, it was held, as the law then stood, that

a road to and from a church, closed up at one end (a "cul-de-sac," as the court termed it), could not be a public road, because not a thoroughfare, and, therefore, that its obstruction was not indictable, whereas chapter 189, Acts 1872-73 (now Code, § 2065), has since made it indictable; but none the less it is still essential, in the absence of a laying out by public authority under Code, § 2062, or actual dedication, not only that there must be 20 years' user, as there was in this case, but the road must have been worked and kept in order by public authority. *Boyden v. Achenbach*, supra. For error in instruction to the jury, there must be a new trial.

GORE v. DAVIS.

(Supreme Court of North Carolina. March 21, 1899.)

MORTGAGE FORECLOSURE—TIME TO ANSWER—JUDGMENT.

1. Where a mortgage authorized foreclosure on default in payment of semiannual interest provided for, a foreclosure suit brought after default, in payment of the first interest installment, before maturity of the note, is not premature.

2. Refusal to grant a defendant further time to answer after the expiration of the term, on overruling his demurrer to the complaint, is, under Code, § 274, within the discretion of the court.

3. A judgment of foreclosure, failing to state what sum is adjudged to be due, is not sufficiently specific, and should be reformed before foreclosure is directed.

Appeal from superior court, New Hanover county; Timberlake, Judge.

Action by D. L. Gore against Rachal Davis for the foreclosure of a mortgage. From a judgment for plaintiff, defendant appeals. Modified.

Iredell Meares, for appellant. John H. Gore, Jr., for appellee.

CLARK, J. The note sued on was dated 19th October, 1897, and payable three years after date, but the interest was made "due and payable semiannually." The mortgage to secure the note specified: "If default shall be made in payment of said bond, or the interest on the same, or any part of either, at maturity," the creditor could proceed to sell the land, and out of proceeds of sale "pay said bond and interest on the same." The defendant failed to pay the interest which fell due 19th April, 1898. By the conditions of the mortgage the principal and interest became due. The demurrer of the defendant, that this action for judgment on the note and foreclosure of the mortgage was premature, was properly overruled. *Capehart v. Detrick*, 91 N. C. 344; *Kitchin v. Grandy*, 101 N. C. 86, 7 S. E. 663; *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 804; *Kliger v. Harmon*, 113 N. C. 406, 18 S. E. 515; *Barbee v. Scoggins*, 121 N. C. 135, 28 S. E. 259. Nor is a

demand or refusal to pay necessary before beginning an action of this nature.

Upon overruling the demurrer, the defendant was entitled to answer at that term (Code, § 272), but the refusal of further time to answer was in the discretion of the trial judge (Code, § 274). The defendant having failed to answer, and the complaint being verified, the court rendered judgment that if \$3,000 (the principal of said note), and interest and costs, were not paid within the time specified in the judgment, the mortgaged premises should be sold after due advertisement, and judgment against the defendant for any deficiency, after applying the proceeds of said sale to the satisfaction of the judgment. The judgment is loosely and inartificially drawn. There is no sum adjudged to be due by the defendant to the plaintiff, which should be done before a foreclosure is directed. It may be inferred upon the maxim, "*Id certum est quod certum reddi potest.*" The judgment should be reformed by the court below to accord with the established form in such cases. This loose practice cannot be encouraged, and the costs of this court will be divided between the parties. Code, § 527. With this modification, the judgment below is affirmed. Modified and affirmed.

A. H. MOTLEY CO. v. SOUTHERN FINISHING & WAREHOUSE CO.

(Supreme Court of North Carolina. March 21, 1899.)

On rehearing. Dismissed.

For former opinion, see 30 S. E. 3.

C. M. Stedman and R. R. King, for petitioner. Bynum & Bynum and A. M. Scales, for respondent.

FURCHES, J. This is a petition on the part of the defendant to rehear and review the former opinion of this court. 122 N. C. 347, 30 S. E. 3. Upon this petition a rehearing has been ordered, but restricted to the constitutional question involved. And upon the rehearing this question has been interestingly discussed on both sides, but there were no new developments in the case; nor was there any phase or aspect of the case presented that had not been presented and considered on the former hearing. There was more elaboration in the argument, and some authorities cited that were not cited on the former argument, but they were only cumulative, and no stronger than those cited before.

It seems to us that the petition and the argument are predicated upon a misconception of the opinion of the court. They seem to be based upon the idea that the court had decided that it was unconstitutional for the legislature to grant the defendant the right to contract against loss. If the court had decided this to be the law, its decision would most

undoubtedly be erroneous. But this is not the case; the opinion does not so decide. The defendant did not contract against loss, as will plainly appear by the receipt copied in the former opinion, which is admitted to contain the contract of the parties. Under this contract and the findings of the jury, the defendant has been guilty of negligence, and is liable to plaintiff in damages, if it is subject to the general law governing the liabilities of warehousemen.

But defendant contends that it is not liable to the same rule of damages that other warehousemen are; that, while they are liable under the general law for the damages caused by their negligence, it is only liable for damages when it specially contracts to be liable, whether the damage was caused by its negligence or not. If this is not a special privilege, not enjoyed by other corporations or by individual citizens, and which could not be granted to them, we are incapable of understanding what would be. It is exclusive because it is a privilege—a thing—that others are excluded from, and not entitled to; and not because it could not be granted to other corporations (if it were constitutional to do so), but because it is not done, and others are excluded from the benefit of this privilege. It was so held in *Simonton v. Lanier*, 71 N. C. 498, and *Staton v. Railroad Co.*, 111 N. C. 278, 16 S. E. 181, cited in the former opinion of this court. And, as these cases seem to be founded upon sound public policy, we have no disposition to overrule them. We do not see that we can add anything more to the argument contained in the former opinion, and will not discuss the matter further. The petition must be dismissed.

CLARK et al. v. BENTON et al.

(Supreme Court of North Carolina. March 21, 1899.)

WILLS—CONSTRUCTION—POSTHUMOUS CHILDREN.

A testator devised certain land in trust for a daughter for life, remainder to her children, if any; if not, to his two youngest children. He then devised other land in trust for his wife for life, remainder to the two children; but, if the wife should bear a posthumous child, it was to share with the two children in the "above land." Held that, on the death of the daughter without issue, the two children and the posthumous child took her share in equal portions.

Appeal from superior court, Iredell county; McIver, Judge.

Partition by T. M. Clark and another against Ola A. Benton and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. B. Connelly, for appellants. Armfield & Turner and L. C. Caldwell, for appellees.

CLARK, J. This was a petition for partition brought by T. M. Clark and Minnie E. Clark against Ola A. Benton, joining W. O.

Benton, her guardian, transferred to the superior court upon issues raised by the pleadings. The result depends upon the proper construction of items 2 and 4 of the will of Alexander Clark, deceased, which are as follows: "Item 2. I will unto my son Alexander Clark, as trustee and in trust to the use of my daughter Mary E. Lemly during her lifetime, and then to her children, if she has any, and, if not, to my two youngest children, Minnie Etta and Alice Rebecca, a piece of land bounded as follows: Beginning at an elm, John Setzer's and my corner [here follow the boundaries]; containing one hundred and fifty or sixty acres, more or less." "Item 4. I will and bequeath unto my son Alexander Clark, as trustee, and in trust to the use of my beloved wife, Clarentine D., the balance of my home plantation during her life, and then to my two daughters, Minnie and Alice R.; and, in case my wife should be in a family way and have a living child, it is to receive an equal part in the above land with Minnie E. and Alice R." It was admitted that Alexander Clark died in the month of August, 1869. It was admitted that Troy M. Clark was 26 years of age at the commencement of this action, and is the posthumous son of Alexander Clark, the testator, born a few months after his death, and is the person mentioned in the fourth paragraph of said will. It was admitted that Alice R. Clark died leaving the defendant Ola A. Benton as her only child and heir at law, and that the said Alice R. Clark has married W. O. Benton. It is admitted that Minnie E. Clark is still living. The land sought to be partitioned is admitted to be the same land as that described in the second paragraph of the will and in the petition. It was admitted on the trial that Mary E. Lemly died in 1896, without issue. The defendant offered Alexander Clark as a witness, who testified that he was the trustee mentioned in the second paragraph of the will, and that Mary E. Lemly received the rents of said land from the death of the testator to her death, in 1896. It is admitted that Troy M. Clark, the plaintiff, has never received any part of the rents of said land.

Upon the foregoing evidence, the judge charged the jury that, if they believed the evidence, they should, in response to the issue, find that the plaintiffs, Troy M. Clark and Minnie E. Clark, and the defendant Ola A. Benton, were each entitled to one-third interest in the land in controversy (described in the second item of the will), and the defendant excepted.

There can be, in our opinion, no reasonable doubt that this was the intention of the testator. By the death of Mary Lemly without issue, the limitation over to Minnie and Alice took effect, and this tract of land became theirs under the will, as much so as that devised in the fourth item; and as such the plaintiff Troy M. Clark is entitled to one-third therein, which renders the shares of the other plaintiff, Minnie E., and the defendant Ola

A. Benton, likewise one-third each, instead of one-half each, as contended by the defendant. Item 4 gives the posthumous child (if there should be one) "an equal part with Minnie E. and Alice R. in the above land"; i. e. not merely in the land devised to them by that clause, but in all that was given them by the will. Being tenants in common, nothing less than adverse possession for 20 years would bar the plaintiffs' right of partition. *Lenoir v. Mining Co.*, 113 N. C. 513, 18 S. E. 73. Indeed, that defense seems to have been abandoned. Affirmed.

CLARK v. BENTON et al.

(Supreme Court of North Carolina. March 21, 1899.)

WILLS—TRUSTS—REMAINDERS.

1. A devise was in trust to two daughters, to be divided when they reached majority; if both died before majority, remainder to two other daughters; and, in case testator had a posthumous child, it was to receive its "proportionable share." *Held*, that the posthumous child took only in case the first two daughters died before majority.

2. One of the first two dying under age, and her survivor attaining majority, she took the whole, and the second two daughters took nothing.

Appeal from superior court, Iredell county; McIver, Judge.

Action by T. M. Clark against Ola A. Benton and another. There was a judgment for defendant Catherine E. Benton, and plaintiff appeals. Affirmed.

Armfield & Turner and L. C. Caldwell, for appellant. J. B. Connelly, for appellee.

CLARK, J. This is also a petition for partition, and involves the construction of the third item of the will of Alexander Clark, deceased, but the parties are different from the preceding case (32 S. E. 555), in that herein T. M. Clark alone is plaintiff, and Ola A. Benton (with her guardian) and Catherine E. Benton are defendants.

Item 3 is as follows: "I will and bequeath unto my son Alexander Clark, as trustee, and in trust to the use of my two daughters, Catherine E. and Margaret A., equally, the lower end of my land, as follows: Beginning at the river bank [here follow the boundaries]; said land to be equally divided when Catherine becomes of age and she receives her part; and, in case either should die before coming of age, then the other is to receive her part; and, in case both should die before coming of age, then said land to go to my two daughters, Minnie E. and Alice R.; and, in case my wife should be in a family way at present and have a living child, then it to receive its proportionable part of the above lands."

It was admitted that Alexander Clark died in the month of August, 1869, and that Troy M. Clark was 26 years of age at the commencement of this action, and is the posthumous son of Alexander Clark, the testator,

and that he was born a few months after the death of the testator, and that he is the person mentioned in the third paragraph of the will. It was admitted that Margaret A. Clark died before she was 21 years old, and without issue. It was admitted that Catherine E. Clark is now the wife of W. O. Benton, and is living. It was admitted that Alice R. Clark died leaving the defendant Ola Benton as her only child and heir at law, and that the said Alice R. Clark was the first wife of W. O. Benton. It was admitted by the parties that Minnie Clark is still living. It was admitted that the land described in the third paragraph of the will and in the petition is the land sought to be partitioned. It was in evidence that the rents of said lands were received by Margaret and Catherine till the death of the former, and since then Catherine had received the rents till the trial.

The plaintiff claimed to be the owner of one-half interest in the land embraced in item 3, above set out, as tenant in common with Ola Benton, who answered claiming sole seisin in herself; and Catherine E. Benton, having been made a party defendant, filed an answer setting up sole seisin and ownership for herself. Upon issues submitted as to the interest of each of the respective parties, the court instructed the jury that, upon the above admissions, they should find that Catherine E. Benton was sole owner. The plaintiff, Troy M. Clark, excepted. The instruction of his honor was certainly correct in excluding Ola Benton from any interest in said land. This item 3 gives the land jointly to Margaret and Catherine, to be equally divided when Catherine becomes of age, and adds: "In case either should die before coming of age, then the other is to receive her part." It being admitted that Margaret died before she was 21 years old, then the whole vested in Catherine, who is living and of full age, and the contingency upon which any interest could devolve upon Alice, through whom her daughter Ola Benton claims, has failed. The sole question admitting of debate is whether Troy M. Clark has any interest in said land. We think not, for the devise is, first, to Catherine and Margaret; second, if either die before becoming of age, then the whole to the survivor; and, third, if both die before coming of age, then to Minnie and Alice; and then, in that event, there is added, "and in case" there is a posthumous child, it is to have its "proportionable part." Taking the second and fourth items of the will, as set out in the preceding case, it seems to have been the intent of the testator (which we are seeking for and wish to effectuate) to give the posthumous child an equal share with Minnie and Alice in the property given in the fourth clause, an equal share in the property in the second item which might devolve upon them by the death without issue of Mary, and now, in like manner, an equal share with Minnie and Alice, should the property given in the third item devolve upon them by the contingency of the death of both Catherine and Mar-

garet before coming of age. The plaintiff's contention would destroy that equality between him and Minnie and Alice by giving him one-half of the tract in item 3, wherein they get nothing, and, if both Margaret and Catherine had died before coming of age, would have cast the whole upon him; thereby defeating entirely the devise over to Minnie and Alice. We think his honor correctly held that the participation of the plaintiff was contingent, as to the property in the second item, upon its devolving upon Minnie and Alice. Affirmed.

STRAUGHAN et al. v. TYSOR et al.

(Supreme Court of North Carolina. March 21, 1899.)

EXECUTORS AND ADMINISTRATORS—SALE OF LANDS—ASSETS—TITLE.

On a special proceeding to sell lands for assets, administrators introduced a deed to their intestate, and showed that he lived on the land until his demise, and that no one else ever cultivated or had anything to do with it. Defendant showed no title from any source, but simply occupation with intestate. On an issue whether intestate was seised and possessed in severalty, the jury were instructed to find in the affirmative if they believed the evidence. *Held*, that there was no error, since, on the principle that possession is implied from title, intestate was not only seised, but possessed, of the land covered by his deed.

Appeal from superior court, Chatham county; Robinson, Judge.

Special proceeding before the clerk of the superior court of Chatham county, by Straughan and Chapin, as administrators de bonis non of Josiah Tysor, deceased, against Missouri Tysor and others, to obtain leave to sell lands for assets. From a judgment granting the relief, defendants appeal. Affirmed.

T. H. Calvert, for appellants. H. A. London and Womack & Hayes, for appellees.

FAIRCLOTH, C. J. This is a petition filed before the clerk by plaintiffs, as administrators d. b. n. of Josiah Tysor, against the defendants, the widow and brother and sisters of said Josiah, for the purpose of selling land for assets. The plaintiffs allege that their intestate died in 1890, seised and possessed of the land described in the petition. The defendants, except the widow, answer and aver that they were tenants in common with said intestate. On the trial of this issue in the superior court, "Was the plaintiffs' intestate seised and possessed in severalty of the lands described in the complaint at the time of his death?" his honor instructed the jury that, if they believed the evidence, to answer the issue, "Yes;" which they did, and judgment was entered directing that the sale proceed, and that the commissioners to sell make their report to the clerk. The plaintiffs introduced as evidence a deed proper in form to convey title to their intestate from his uncle, Harris Tysor, dated and delivered in June, 1868, and proved that their intestate lived on said land until his death, in 1896, and

that no one else ever cultivated the land or had anything to do with it. The defendants proved that Dennis Tysor, father of plaintiffs' intestate and defendants, formerly lived on this land, and that, after the death of Dennis, his widow, daughters, and said Josiah lived on the land until the daughters were married. This was the evidence. There is no question of ouster or adverse possession in the case. The defendants have shown no title from any source, but simply occupation with their brother Josiah until they married. They asserted no claim until this action was instituted. The plaintiffs show title, color of title, and possession in their intestate, and that he alone exercised ownership, by cultivation, etc., until his death, covering a period of more than 26 years after the date of his deed. On the principle that possession is implied from title, in the absence of any adverse claim, until the contrary is shown, we hold that the plaintiffs' intestate was not only seised, but was possessed, of the land in dispute and covered by plaintiffs' deed, and that no error was committed by the court below. Affirmed.

MOREHEAD BANKING CO. v. CITY OF BURLINGTON.

(Supreme Court of North Carolina. March 21, 1899.)

APPEAL—EVENLY DIVIDED COURT—AFFIRMANCE.

Where the justices sitting, are evenly divided, the judgment below stands, not as a precedent, but as the decision in the case.

Appeal from superior court, Alamance county; Timberlake, Judge.

Action by Morehead Banking Company against the city of Burlington. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Bynum & Taylor, C. E. McLean, and W. H. Carroll, for appellant. Winston & Fuller, for appellee.

PER CURIAM. In this case, Justice CLARK did not sit, and the court is evenly divided. According to the settled practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case. *Puryear v. Lynch*, 121 N. C. 255, 28 S. E. 410; *Town of Durham v. Richmond & D. R. Co.*, 113 N. C. 240, 18 S. E. 208, and cases there cited.

Affirmed.

BEAR v. COMMISSIONERS OF BRUNSWICK COUNTY.

(Supreme Court of North Carolina. March 21, 1899.)

JUDGMENT—ESTOPPEL—WAIVER—MANDAMUS—SCHOOLS—COUNTIES—CONSTITUTIONAL LAW—TAX LEVY—NECESSARY EXPENSES.

1. Where, in mandamus to compel payment of a judgment, plaintiff omits to plead his judgment in estoppel of the defense that it was

based on an invalid claim, and goes to the hearing on the merits of the original claim, he waives the estoppel.

2. Under 2 Code, § 2551, requiring the county board of education each year to apportion among the several districts all school funds which were subject to the orders of the school committees for school expenses, to be disbursed by the county treasurer under a separate bond as treasurer of the county board, the control of the county commissioners over the school funds ceased, and hence a judgment against them, based on school orders, was void.

3. Under Const. art. 7, § 7, prohibiting levy of a tax by a county except for necessary expenses, unless by vote of a majority of the voters, mandamus will not lie to compel levy to pay a judgment against a county, unless the debt on which the judgment was based is affirmatively shown to be a necessary county expense.

Faircloth, C. J., and Furches, J., dissenting.

On rehearing. Affirmed.

For former opinion, see 29 S. E. 719.

E. K. Bryan and Frank McNeill, for petitioners. J. D. Bellamy and Shepherd & Busbee, for respondent.

MONTGOMERY, J. This case is before us on a petition to rehear, the first opinion having been filed at the spring term, 1898, and published in 122 N. C. 434, 29 S. E. 719. After further argument, and a closer investigation, we have arrived at the conclusion that there was error in the former opinion in its reversal of the judgment of the superior court. That judgment ought to have been affirmed. The plaintiff, in his complaint, alleged that the defendants were indebted to him in the sum of ——— dollars, due by eight judgments originally had in a court of a justice of the peace, and afterwards docketed by transcript in the office of the clerk of the superior court of Brunswick county, and prayed judgment that the defendants be compelled to levy a tax to pay the judgments and costs. The defendants, in their answer, admitted that the judgments were procured as alleged, but averred that they were not valid and binding against the defendants, for the reason that they were obtained against a former board of commissioners on school claims, for which neither the defendants nor their predecessors were liable in law. The defendants further aver that the judgments were obtained on certain school orders issued about the year 1886 by the school committee men of certain school districts of Brunswick county upon the treasurer of the county board of education, and that they were not a valid charge against the defendants, the board of commissioners, or a charge upon the public funds of the county, or upon any other fund except those expressly set apart for school purposes. And for a further defense the defendants aver that section 7 of article 7 of the constitution of North Carolina prohibits any tax from being collected or levied by any county, city, or town, or other municipal corporation, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein;

and the defendants aver that the consideration upon which the judgments were had was not for the necessary expenses of the county, or for a debt contracted in the manner provided by the constitution. When the case came on for trial, a jury trial was waived, and it was agreed that his honor who presided should find the facts, and the case was heard by the court by the consent of counsel of the plaintiff and of the defendants. What facts could have been in the mind of the counsel except the facts connected with the consideration of the claims on which the original judgments were procured, and those connecting the judgments of 1894, docketed in the superior court by transcript, as being the same judgments which were originally rendered by the justice of the peace in 1888? No other facts could have been referred to, for they were raised by the pleadings; and the defendants, in their answer, had admitted that the judgments had been obtained by the plaintiff, as set out in his complaint. The plaintiff, having failed to plead his judgments in estoppel of the matter set out in the answer, or to demur to the answer, waived his rights as to any advantage which the law had given to his position, and by his agreement to submit the facts to the finding of the court went to the hearing on the merits of the original consideration upon which the judgments were granted. "Numerous decisions in this country and England hold that where a party has an opportunity to plead an estoppel, and voluntarily omits to do so, but goes to the issue on the facts, he thereby waives the estoppel, and the jury is at liberty to find according to the facts of the case. So, where the advantage might have been taken of an estoppel by means of a demurrer, and the party fails so to take advantage of it, he will be held to have waived the estoppel." 8 Am. & Eng. Enc. Law, p. 13, and cases there cited. If the plaintiff intended to avail himself of the full benefit and effect of his judgments, it was incumbent on him to do so by some proper pleading because of the nature of the defendants' answer, for, though mandamus is in the nature of an execution, yet it is in the nature of a civil action. It is commenced by summons, and the pleadings and the practice are the same as are prescribed for the conducting of civil actions. 1 Code, § 623. His honor found as a fact upon the evidence, none of which was objected to, that the original judgments were obtained upon certain school orders issued during the year 1886, and that the judgments of 1894 in the superior court were the same judgments which were obtained before the justice of the peace in 1888, and that there was nothing in the record or judgment of 1894 to show what the cause of action was, except that they were brought on former judgments.

Now, upon his honor's findings of fact, the legal question arises, were school orders issued in 1886 a debt for which the county was liable, and for which the board of com-

missioners could be made to provide by taxation? We think not. The law in force at the time when the school orders upon which the plaintiff's action was brought were issued was 2 Code, c. 15, as amended by chapter 174, Acts 1885. Section 2551 of the Code provides that the county board of education shall, on the first Monday in January of each year, apportion among the several districts all school funds, specifying how much of the same is apportioned to each race, and give notice thereof to the school committees of the several districts of the county. It is further provided in the same section that the sums thus apportioned to the several districts shall be subject to the orders of the school committees thereof, for the payment of the school expenses authorized by law. In section 2555 of the Code it is provided that "all orders upon the treasurer of the county board of education for school money for the payment of teachers, duly countersigned by the county superintendent of public instruction, and all orders for the purchase of sites for school houses and for the cost of building, repairing and furnishing school houses, shall be signed by the school committee of the district in which the school is taught, or in which the site or school house is situated, which orders, duly endorsed by the person to whom the same are payable, shall be the only valid vouchers in the hands of the treasurer of the county board of education, to be paid out of the funds apportioned to the district in which the school house is erected." The county treasurer of each county was required to receive and disburse the public school funds, not under his general bond, but under a separate bond, conditioned for the faithful performance of his duties as treasurer of the county board of education. The county board of education were empowered, if they deemed it necessary, to require the treasurer of the county board of education to strengthen his bond, and for any breach of that bond action was to be brought, not by the county commissioners, but by the county board of education. 2 Code, § 2554. The treasurer of the county board of education was required to open accounts with each public school district, and report yearly to each school committee the amount apportioned to the respective districts for the year, and to the county board of education the amounts received from all sources for public-school purposes. From this review of the law in force when the school orders were issued upon which the plaintiff's judgments were obtained, it appears that there was a complete separation of the school funds from the general county fund upon the apportionment being made, and from that time all control of the same by the county commissioners ceased; that the funds were taken charge of by the treasurer of the board of education under a separate bond; that the disbursements were made by that officer under orders signed by the school committees; that the accounts of the school

fund were kept between that officer and the several school committees, and a report, yearly, to the county board of education made of all receipts of school funds by him; and the amount apportioned to each district was the fund out of which school orders were to be paid. The county, therefore, through the board of commissioners, was not liable for the debt upon which those orders were issued. If the amount apportioned to the district or districts upon whose committee or committees the orders were drawn had been in the hands of the treasurer of the board of education, and he had defaulted in their payment, then the law required action for such default to be instituted against that officer and his bond. If there never had been in the treasurer's hands any funds to meet those orders, because they were improperly issued, then there was no liability on either the county or the treasurer. But, besides the view of this case, as expressed above, we are of the opinion that, before mandamus can be issued to compel the board of commissioners of a county to levy a tax to pay a judgment against the commissioners, the plaintiff (judgment creditor) must show affirmatively by the record or other competent evidence that the consideration of the debt upon which the judgment was obtained was of such a character as to fall under the head of ordinary or necessary county expenses. Any other view of the law would enable a board of county commissioners to levy a tax to pay a debt reduced to judgment by confession or by default, which debt, under section 7 of article 7 of the constitution, the county would be prohibited from contracting, unless the question was submitted to a vote of the qualified voters of the county. Such a course would, in effect, be a convenient method, whenever the county commissioners might choose to do so, of destroying a most salutary provision of the constitution. It would be equivalent to holding that, by a rule of pleading, a plain provision of the constitution can be abolished. No technical learning based on the rules of pleading can force us into such a conclusion. The prayer of the petitioners must, therefore, be granted. The case must be reheard, and the judgment of this court entered therein at the spring term, 1898, must be set aside, and judgment entered at this term affirming the judgment of the superior court. Prayer of the petitioners granted.

FAIRCLOTH, C. J. (dissenting). On this petition to rehear I am unable to agree with the opinion of a majority of the court.

The facts: The plaintiff, in 1888, instituted several actions before a justice of the peace against defendant board of county commissioners. The only matter filed in the nature of a complaint was "claim," and stating the amount of each. No denial of the claim nor any defense was made by the defendants, and judgments were entered in each case for the amount of the claim and costs. These judgments were not paid, and they were dock-

eted in the superior court on September 29, 1893. In 1894 the plaintiff obtained judgments upon these former judgments, and it does not appear that defendants then made or offered any defense. In the present action, by consent of parties, his honor found the facts in these words: "That the judgments sued on in the complaint were obtained in the year 1894, in certain actions brought on former judgments obtained in 1888; that the cause of action on which said judgments of 1888 were obtained were school claims, as alleged in the answer; that there was nothing in the record or judgments of 1894 to show what the causes of action were, except that they were brought on former judgments."

This action for mandamus, to compel defendants to levy a tax and pay said judgments, was before us at last term by appeal from the superior court refusing to grant the writ, and this court held that was error, and reversed the judgment below. In this proceeding the defendants answer, and deny the validity of the judgments, and plead section 7 of article 7 of the constitution, and aver that said school claims are not a necessary expense of the county. I shall not further remark on the effect and force of the judgments, as I did so for the court in this case supra. The case of *Young v. Town of Henderson*, 76 N. C. 420, is decisive. The court now admits the integrity of the judgments, that they cannot be impeached, and that the matters therein in issue are *res adjudicata*, and puts its opinion on the ground that the consideration is a debt, not for a necessary county expense. Passing over the competency of evidence in the executionary stage of the cause, to go behind the judgments to set up a defense which was open to the defendants before the judgments were entered, we must consider whether the expense of the public common county school system is a necessary expense. What is a necessary expense is a question for the court, whenever the question arises. It is necessary for the good, safety, and happiness of the whole people that certain benefits and improvements shall be recognized as necessary expenses. The public school system tends to improve the manners, morals, and material condition of the people in the march of civilization. This court has often said that the building of court houses, public roads, and bridges are necessary expenses. *Vaughn v. Board*, 117 N. C. 434, 23 S. E. 354. We have said that waterworks is not a necessary expense of a corporation (*City of Charlotte v. Shepard*, 120 N. C. 411, 27 S. E. 109), and that electric lights are not a necessary corporate expense (*Mayo v. Board*, 122 N. C. 5, 29 S. E. 343). In *Lutterloh v. Commissioners*, 65 N. C. 403, it was held: "Where a party has established his debt against a county by judgment, and payment cannot be enforced by an execution, he is entitled to a writ of mandamus against the board of commissioners of said county to compel them to levy a sufficient tax to pay off and discharge his said

judgment." It does not appear that it then occurred to any layman or lawyer that ex-cutionary process was inhibited by section 7 of article 7 of the constitution, which was then in force. The opinion of the court refers briefly to that case, but fails to distinguish it from the present case. Every necessary expense in the whole list is such by force of the law, written or unwritten. Public education is a cherished object of our constitution and of our legislature and people. It is of vital importance to society and to the state. Is it less so than a public bridge across a stream, which can be crossed by a common ferryboat? Section 27, art. 1, Const., declares that "the people have the right to the privileges of education, and it is the duty of the state to guard and maintain that right." Section 4, art. 9, makes a most liberal provision for funds for the purposes of education, and commands that they "shall be faithfully appropriated for establishing and maintaining in this state a system of free public schools, and for no other uses or purposes whatsoever." Section 15, art. 9, empowers the legislature to require every child within the prescribed age to attend the public school, unless educated by other means. Finally, section 2, art. 9, declares "that the general assembly * * * shall provide by taxation, and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the state." I have thus quoted to show how important and necessary the constitution considers the subject of public education. Every one knows that much machinery is necessary to perform this command of the organic law. Are not teachers necessary? And who will teach if his undisputed "school claim" cannot be collected, as this plaintiff's cannot be, if the remedy he prays for is withheld by this court? The court cites no authority whatever in support of its position, except the case of *Rodman v. Town of Washington*, 122 N. C. 39, 30 S. E. 118. Let us examine that case. The defendants were proceeding to levy and collect a tax under a special act (chapter 343, Laws 1897) to meet the expenses of a corporation graded school, and the plaintiff obtained an injunction on the ground that the act was not passed according to the constitution (section 7, art. 7), as construed by a majority of this court. This was admitted by the defendants, but they insisted that the expense was a "necessary expense," in the spirit of that article. It was also admitted that the tax, if levied, would largely exceed the constitutional limit of taxation. The court held that, while it favored public education, it could not hold that a tax over and beyond the constitutional limit is a necessary corporation tax, that the act in that respect was void, and affirmed the judgment. I am unable to see how that case supports the defendants' contention as to a necessary county expense to support the public school system, when neither the record nor the opinion refers to that question. My

conclusion is that the petition ought to be dismissed, and that the writ of mandamus should issue.

FURCHES, J., concura.

WHETSTONE v. LIVINGSTON.

(Supreme Court of South Carolina. March 30, 1899.)

NEW TRIAL—NOTICE OF APPEAL—SERVICE—STATEMENT OF COUNSEL—APPEARANCE—WAIVER—JURISDICTION—COURTS.

1. The statute requiring a motion for new trial to be "made" within five days after judgment does not require it to be "heard" within that time.
2. Magistrate's return, showing notice of appeal, while sufficient to show service of the notice on the magistrate, is insufficient to show service on respondent, as required by Code, § 360.
3. Statement of counsel in argument that the opposing party appeared, and was represented at the hearing below, will not be considered, where the "case" does not show it.
4. Appearance of counsel to object to the jurisdiction is not a waiver of proof of the notice on which the jurisdiction depends.
5. Question of jurisdiction may be raised at any time by the parties or by the court of its own motion.

Appeal from common pleas circuit court of Orangeburg county; W. C. Benet, Judge.

Action by W. L. Whetstone against Leslie Livingston. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Glaze & Herbert, for appellant. W. C. Wolfe, for respondent.

McIVER, C. J. This case was originally tried before a magistrate and a jury, on the 17th of February, 1898, and judgment was rendered in favor of plaintiff. In the "case," as prepared for argument here, we find a paper of which the following is a copy: "To W. L. Whetstone: Take notice that the defendant, Leslie Livingston, in the above-entitled case, through his counsel, has moved for a new trial, on the grounds (see copy attached), which they have filed with me, dated the 21st February, 1898. I have named Friday, 25th day of February, 1898, 8 p. m., to hear argument on said motion. Given under my hand and seal, this 21st day of February, 1898. [Signed] W. Arthur Johnson, Magistrate. [L. S.]" The magistrate's return is as follows: "The case was tried on February 17, 1898. Notice for a new trial was served on February 21, 1898, which motion was heard on 25th of February, 1898." It is stated in the "case" that "this motion was refused, and the defendant appealed to the circuit court. The following also appears in the magistrate's return: 'Notice of appeal was served on March 2, 1898.' The record does not show affirmatively any proof of service of the motion for a new trial or appeal upon the plaintiff (respondent) or his attorney. When this case was called by the pre-

siding judge at the September, 1898, term of the court, for the purpose of hearing the appeal from the magistrate's court, the attorney for the plaintiff (respondent) raised the question of jurisdiction, and contended that, inasmuch as the motion for a new trial made in the magistrate's court had not been heard within five days after the trial and verdict, the court had lost jurisdiction of the case, and moved to dismiss the appeal for want of jurisdiction. After argument, the presiding judge made the following order dismissing the appeal: "The appeal in the above-stated case coming on to be heard before me, and after hearing counsel pro and con, now, on motion of W. C. Wolfe, attorney for respondent, ordered that the said appeal be, and hereby is, dismissed, for the reason that, the motion for a new trial antecedent to the appeal to this court not having been made before the magistrate within five days after rendition of judgment, the magistrate's court was without jurisdiction in hearing the said motion, and that this court is therefore without jurisdiction, notice of appeal not having been served within the time fixed by the statute; following *Doty v. Duvall*, 19 S. C. 143. [Signed] W. C. Benet, Presiding Judge. Sept. 29, 1898." From this judgment defendant appeals upon the several grounds set out in the record, only one of which (the second) need be stated here, as the others raise, substantially, the same questions: "(2) Because the presiding judge erred in holding and deciding that, the motion for a new trial antecedent to the appeal to the circuit court not having been made before the magistrate within five days after rendition of judgment, the magistrate's court was without jurisdiction in hearing the said motion, and that the circuit court was without jurisdiction, notice of appeal not having been served within the time required by the statute."

It appears, therefore, that his honor, Judge Benet, dismissed the defendant's appeal from the order of the magistrate refusing his motion for a new trial upon two grounds: (1) Because such motion was not made within five days after the rendition of judgment, and hence the magistrate had lost jurisdiction to hear such motion; (2) because no notice of appeal to the circuit court was served within the time required by statute, and hence the circuit court had no jurisdiction to hear the appeal.

It will be observed that the "case" shows that, when the attorney for plaintiff (respondent) appeared in the circuit court and moved to dismiss the appeal for lack of jurisdiction, he based his motion upon the ground that the motion before the magistrate for a new trial "had not been heard," not that it had not been made, within five days; and it will also be observed that the record before Judge Benet showed, on its face, that the motion was made before the magistrate within five days, as the notice addressed to plaintiff, and signed by the magistrate, expressly states

that defendant "has moved for a new trial, on the ground (see copy attached), which they have filed with me, dated the 21st February, 1898,"—which notice bears date 21st of February, 1898, less than five days after the rendition of judgment, although the motion was not heard or decided until after the expiration of the five days, as the magistrate appointed the 25th of February, 1898, "to hear argument on said motion." In view of these facts thus appearing upon the record, we are bound to conclude that Judge Benet, in stating in his order that the motion was not made within the five days, either wholly disregarded the facts before him (a supposition which cannot, for a moment, be entertained), or that he really meant that the motion was not "heard" within the five days. If so, then there was error, as will be seen by reference to the case of *Speer v. Meschtine*, 46 S. C. 509, 24 S. E. 331, where Mr. Justice Jones, in delivering the opinion of the court, after stating the provisions of the statute, uses these words: "It will be seen that the limitation is that the motion must be made, and is not that the motion must be decided, within five days from the judgment." Besides, under the settled rule, when a party is allowed a given number of days within which to do any act, he is entitled to do the act at any time up to the last moment of the last day allowed. Hence, under this rule, the defendant was entitled to the whole of the time allowed, even up to the last hour of the fifth day, to make his motion for a new trial, and, if he availed himself of this privilege, it would be impossible for the motion to be heard and determined within the five days. A construction of the statute leading to such a result cannot be adopted, as it would tend to defeat the very object of the statute. So that we do not think that the first ground upon which the circuit judge rested his order can be sustained.

The second ground, however, is much stronger, and must be sustained. If the notice of appeal to the circuit court was not given within the time prescribed by statute, then that court could not take jurisdiction of the appeal. The record contains no evidence whatever that this notice of appeal was ever served, either upon the respondent or his attorney, and there is no evidence allunde of that fact. The statement appearing in the magistrate's return, that "notice of appeal was served on March 2, 1898," while sufficient, as an admission, to show that the magistrate was served with the notice of appeal, does not show, or even purport to show, that either the respondent or his attorney was ever served with any notice of appeal; and the statute (Code, § 360) expressly requires that the notice of appeal must be served, not only upon the magistrate, but also upon the respondent or his attorney. It is no part of the functions of magistrates either to serve or to certify to their service. That duty falls within the province of the executive officer of the court, and the fact of the service

can only be shown either by the certificate of such officer, or by the affidavit of the individual who makes the service, or by the admission of the party served, unless such evidence be waived by the voluntary appearance of the party in court; but not where, as in this case, such appearance was only for the purpose of raising the question of jurisdiction. Indeed, as was said in *Perkins v. Douglass*, 46 S. C. 6, 24 S. E. 42, the notice and grounds of appeal, in a case like this, constitute no part of the return which the magistrate is required to make, as the statute (Code, § 362) only requires the court below to make a return to the appellate court "of the testimony, proceedings, and judgment," which, as was said in that case, "of course meant the proceedings in the court below, and did not embrace the notice and grounds of appeal, which followed, and were not a part of the proceedings in the court below." That case was cited by counsel for appellant for the purpose of showing that the fact that it did not appear by the return of the magistrate that respondent had, in due time, been served with the notice of appeal, was not fatal to the appeal. But the wide difference between that case and the case now under consideration is that, in *Perkins v. Douglass*, while the return of the magistrate contained no evidence that the respondent had ever been served with notice of appeal, yet there was evidence allunde before the circuit judge that the respondent had been served, in due time, with the notice; but here there is no evidence whatever, either allunde or otherwise, that either respondent or his attorney had ever been served with the notice of appeal.

It is true that it is stated, in the argument of counsel for appellant, that "the plaintiff (respondent) was present at the hearing of the motion for a new trial, and took part in the argument, and was also represented at the hearing of the appeal below, and is still represented here by counsel learned in the law"; but these facts do not appear in the "case," and, as this court has repeatedly held that facts appearing only in the argument of counsel cannot be considered by this court, we cannot take notice of any fact, unless it appears in the "case," and must confine our attention to the facts there stated, and there it appears that counsel for plaintiff only appeared in the circuit court for the purpose of raising the question of jurisdiction, and his argument before this court is addressed solely to the same question. Surely, an appearance for such a purpose cannot be held to be a waiver of proof of the very fact upon which alone the question of jurisdiction turns.

It may be said that the question raised by the second ground, upon which the circuit judge based his order, was not presented by plaintiff's counsel when he moved to dismiss the appeal in the circuit court for want of jurisdiction. But it is well settled that, even in this court, a question of jurisdiction may be raised at any time, either by the parties or by the court of its own motion. *Lowry v.*

Thompson, 25 S. C. 416, 1 S. E. 141, which has been recognized and followed in several subsequent cases. Upon the same principle, we cannot doubt that a circuit judge may, of his own motion, raise a question of jurisdiction, and, if he is satisfied that he cannot take jurisdiction of the case, he may dismiss the case upon that ground. Of course, if he errs in so doing, this court may correct such error. But in this case we do not think that Judge Benet erred in granting the order upon the second ground upon which it is based. The judgment of this court is that the judgment or order of the circuit court be affirmed.

MOODY et al. v. DICKINSON.

(Supreme Court of South Carolina. March 28, 1899.)

REVIEW — APPEAL — NOTICE OF INTENTION — PRESUMPTION — CLERICAL ERROR — CORRECTION — FORECLOSURE SALE — TITLE OF PURCHASER — IMPROVEMENT.

1. Unless the contrary affirmatively appears, a notice of intent to appeal will be presumed given in time.

2. The court may properly allow an appellant to correct a mere clerical error in the title of his notice of intention to appeal, not prejudicial to appellee.

3. The title of a purchaser at a foreclosure sale cannot be impeached by a defendant who voluntarily withdrew from the case.

Appeal from common pleas circuit court of Barnwell county; R. C. Watts, Judge.

Action by H. J. Moody and others, as heirs of M. A. Moody, against F. H. Dickinson. From an order overruling a demurrer to the answer, and from a judgment for plaintiffs, defendant appeals; and from an order permitting defendant to amend the notice of his intention to appeal, plaintiffs appeal. Affirmed.

The following is the second defense set forth in the answer, including the covenant made a part thereof:

"(1) The defendant alleges that on the 11th day of December, 1891, he executed and delivered to Henry J. Moody, the husband of plaintiff, a conveyance of the said described tract of land, and at the same time the defendant and the said Henry J. Moody entered into a solemn covenant, wherein the said Moody assumed and undertook to perform certain trusts and obligations therein minutely and particularly set forth, for their mutual benefit and advantage, and that said conveyance was intended solely to enable the said Moody to execute the trusts and obligations he had assumed, and was wholly without other consideration whatsoever, a copy of which covenant is hereto attached, and made part of this answer. (2) The said Moody, disregarding the terms of his solemn covenant, and intending to mislead, deceive, and defraud this defendant, procured an action to be brought in this court, in which a large number of persons were made parties, this defendant being made a party defendant in said action; and

on the petition of the Union Mortgage Banking & Trust Company of London, another defendant therein, the said action was removed from this court into the United States circuit court, and by the contrivance of said Moody, and with his consent, and the consent of other parties to said action, in collusion with him, a decree of said court was obtained, whereby the lands of this defendant embraced in said conveyance were to be sold from time to time, until the said lands conveyed to said Moody were sold and disposed of. (3) That pending the action in said United States court, and before said decree, an order was made by said court dismissing the plaintiff's bill as to this defendant; and in the said action none of the rights of this defendant, legal or equitable, were either considered or adjudicated. (4) That, at the sales from time to time of defendant's lands under the decree of said United States court in said action, this defendant gave notice that he was the owner and in the possession of said lands; and the said Henry J. Moody, the husband and agent of the plaintiff herein, was present when the said described tract of land was sold, and purchased the same in the name of the said plaintiff, and subsequent to said sale, on a rule to obtain possession of said premises, the said United States court refused to require this defendant to surrender the possession of said premises to said plaintiff; all of which facts herein set forth and alleged being well known to plaintiff by and through her said husband and agent. A copy of the order of said court is attached hereto, and made a part of this answer. (5) That said Henry J. Moody has not only failed and refused to fulfill and perform his solemn trusts and obligations set forth in said covenant, but has deceitfully and fraudulently used said covenant and his trusts as instruments of injury and damage to this defendant; subjecting this defendant to onerous litigation and expense, and defeating the scheme of said covenant. Wherefore defendant demands that the complaint herein be dismissed, with costs."

"South Carolina, Barnwell County. Whereas, we, Henry J. Moody and Frank H. Dickinson, both of the county aforesaid, are owners in the fee of the two parcels of land laid off and set apart for the building of the town of Seigling, on the Carolina Midland Railroad, the said H. J. Moody being the owner of all the land lying north of the Orangeburg road, and the said Frank H. Dickinson being owner of all the land south of said road, to be included in, become part of, said town, making together — acres; and whereas, the said Frank H. Dickinson, in consequence of ill health and other causes, is unable to give such attention to the sale of lots in said proposed town or to adjacent lands, as is desirable and necessary for the progress and advancement of said town; and whereas, there are now two mortgages covering the entire tract of land owned by said Frank H. Dickinson, one to the Union Mortgage Banking &

Trust Company, for three thousand five hundred dollars, dated May 24th, 1880, and recorded in clerk's office, in Book 5, T, page 284, and the other to W. H. Wroten, agent, for five hundred and thirty-eight dollars, recorded in Book 5, R, page 402, the interest in the former mortgage payable annually being now due, and both principal and interest, in the second mortgage being now due; and whereas, the said Frank H. Dickinson by his deed the 11th day of December A. D. 1891, did convey to me, the said H. J. Moody, in fee simple, the said tract of land, consisting of four hundred and twelve acres, more or less, and being the same land covered by said mortgages, and parties who are anxious to purchase lots in said proposed town have refused to do so, in consequence of said incumbrances, but are willing to purchase and invest, if warranty of their titles are given by me, the said H. J. Moody: Now, therefore, I, Henry J. Moody, in consideration of the premises, and in consideration, also, of the sum of five dollars to me in hand paid by the said Frank H. Dickinson, do hereby covenant and agree, to and with the said Frank H. Dickinson, to sell and convey and make warranty in my own name to all persons purchasing lot or lots from me, or any part of said lands conveyed to me by the said Frank H. Dickinson, in such manner and at such price and on such terms as shall be to the greatest benefit and advantage to the parties hereto, and to the interest and advancement of the proposed town, and, when sales of any portion of said lands are made, that the proceeds thereof shall be applied to the payment of the interest and principal of the mortgages hereinbefore described; that the said Henry J. Moody shall take receipts for all amounts paid out, and vouchers, which shall disclose his actings and doings in the premises, and on demand of the said F. H. Dickinson shall exhibit the same, and when said mortgages are paid, or when by mutual consent this agreement shall be revoked and discontinued, I, the said Henry J. Moody, for myself, my heirs, executors, and administrators, agree to convey to the said Frank H. Dickinson, his heirs and assigns, the lands remaining unsold or unbargained for, in fee and absolute; and I, the said Frank H. Dickinson, for myself, my heirs, executors, and administrators, agree that should the said Henry J. Moody have, during the existence of this covenant, paid out, either by way of interest or principal on said mortgages, any sum of money, or bound himself to so pay out any sum, in excess of the proceeds of the sale of any of the lots, or lands included in my deed to him, that, whenever this agreement or covenant shall be revoked or discontinued, the said lands so conveyed by me, F. H. Dickinson, to the said Henry J. Moody, shall stand as security for the excess so paid out, and the said Henry J. Moody shall hold the title to said lands until all legal and proper demands by him shall be fully satisfied and discharged. In witness whereof, we, the said Frank H.

Dickinson and the said Henry J. Moody, have affixed our hands and seals this eleventh day of December, A. D. one thousand eight hundred and ninety-one. H. J. Moody. [L. S.] F. H. Dickinson. [L. S.]

Patterson & Holman, for plaintiffs. J. J. Brown, for defendant.

McIVER, C. J. This action was commenced on the 19th of May, 1897, by one M. A. Moody against the defendant, to recover possession of certain real estate alleged to be in the possession of the defendant. The complaint was in the usual form, and the defendant answered, setting up two defenses: (1) A general denial of all the allegations contained in the complaint, except "that the defendant is in possession of said described tract of land"; (2) a special defense, which will hereinafter be more particularly referred to. The original plaintiff, M. A. Moody, having departed this life intestate on the — day of September, 1897, leaving as her heirs at law her husband, H. J. Moody, and the following named children, to wit, J. P. Moody and L. M. Cave (née Moody), the present plaintiffs, they applied for and obtained on the — day of November, 1897, from his honor, Judge Ernest Gary, an order substituting the persons named in the title of this opinion as parties plaintiff in lieu of the original plaintiff, M. A. Moody, deceased, and authorizing them to prosecute said action in the same manner and to the same extent as the said M. A. Moody could have done, were she still living. The case came on to be heard before his honor, Judge R. C. Watts, and a jury, at March term, 1898. When the pleadings were read, plaintiffs demurred to the second defense set up in the answer, upon the ground that the facts stated therein were not sufficient to constitute a defense. The circuit judge sustained the demurrer, and the case went to the jury upon the issues raised by the first defense, who found a verdict in favor of the plaintiffs, upon which judgment was duly entered. From the order overruling the demurrer, and from said judgment, defendant gave notice of his intention to appeal, which, it is conceded, was given in due time. But, in framing his notice of his intention to appeal, defendant's counsel, through inadvertence, entitled the notice as follows, "H. J. Moody, as administrator, Plaintiff, against F. H. Dickinson, Defendant," instead of "H. J. Moody & Others v. F. H. Dickinson," as it should have been; but it does not appear that the notice of intention of appeal was returned by plaintiffs' counsel for this or any other reason. But defendant's counsel, having soon afterwards discovered the mistake in the title of his notice of appeal, gave notice to plaintiffs' counsel that he would move before his honor, Judge Watts, "to amend the notice of appeal by striking out the word 'administrator,' and adding the names of J. P. Moody and L. M. Cave to the name of H. J. Moody, plaintiff." The

circuit judge, after hearing argument of counsel representing the respective parties, granted an order, in which, among other things, he says: "I am satisfied that the notice of appeal was served in due time and in good faith; * * * that the notice of appeal was amply sufficient to apprise plaintiffs of the case to which it had reference; that there was no such case on the calendar as 'H. J. Moody et al., Plaintiff, against F. H. Dickinson, Defendant,' and that the error of inserting the name of 'H. J. Moody, Administrator,' instead of 'H. J. Moody et al.,' in the notice of appeal, was excusable inadvertence, arising from confusion of different cases on the calendar, and the defective notice of appeal, with objections stated, should have been returned at once to the party serving it, which was not done; that the plaintiffs have not been misled or surprised, nor will they be delayed by allowing the proposed amendment." He therefore ordered, among other things, "that the amendment asked for be allowed, that the amended notice of appeal be served on the plaintiffs' attorneys within ten days from this date, and that defendant's attorneys be allowed to prepare and serve their case and exceptions within thirty days from the date of this order," which bears date 21st April, 1898. From this order plaintiffs' attorneys gave notice of their intention to appeal, which notice bears date 2d of May, 1898, and afterwards served their exceptions, which bear date 10th May, 1898. In the meantime, however, defendant, in accordance with the leave granted by Judge Watts, gave another notice of appeal from the ruling of the circuit judge sustaining the demurrer, and from the judgment entered on the verdict, which is properly entitled, which bears date 26th of April, 1898. There are, therefore, two appeals before us in this case: (1) The plaintiffs' appeal from the order of the circuit judge allowing the defendant to amend his notice of intention to appeal by correcting an inadvertent clerical error in the title of such notice; (2) the appeal of the defendant, which substantially affects the merits of the case. We will first consider the plaintiffs' appeal, because that seems to be the most natural order.

If, as is contended for in plaintiffs' exceptions to the order of the circuit judge, he had no jurisdiction to hear or consider the same, then such order could have been disregarded with impunity, and the plaintiffs' remedy would have been by a motion in this court to dismiss the appeal upon the ground that no notice of intention to appeal was given within the time prescribed by law; but there is nothing in the "case" showing that any notice of any such motion was given. If, however, such a motion had been made before this court, it could not have been granted, under the facts as set forth in the "case." It there appears that a notice of intention to appeal, properly entitled, bearing date the 26th of April, 1898, was given; and there is nothing in the "case" which shows that the time

for giving such notice had then expired, for there is nothing to show when the court rose, and, for naught that appears, such notice may have been given within the prescribed time, for the law allows 10 days after the rising of the court within which the notice of intention to appeal may be given in a case tried by a jury, as this was, and a motion to dismiss an appeal upon such grounds cannot be granted, unless it appears affirmatively that the time allowed had expired before this notice was given. It is true that it is stated in one of plaintiffs' exceptions that no notice of appeal was given within the time allowed, and the same statement is made in the argument of plaintiffs' counsel; but this court has so often held that no fact which appears only in the exceptions or in the argument of counsel can be considered, that we need not say more upon the subject. It may be said that this view rests upon a mere technicality, but it must be remembered that the appeal of plaintiffs also rests upon technical grounds; and as is said in *Ware v. Miller*, 9 S. C. 16, "Parties who assail others upon the purely technical grounds should be careful to see that their mode of attack is itself technically accurate." Of course, we are not to be understood as saying that the question of jurisdiction presented by plaintiffs' exceptions is technical. But what we do mean to say is that the ground upon which plaintiffs attack defendant's appeal is purely technical. There can be no doubt that plaintiffs did have notice of defendants' intention to appeal, within due time, and the effort to take advantage of a mere clerical error in the title of the notice, by which they were in no way prejudiced or misled, seems clearly technical.

Under this view, plaintiffs' appeal cannot be sustained, without regard to the question whether there was error in the order granting leave to defendant to amend a mere clerical error in the notice of intention to appeal first served. But, as that question has been made, we may say that we are not prepared to hold that there was any error in allowing the defendant to correct a mere clerical error in the title of his notice of intention to appeal, whereby it is not even claimed that plaintiffs were misled or in any way prejudiced, and were not delayed; for the case was prepared for hearing, and was actually heard by this court, at the first term at which it could have been heard, in any event.

We will next consider the appeal on the part of the defendant, which substantially raises the single question whether there was error in sustaining the demurrer to the second defense set up in the answer. For a full understanding of this question, the reporter should set out in his report of this case a copy of the second defense, including the covenant which is made a part of the answer. It is sufficient to state here, in general terms, that, as we understand it, defendant's second defense is based upon certain transactions between the defendant and H. J. Moody, the

husband of the original plaintiff, M. A. Moody, in which it is not alleged that she was in any way implicated. These transactions may be substantially stated as follows: On the 11th day of December, 1891, the defendant, being then the legal owner of the land now in dispute, conveyed the same to the said H. J. Moody, subject, however, to the lien of two antecedent mortgages, one in favor of the Union Mortgage Banking & Trust Company, to secure the payment of \$3,500, and the other in favor of W. H. Wroten, to secure the payment of \$538. On the same day (11th of December, 1891) the said parties (H. J. Moody and the defendant) entered into the covenant above referred to, whereby Moody undertook to sell said land, apply the proceeds to the payment of said mortgages, and account to defendant for any surplus of the proceeds of such sale. Subsequently, but at what time is not stated, an action was brought in the court of common pleas for Barnwell county, in this state, to which a large number of persons were made parties, including the Union Mortgage Company, above referred to; and the same was, on the petition of said company, removed into the United States court, where a decree was made directing a sale of said lands. Under that decree the lands here in dispute were sold by the special master appointed for that purpose, and bid off by the original plaintiff in this case, M. A. Moody, who received titles for the same. There are allegations of fraud and collusion against H. J. Moody in procuring the said action to be brought, and in obtaining the order of the sale in the United States court, which need not be particularly stated, as it is not alleged that the original plaintiff, M. A. Moody, was in any way implicated in such fraud or collusion. An order of his honor, Judge Simonton, is set out in the "case," from which it appears that the action above referred to was brought by C. M. Edenfield and others against the Union Mortgage Company and others, among whom was the present defendant, F. H. Dickinson, who answered in full; but, on exceptions to his answer being sustained, it was withdrawn, and said Dickinson then demurred to the bill upon the ground that no cause of action, as against him, was stated. Thereupon, by consent of all parties, the bill was discontinued as to Dickinson, and he ceased, from that date, to be a party to the action. Subsequently a decree of foreclosure and sale was made, at which Mrs. M. A. Moody became the purchaser of the land in dispute, and a conveyance in fee was made to her by the special master. It seems that Mrs. Moody, after receiving her title, demanded possession from defendant, F. H. Dickinson, who refused to comply with her demand. She thereupon applied to the United States court for a rule to show cause why said Dickinson should not be attached for a contempt, in refusing to surrender the possession of said land; and, upon hearing the return to the rule to show

cause, Judge Simonton granted the order above referred to, discharging the rule, solely on the ground that Dickinson was not a party to the case in the United States court when the decree of foreclosure and sale was made, without undertaking to adjudicate the legal rights of the parties. From the foregoing statement, it seems to us very clear that there was no error in sustaining the demurrer to the second defense set up in the answer. None of the allegations therein contained impair the title of Mrs. Moody, which she acquired by purchase at a judicial sale under a decree made in a cause to which the defendant was originally a party, and from which, by his own act, he withdrew; and he cannot now impeach the title of the purchaser at such sale. It may be possible (though as to that we decide nothing, as the question is not before us) that the defendant, if he had not voluntarily withdrawn from that case, might have made the questions in that case which he is now seeking to raise. Or it may be that he still has a good ground of complaint against the said H. J. Moody for his acts and omissions under the covenant above referred to. But even conceding, though not deciding, that such is the case, we are unable to see how that could affect the title of Mrs. Moody, or her heirs at law, who stand in her shoes. All that we mean to say in reference to this particular matter is that nothing which we have said is to be regarded as precluding the defendant from taking such action against H. J. Moody as he may be advised. The judgment of this court is that the judgment of the circuit court be affirmed.

PICKENS v. SOUTH CAROLINA & G. R. CO.

(Supreme Court of South Carolina. March 25, 1899.)

CARRIERS—FAILURE TO TRANSPORT—NEGLIGENCE—DAMAGES—QUESTION FOR JURY—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. An action against a railroad company for its negligence in failing to transport plaintiff to her destination, in accordance with a ticket which she purchased of it, is an action of tort.

2. In an action against a railroad company for willful failure to transport plaintiff to the destination called for by her ticket, whether damages received by plaintiff from a storm which overtook her after leaving defendant's depot were proximate or too remote was for the jury, depending on whether the storm was reasonably to be expected or extraordinary.

3. Where different inferences may be drawn from the same testimony, the inference to be drawn is for the jury.

4. Under a complaint alleging willful failure to carry plaintiff to her destination, and damages resulting from a storm after leaving defendant's depot, evidence that plaintiff was annoyed by negroes at and about the depot, and by defendant's failure to have a fire therein, was competent to show what caused her to leave, though she did not claim to have been injured by a failure to provide suitable accommodations therein.

5. It was otherwise competent as evidence of the circumstances of the willful wrong alleged, to be considered in estimating the amount of punitive damages.

6. From evidence that a railroad company sold a passenger a ticket over a leased road, knowing it would cease to operate it before the time to which the ticket was limited would expire, willful failure to transport her over the leased line after the lease had expired, and while the ticket was good, may be inferred, though failure to operate the same was not willful.

7. In an action against a railroad company for its willful failure to transport a passenger over a leased line, evidence that its lease had expired, and that it was not in its power, was competent on the question of willfulness.

8. Verbal inaccuracies in the court's preliminary statement of the pleadings, which could easily have been corrected, if attention had been called thereto, are harmless error.

9. It is error to charge that certain facts constitute negligence, when there are other relative facts in evidence.

10. Portions of a charge, which, considered alone, are objectionable, are not erroneous if, when construed with the whole charge, the objections are not apparent.

11. Unless all propositions of law in a request to charge are correct, it is properly refused.

Appeal from common pleas circuit court of Aiken county; R. O. Watts, Judge.

Action by Lucy H. Pickens against the South Carolina & Georgia Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Joseph W. Barnwell and Henderson Bros., for appellant. G. W. Croft & Son and J. W. De Vore, for respondent.

GARY, A. J. The complaint sets forth two causes of action, the first of which is as follows: "(1) The first paragraph alleges the corporate existence of the defendant. (2) That at the said times the defendant was operating, in connection with its railroad, the Carolina, Cumberland Gap & Chicago Railway; the same being a line of railway running from the city of Aiken, in this state, to the town of Edgefield, also in this state, and then owned by the Carolina, Cumberland Gap & Chicago Railway Company, which was also a corporation created by and under the laws of this state. (3) That on or about the 31st day of March, 1896, the plaintiff, for a valuable consideration, purchased of the defendant company, at the depot of the Carolina, Cumberland Gap & Chicago Railway, at the town of Edgefield, a round-trip ticket, which entitled the plaintiff to passage from the town of Edgefield over the railway of the said Carolina, Cumberland Gap & Chicago Railway Company, via the said city of Aiken, thence over the railway of the defendant company to the city of Augusta, in the state of Georgia, which said ticket was limited to a period of ten days from the date of issuance. And that the plaintiff did, accordingly, on or about the — day of March, 1896, board a passenger car of defendant at Edgefield, and in due course of travel was carried by virtue of said ticket to the said city of Augusta; and, after remaining in said city several days, the plaintiff did, on

or about the — day of April, 1898, and within the period limited by said ticket, board the train of the defendant company for the purpose of returning to the town of Edgefield upon said ticket, as was provided by the terms of the contract thereon stated, but that, when the plaintiff reached the city of Aiken on the said return trip, the defendant, in disregard of its said contract as contained upon said ticket, and of the rights of the plaintiff, negligently failed to carry, or to provide for the carriage of, the plaintiff from said city of Aiken to the said town of Edgefield, and left her in said city of Aiken. And the plaintiff further alleges that, by reason of the failure of the defendant to carry her back to said town of Edgefield, she was exposed to a severe storm of sand, wind, and rain, which brought on her a severe attack of sickness, and caused her to be confined to her bed and house for upward of two months, and caused her severe pains and suffering, and has thereby caused her health to be permanently impaired, so that she is not as strong and healthy as she was before being exposed to said storm, through the negligence of the defendant in not providing her with passage back to the town of Edgefield as aforesaid, to the injury and damage of the plaintiff in the sum of two thousand dollars." The second cause of action is similar in its allegations to the first, except it alleges that the defendant's wrongful act was willful, grossly negligent, and in wanton and reckless disregard of the plaintiff's rights, and that she was damaged in the sum of \$5,000.

The jury rendered a verdict in favor of the plaintiff for \$3,000, and the defendant appealed upon exceptions, the first of which is as follows: "(1) That his honor, Judge Watts, the presiding judge, erred in permitting the plaintiff, as a witness upon the stand, against the objection of the defendant, to testify that she was caught in a storm of sand and rain after she left the depot of the defendant company at Aiken, and to testify that she received injuries from said storm; for the reason, it is submitted, that this action is for a breach of contract, and not a tort, and such damages are too remote, and would not enter into the proper measure of damages for the causes of action set forth in the complaint."

The first question raised by this exception is whether the action is for a breach of contract or a tort. The allegations of the first cause of action are appropriate to an action of tort arising from negligence, and the second cause of action is founded upon a tort growing out of alleged willfulness or intentional wrong. The cases of *Head v. Railway Co.* (Ga.) 7 S. E. 217, *Purcell v. Railroad Co.* (N. C.) 12 S. E. 954, and *Hansley v. Railroad Co.* (N. C.) 20 S. E. 528, as well as many others that could be cited, show that an action of tort can be brought for such alleged violations of duty; and the case of *Hammond v. Railroad Co.*, 6 S. C. 130, which was an action by a passenger to recover damages for

injury caused by defendants' negligence, shows that the recital of the contract was not for the purpose of "founding a right to a recovery for the breach of the contract." The court further says: "It was not referred to as the foundation of his action. It may be that his complaint would not have been open to any exception, if he had omitted all reference to it. It was introduced to show that he was not an intruder on the train of the company. It was merely preliminary to the statement of his real cause of action; and, if necessary to its support, he could have offered proof of it without setting it out in his complaint." Parenthetically, we may remark that the cases of *Purcell v. Railroad Co.* and *Hansley v. Railroad Co.*, *supra*, are in seeming conflict; but, when carefully considered, it will be seen that the court reached the correct conclusion in each of them. In the case of *Purcell v. Railroad Co.*, the intentional wrong of the defendant was the direct cause of the injury; while in the case of *Hansley v. Railroad Co.*, an efficient cause intervened, to wit, the breaking of the axle, which was not intentional.

The second question raised by this exception is whether the testimony therein mentioned should have been excluded on the ground that it tended to prove damages that were too remote. The subject of proximate and remote damages has been prolific of discussion by text writers and judges. It has frequently been before this court for consideration, and it has been found difficult to formulate a general rule by which each case could be determined. In the case of *Harrison v. Berkley*, 1 Stro. 525, which was an action for damages against a shopkeeper who sold liquor to a slave, in violation of the statute, in consequence of which he became intoxicated, and died from exposure, the rule is thus stated: "Only the proximate consequences shall be answered for. 2 Greenl. Ev. 210, and cases there cited. The difficulty is to determine what shall come within that designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be would often depend upon the power of the microscope with which we should regard the affair. Various cases show that in search of the proximate consequences the claim has been followed for a considerable distance, but not without limit, or to a remote point. 8 Taunt. 535; Peake, 205. Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connection is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person in-

tervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequences than the first injurious act. 8 East, 1; 1 Esp. 48. It is therefore required that the consequences to be answered for should be natural, as well as proximate. 7 Bing. 211; 5 Barn. & Adol. 645. By this I understand, not that they should be such as upon a calculation of chances would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued, one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural, to constitute legal damage, it seems that, in proportion as one quality is strong, may the other be dispensed with; that which is immediate cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed. *Bennett v. Lockwood*, 20 Wend. 223." Leaving the depot was the natural consequence of the defendant's failure to provide transportation for the plaintiff from Aiken to Edgfield; and, in view of the frequency and suddenness with which storms arise in this country, it cannot be said that the injury from the storm was "the intervention of any such extraordinary result as that the usual course of nature should seem to have been departed from." At least, this was a question to be determined by the jury. More than one inference could have been drawn from the testimony, and, when this is the case, it is always a matter for the consideration of the jury. This exception is overruled.

The second exception is as follows: "(2) That his honor erred in permitting the plaintiff, whilst a witness on the stand, against the objection of the defendant, to testify that she was annoyed by the depot not having fire therein, and by the rude talking, and singing and dancing, and rude conduct generally, of some negroes at and about the depot, for the reason that there were no allegations in the complaint to which said testimony was responsive; the complaint simply alleging negligence in the failure to carry, and not negligence of any other kind, nor general negligence." While there are no allegations in the complaint that the plaintiff suffered injury as the result of the defendant's failure to provide suitable accommodations at the depot in Aiken, the testimony was nevertheless competent, as explanatory of the reasons that induced the plaintiff to leave the depot; thus tending to throw some light upon the causal connection between the alleged wrongful act of the defendant and the injury resulting therefrom. Furthermore, the second cause of action alleged that the defendant's wrongful act was willful. In 16 Am. & Eng. Enc. Law, 392,

395, it is said: "The element which distinguishes actionable negligence from criminal wrong or willful tort is inadvertence on the part of the person causing the injury. He may advert to the act of omission of which he is guilty, but he cannot advert to it as a failure of duty,—that is, he cannot be conscious that it is a want of ordinary care,—without subjecting himself to the charge of having inflicted a willful injury, because one who is consciously guilty of a want of ordinary care is, by implication of law, chargeable with an intent to injure; malice being but the 'willful doing of a wrongful act.' * * * Negligence and willfulness are the opposites of each other. They indicate radically different mental states. The distinction between negligence and willful tort is important to be observed, not only in order to avoid a confusion of principles, but it is necessary in determining the question of damages, since, in case of an injury by the former, damages can only be compensatory, while in the latter they may also be punitive, vindictive, or exemplary." The complaint alleged intentional wrong, and the plaintiff had the right to introduce testimony having only a remote causal connection between the alleged wrongful act and the injury resulting therefrom, in order that the jury might have all the facts and circumstances before them, in estimating the exemplary damages. This exception is overruled.

The third exception is as follows: "(3) That his honor, the presiding judge, erred in refusing to grant the nonsuit moved for on the part of the defendant at the close of the plaintiff's testimony, for the reason, it is submitted, that there was not a particle of testimony to support said second cause of action; no testimony having been introduced to show that the alleged failure of the defendant to provide transportation for Mrs. Pickens to Edgfield was on account of gross negligence, willfulness, malice, or wantonness." Before referring to the testimony, we will state some general principles relating to the subject of torts. (1) In 16 Am. & Eng. Enc. Law, 389, actionable negligence is defined as "the inadvertent failure of a legally responsible person to use ordinary care, under the circumstances, in observing or performing a noncontractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." (2) Ordinarily it is a question to be determined by the jury whether the injury was caused proximately or remotely by the defendant's wrongful act, and this is the rule in all cases when the facts are susceptible of more than one inference. (3) In actions of tort founded simply upon negligence, the injury must be the natural and proximate result of the defendant's wrongful act. The rule is practically the same in actions for damages arising from a breach of contract. (4) In an action for a willful tort, the jury has the right to take into consideration two elements of damages: First, compensation for the injury sustained, as to which the plaintiff is confined

to a recovery of such damages as flow naturally and proximately from the wrongful act; and, second, the conduct of the defendant, for which the plaintiff is entitled to recover exemplary damages, sometimes called punitive or vindictive damages. The exemplary damages are in addition to the compensatory damages. *Duckett v. Pool*, 34 S. C. 311, 13 S. E. 542. There are cases which decide that, when the wrongful act was willful, the plaintiff can recover for consequences of which the original wrongful act of the defendant was only a remote cause; but this is not sound in principle. The correct rule is that, when the plaintiff is entitled to damages arising from defendant's intentional wrong, the jury has the right to take into consideration those causes even remotely contributing to the injury, not for the purpose of giving damages for the injury thus caused, but that they may have in view all the facts and circumstances of the case in awarding the exemplary damages. (5) Willfulness is the foundation of a recovery for exemplary damages, and such damages are not recoverable unless the wrongful act was willful or intentional. *Hansley v. Railroad Co.*, supra. We are aware that there are expressions in the case of *Quinn v. Railway Co.*, 29 S. C. 381, 7 S. E. 614, which are not in accord with this last proposition. That case, however, as to this question, is not sound in principle. Both the cases upon which it rests are in harmony with the foregoing proposition. We will now refer to the facts.

It seems to be an undisputed fact that, when the defendant sold the ticket, it knew that it would cease to operate the leased road before the time within which the plaintiff had the right to return upon the ticket would expire; and from this fact the jury might have inferred willfulness on the part of the defendant in failing to provide some suitable transportation for the plaintiff, even if they had been satisfied that the failure to operate the leased road was not willful. The presiding judge therefore properly refused the motion for a nonsuit.

The fourth exception is as follows: "(4) That his honor, the presiding judge, erred, it is submitted, in excluding, upon the objection of plaintiff's counsel, the testimony of Edwil Parsons and Wilbur Herbert, taken in New York, and presented to the court, they being witnesses on the part of defendant; for the reason, it is submitted, that said testimony was responsive to the issues raised in the case, and especially to the issues raised in the second cause of action set up in the plaintiff's complaint, and denied by the defendant in its answer,—that the failure to provide transportation and to carry Mrs. Pickens from Aiken to Edgefield was because of gross negligence and willful and wanton action of the defendant company." This testimony is not set out in the "case," but the statements therein contained show that it was directly responsive to the issue as to the alleged intentional wrong on the part of the

defendant, which constituted at least part of the damages for which the jury rendered a verdict. It seems that the time fixed for the expiration of the lease had been agreed upon even before the plaintiff bought her ticket, and that at the time of the alleged injury the defendant was not operating the leased road. While the jury might have inferred willfulness from other facts, still it was pertinent to the issue as to willfulness for the defendant to show that the failure to operate the leased road at the time of the alleged injury was not a willful disregard of its duty as a common carrier, and that it was not in its power at that time to operate the said road. This exception is sustained.

The fifth exception is as follows: "(5) That his honor, the presiding judge, erred, it is submitted, in stating the allegations of the complaint, when he charged the jury as follows: 'She further alleges that she boarded the train, and went to Augusta, and within ten days' time she took the train to return from Augusta to Edgefield via Aiken, and when she got to Aiken the railroad negligently refused to furnish her transportation.' And in further charging the jury that she alleged in the complaint that 'she was forced to hunt lodging in the town of Aiken, and by the negligence of the railroad company she was forced to do this, and while hunting lodging she was caught in a sand storm.' Whereas, it is submitted that the complaint did not allege that the defendant company refused to furnish Mrs. Pickens transportation, but that it simply failed to furnish transportation; and whereas, it is nowhere alleged in the complaint that Mrs. Pickens was forced by the negligence of the railroad company 'to hunt lodging' in Aiken, the complaint saying no such thing; and this charge of the judge, especially when taken in connection with his charge on the facts, tended to mislead the jury." The expressions in this exception were used by the presiding judge in his preliminary statement of the issues made by the pleadings, and any mistake in stating them could easily have been corrected if the matter had been called to his attention. Even if there was error, it was harmless; and this exception is overruled.

The sixth exception is as follows: "(6) That his honor, the presiding judge, it is submitted, erred in charging the jury as follows: 'I charge you, as matter of law, that if you find from the evidence in this case that Mrs. Pickens got on the train in Augusta in ten days' time, and got to Aiken, and the railroad did not furnish her with any transportation from Aiken to Edgefield, then it is guilty of negligence, and she will be entitled to recover at your hands whatsoever she has sustained by the negligence of the railroad company,'—for the reason, it is submitted: That the judge therein invaded the province of the jury, granted to it under the constitution, when he said what facts, or series of facts, would amount to neg-

ligence." Negligence is ordinarily a mixed question of law and fact. The court should instruct the jury as to the principles of law governing in such cases, and the jury should determine whether, in applying the law to the facts of the particular case, they constitute negligence. *Samuels v. Railroad Co.*, 35 S. C. 493, 14 S. E. 943; *Bridger v. Railroad Co.*, 25 S. C. 30. Whenever the facts introduced in evidence for the purpose of proving negligence are susceptible of more than one inference, it must be determined by the jury, and in this case they were susceptible of more than one inference. It was error to charge that certain facts constituted negligence, when there were other facts brought out in evidence relative to this question. As this case must be remanded for new trial, it is deemed best not to discuss the facts in this respect, as it might tend to prejudice the rights of one or the other parties to the action. This exception is sustained.

The seventh exception is as follows: "(7) It is submitted that his honor erred in charging the jury as follows: 'In other words, if the testimony satisfies you that the plaintiff arrived here in Aiken, and there was no way to carry her from Aiken to Edgefield, and she was forced to leave the depot and hunt lodging, and if, in leaving the depot, she was exposed to the inclemency of the weather, and by reason of that exposure sickness was brought on, and she suffered, and was sick, and her health was impaired, then I charge you, as matter of law, if you believe that if it had not been for the negligence of the railroad in not providing her with transportation to Edgefield, which forced her to leave the depot to hunt lodging, and exposed her to the inclemency of the weather, then I charge you, as matter of law, that she is entitled to whatever damages she has sustained by reason of that sickness, if you find that the railroad was the prime cause of that,—the negligence of the railroad company. In other words, if you believe from the testimony that Mrs. Pickens arrived at Aiken, and if the South Carolina & Georgia Railroad Company had had cars to carry her on to Edgefield, and she could have remained at the depot till she got on the train, and would not have been exposed to that storm, but would have been in the depot or the train, not forced to leave the station or depot, and by reason of not having the train there she did go out, and was exposed, and got sick, then I charge that the railroad company would be liable for damages, if it was the negligence of the railroad company that forced her to leave the depot and get in this storm; and she would be entitled to damages whatever she had sustained by reason of this negligence.' For, it is submitted, that his honor invaded the province of the jury in this charge, in several particulars: In that he gave them, practically, his opinion that she was forced to leave the depot and hunt lodging by the railroad not having a train to

take her away, and in that he especially told them, in effect, that there was a storm, when one of the material questions of the case, and one disputed by the defendant, was that there was no storm. And, further, that he erred in laying down the measure of damages in this case,—that Mrs. Pickens could recover damages for any injury which she received from any storm which may have existed.'" When the language of the presiding judge in this exception is considered in connection with the entire charge, it will be seen that he did not invade the province of the jury in the particulars therein mentioned; and this exception is overruled.

The eighth exception is as follows: "(8) It is submitted that his honor erred in charging the jury as follows: 'I charge you further that if the railroad company was negligent in furnishing her transportation, and she was forced to hunt quarters, and in hunting quarters she encountered a storm, as alleged in the complaint, and that brought about sickness, she would be entitled to recover whatever damages, in your opinion, she would be entitled to.' For that, it is submitted, there is no allegation in the complaint that the plaintiff was forced to hunt quarters, or that she attempted in any way to hunt quarters; and it is further submitted that this measure of damage laid down by his honor was too remote, upon the cause of action set forth in the complaint." Standing alone, the part of the charge contained in this exception would be erroneous, as it does not state that the injury must be the natural and proximate result of the defendant's wrong; but, when this part of the charge is considered in connection with the whole charge, it will be seen that the presiding judge impressed upon the jury these requirements of the law. This exception is overruled.

The ninth exception is as follows: "(9) It is submitted that his honor erred in refusing to charge, and in not charging, the defendant's first request to charge, as follows: 'First. As to the compensatory damages claimed by the plaintiff under the first cause of action set forth in the complaint in this action, the jury is charged that said cause of action, as set forth in the complaint, complains of a breach of contract for not carrying Mrs. Pickens from Aiken to Edgefield, as it is claimed the defendant had undertaken to do, and that no complaint is made as upon a tort. In such action for breach of contract, the measure of damages is "that only such damages should be given as were fairly within the contemplation of the parties as the possible result of the breach of contract at the time it was made, or such as might reasonably be expected to arise naturally and directly therefrom." In such cases, damages can only be recovered as are produced directly by the act of the defendant, and no damages can be recovered that are produced by a remote cause. If there was a breach of contract on the part of the defendant, and Mrs. Pickens suffered any damages

caused directly thereby, for such she can recover; but, if she has suffered injury from any intermediate efficient cause other than being left at Aiken, she cannot recover damages therefor. And the jury is charged that if she has suffered injury because of a storm in which she was caught, away from the depot, that such is not a direct cause, but a remote cause, and she cannot recover damages therefor, or flowing therefrom.' Whereas, it is submitted that said first request so refused is in accordance with law, and the principles thereof applicable to this case." It has been shown that the first and second causes of action are both founded upon tort, and not upon a breach of contract. The presiding judge could not have charged that, if the plaintiff suffered injury because of a storm in which she was caught, such is not a direct cause, without invading the province of the jury. This question is disposed of by what was said in considering the other exceptions. This exception is overruled.

The tenth exception is as follows: "(10) That his honor erred, it is submitted, in refusing to charge the defendant's second request, as follows: 'Second. As to the damages claimed under the first cause of action, which is for a breach of contract, the jury is further charged that in this case it is not claimed in the pleadings that any personal injury was inflicted on the person of the plaintiff by the defendant company; and, such being the case, she cannot recover any damages for worry and mental excitement, and for inconvenience and annoyance, such as are felt at every disappointment of one's expectations, nor for pain of mind, because the law is that no such elements of damage can be taken in consideration, unless there be physical injury.' Whereas, it is submitted that the said second request so refused is in accordance with law, and the principles thereof applicable to this case." Unless all the propositions of law embodied in a request to charge are correct, the presiding judge does not commit error of law in refusing to charge as therein requested. As the first cause of action was not for a breach of contract, the presiding judge did not err in refusing the request to charge; and this exception is overruled. It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

McIVER, C. J., concurs. POPE, J., concurs in result.

JONES, J. I concur in the result. I do not think there was a particle of evidence to sustain the second cause of action, and the motion for nonsuit as to that cause of action should have been granted. Moreover, I am satisfied that injury resulting from a storm which suddenly arose after plaintiff voluntarily left the depot is too remote from the alleged negligence of the defendant, which was failure to provide transportation. Such injury is the result of an efficient intervening cause, and is not the

natural and proximate result of the alleged negligence, any more than if some one had robbed or injured her on her way from the depot.

SUMNER et al. v. HARRISON et al.

(Supreme Court of South Carolina. March 11, 1899.)

PARTITION—ISSUES OF TITLE—SUBMISSION TO JURY—DEEDS.

1. Where, in partition, two defendants set up different titles in themselves, one cannot complain that the issue of title between himself and the other defendant was submitted to a jury, as well as that between himself and plaintiff, though the court's order setting the case for trial apparently limited it to the last-named issue, since all the issues of title raised by the pleadings should be submitted to the jury.

2. A deed, in the usual form for conveying title in present, provided that the grantee should hold the premises in trust for 20 years after the grantor's death, for the use of the grantor's children, dividing the rents and profits among them, and at the end of the period he could sell, and divide the proceeds per stirpes among the grantor's descendants. The usual habendum clause was added. *Held*, that the deed conveyed the title in present.

Appeal from common pleas circuit court of Spartanburg county.

Action by Jane Sumner and others against A. M. Harrison and others. There was a judgment for defendant S. T. McCravy, trustee, and defendant Elizene Harrison appeals. Affirmed.

The following is the deed from Jane Harrison to S. T. McCravy, as trustee:

"State of South Carolina. Know all men by these presents that I, Jane Harrison, in the state aforesaid, for and in consideration of the love and affection I have for my children, E. J. Harrison, A. M. Harrison, Jane Sumner, Mary Walker, W. H. Harrison, Christian Strange, Massie Varner, and J. A. Harrison, and to secure to them the rents and profits of the following described premises, and in consideration of the sum of five dollars to me paid by S. T. McCravy, of the county of Spartanburg, in the state aforesaid, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said S. T. McCravy, all the lot or parcel of land lying and being in the county of Spartanburg and state aforesaid, and bounded on the north by Alex Prewitt, and on the west by Nancy Cathcart, and on the south and east by A. M. Harrison and F. L. Linder, and containing seventy-one acres, more or less. For more particular description see plat made by W. C. Camp, Esq., in partition suit. In trust, nevertheless, and it is the true intent and meaning of these presents, that the said S. T. McCravy shall hold the said premises, for the term of twenty years from and after the date of my death, for the sole use and behoof of my said children, or those of them who may be alive at that time, or their children, per

stirpes. And the said S. T. McCravy shall have the power, and he is hereby authorized, to rent the said premises, to collect the rents, and, after paying the expenses, to divide the balance among my said children or their grandchildren equally, per stirpes; and after the expiration of twenty years from my death as aforesaid the said S. T. McCravy shall have the power, and he is hereby authorized, to sell the said premises at public or private sale, on such terms as he might think best for my said children, and to divide the proceeds of such sale among said children equally, per stirpes, and to make good and sufficient titles to the purchaser or purchasers of said premises. Together with all and singular the rights, members, and hereditaments and appurtenances to the said premises belonging, or in any wise incident or appertaining. To have and to hold, all and singular, the said premises before mentioned, unto the said S. T. McCravy, as trustee as aforesaid. And I do hereby bind myself, and my heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises unto the said S. T. McCravy, trustee as aforesaid, against me and my heirs, lawfully claiming or to claim the same, or any part thereof.

"Witness my hand and seal this fourth day of September, in the year of our Lord 1883, and in the 108th year of the sovereignty and independence of the United States of America.

her
"Jane X Harrison. [Seal.]
mark.

"Signed, sealed, and delivered in the presence of S. M. Rice, John W. McCravy.

"State of South Carolina, County of Spartanburg. Personally appeared before me S. M. Rice, and makes oath that he saw the within named Jane Harrison sign, seal, and as her act and deed deliver the within written deed, and that he, with J. W. McCravy, witnessed the execution thereof. S. M. Rice.

"Sworn to before me this 12th day of January, 1884. J. Jennings, Notary Public. [Seal.]"

Nicholls & Jones, for appellant. Bomar & Simpson, for respondents.

McIVER, C. J. This action was brought by plaintiffs, as some of the heirs at law of Jane Harrison, deceased, for the partition of a tract of land on which said Jane Harrison lived, "and of which plaintiffs alleged that she died seised and possessed." Others of the heirs of Jane Harrison were made defendants, and Elizene Harrison and S. T. McCravy, as trustee, were also made defendants, "under an allegation that they claimed some interest in the land." No copy of the complaint is set out in the "case," and we know nothing of the allegations contained therein, further than as above briefly stated. The answer of Elizene Harrison is set out in the "case," in which—First, she denies each and every allegation contained in the complaint; and, second,

she alleges "that at the time therein specified [when that was we do not know] she was, and now is, in lawful possession of said premises, by virtue of a deed executed by Jane Harrison to this defendant, for valuable consideration, whereby said Jane Harrison conveyed to her in fee simple the whole of the land described in the complaint,"—and she therefore demands judgment that the complaint be dismissed. The answer of S. T. McCravy is likewise set out in the "case," in which, admitting certain allegations in the complaint, and denying others (what such allegations were we have no means of ascertaining), he answers further, setting up title in himself, as trustee under a deed from Jane Harrison, a copy of which is appended to his answer as a part thereof. Further answering, he says that the claim of title set up by the defendant Elizene Harrison is based solely on a pretended deed, which he avers is, and always has been, absolutely null and void, because made long after the deed under which he claims title to the land in question, and, further, because, when executed, said Jane Harrison was not competent to make a deed. Wherefore he demands judgment, among other things, that the title to said land may be adjudged to be in him, and not in the said Elizene Harrison.

A copy of this answer was served on the defendant Elizene Harrison on the 27th of July, 1896, and was returned the same day, but for what reason does not appear. The case was placed on calendar 2 for trial, and on the 7th of August, 1896, his honor, Judge Witherspoon, passed the following order: "It appearing to the court that the defendant Elizene Harrison has set up by her answer a claim to the land involved in this suit, and it being proper that such issue shall be referred to a jury for trial, it is ordered that this cause be docketed on calendar 1 for trial at the next term of court, for the purpose of trying the issue raised by the said defendant. Let the cause remain as now docketed on calendar 2 for the trial of any other issues that may properly be triable by the court." The cause came on for trial at November term, 1897, before his honor, Judge Aldrich, and a jury. The counsel for defendant Elizene Harrison raised the point "that, under the order of Judge Witherspoon, the only issue to be submitted to the jury was the issue of title between plaintiffs and Elizene Harrison, raised by her answer. The point was overruled, and the issue of title between the defendants Elizene Harrison and S. T. McCravy was also submitted to the jury." The deed under which the defendant Elizene Harrison claims title to the premises in question was introduced in evidence. It bears date on the 19th of November, 1894, and is in the usual form of a conveyance in fee simple, with covenants of warranty. It does not appear to have been either probated or recorded. The deed under which the defendant S. T. McCravy, as trustee, claims title to

the premises was likewise introduced in evidence. It bears date the 4th of September, 1883, and was probated on the 12th of January, 1884, and it was admitted by counsel at the hearing that it was recorded on that day. Whether any other evidence was introduced, and, if so, what it was, does not appear in the "case"; but at the hearing in this court counsel agreed in writing that the "case" should be amended by inserting therein the following: "It was admitted that the above deed was recorded on January 12, 1884, that the \$5 mentioned in the deed was not paid, that S. T. McCravy was the son of the nephew of Jane Harrison, and that Jane Harrison continued to live on the land, after the deed to him was executed, till her death." Inasmuch as this appeal turns largely upon the proper construction of the deed from Jane Harrison to S. T. McCravy, as trustee, above referred to, the reporter will incorporate in his report of this case a copy of that deed.

The circuit judge, in his charge, construed the paper purporting to be a deed from Jane Harrison to S. T. McCravy, as trustee, to be good as a deed, and should not be construed as a covenant to stand seised to uses, and therefore the jury were instructed that if they found that such paper was duly executed, and that there was no other valid objection to it,—such as duress, for example,—it conveyed the title out of Jane Harrison, and into S. T. McCravy, as trustee, the moment it was executed, and as no title, under this view, would be in Jane Harrison at the time she undertook to convey the land to the defendant Ellzene Harrison, by her deed bearing date the 19th of November, 1894, no title could pass to said defendant by such deed. The jury having found by their verdict that the title to the land was in S. T. McCravy, as trustee, and judgment having been entered accordingly, the defendant Ellzene Harrison appeals upon the following grounds: "Because his honor erred in submitting to the jury the issue of title raised by the defendant S. T. McCravy against the defendant Ellzene Harrison by his answer, under the order of Judge Witherspoon authorizing only the submission of the issue raised against the plaintiffs' claim of title by the defendant Ellzene Harrison, thereby exceeding the terms of the order; and in not holding that it was a deed to land to commence in futuro, and hence was invalid." Counsel for defendant S. T. McCravy gave notice that, if this court should find itself unable to agree with the circuit judge in the construction which he placed upon the deed from Jane Harrison to S. T. McCravy, as trustee, this court would be asked to hold that said deed was good as a covenant to stand seised to uses, and as such vested the title in the defendant S. T. McCravy, and, if so, then the verdict of the jury must necessarily have been the same as it was, and the judgment entered thereon must stand.

Appellant's exception raises two distinct and different questions, the first being whether it was error on the part of Judge Aldrich to refuse to confine the issue of title submitted to the jury to the inquiry whether the appellant had title as against the plaintiffs, and not whether the appellant had title as against the defendant McCravy. We do not think there was any error on the part of the circuit judge in this respect. The cases of *Reams v. Spann*, 28 S. C. 580, 6 S. E. 325, *Carrigan v. Evans*, 31 S. C. 262, 9 S. E. 852, and *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711, settle the rule upon this subject,—that in a case of this kind the question of title must be submitted to the jury "upon the issues made by the pleadings," and there is no necessity for, nor propriety in, the trial judge framing issues for the jury. It will be sufficient to quote from the last of the above-mentioned cases, where Mr. Justice Pope, after having declared that there should be no framing of issues in such a case, quotes, with approval and with emphasis, the following language, used by the late Mr. Justice McGowan in *Reams v. Spann*, *supra*, which had been previously approved in *Carrigan v. Evans*, *supra*: "In the trial of the legal issue, the action being for the recovery of specific real property, the question of title should have been submitted to a jury upon the issues made by the pleadings." Now, in this case, the pleadings unquestionably raised several issues of title, and all of these issues must necessarily have been submitted to the jury before the court, on its equity side, could proceed to determine the matter of partition. So that, even if Judge Witherspoon had intended by his order to limit the issue to be submitted to the jury to whether the appellant had title as against the plaintiffs,—though it is not so clear, from his language, that he did so intend,—he had no power so to limit the issue to be tried by the jury. Here was a tract of land which, it was conceded, formerly belonged to Jane Harrison, of which plaintiffs, as her heirs at law, were seeking partition; but, as there were two persons—the appellant and S. T. McCravy—each setting up an independent claim to the land, it was absolutely necessary that, before any effective partition could be made, these claims should be determined, and for this purpose they were both made parties defendant. When, therefore, they each answered, setting up an independent legal title to the premises sought to be partitioned, they each had a right to have the question as to their title submitted to the jury. Besides, even if McCravy had not been made a party to this action, we see no reason why the plaintiffs might not have shown that the deed under which the appellant claimed title was of no force and effect, because her grantor had previously divested herself of title by a conveyance to McCravy, or any third person, and thus defeated appellant's claim of title. But the court, having all the parties before it, could, under the pleadings, adjudi-

cate the claims of the parties in one action; and this is what was done. It will be observed that there is nothing in the "case" tending to show that any question was raised as to who should be the actor in the issues submitted to the jury. It cannot be contended that appellant was surprised by the claim of title set up by McCravy in his answer; for it was served upon her more than 12 months before the trial, and she therefore had the opportunity of knowing, and doubtless did know, what was in it, even though she returned it on the same day it was received (for what reason is not stated). Indeed, there is nothing whatever in the "case" which even tends to show that appellant suffered any prejudice by the course pursued at the trial. She offered her deed in evidence, upon which, so far as appears, she alone relied to establish her claim of title. The deed to McCravy was likewise offered in evidence without objection, and the real controversy in the court below was as to the proper construction and effect of that paper; and upon that question, as the circuit judge, in his charge to the jury, says, counsel for appellant "made a very able argument, one that indicates beyond all argument [question?] that he has studied his case very carefully,"—showing that counsel for appellant was fully prepared to meet the real question in the case. If there were any objections to the title set up by McCravy, other than that the paper relied upon by McCravy was invalid, both as a deed and as a covenant to stand seised to uses, they were not raised in the court below, as they might have been, and we cannot now indulge in any speculation as to any other possible objections. We do not see, therefore, how it is possible, in any view of the case, to sustain the position contended for by appellant.

The next question raised by appellant's exception is whether the circuit judge erred in holding the paper offered by McCravy to be good as a deed. That depends upon the result of the inquiry whether the terms used in the paper show that the intention was that the title should pass to the grantee from the grantor immediately upon the execution of the paper, or whether it should pass only at the death of the grantor; she reserving to herself a life estate. An examination of the terms of the paper in question will show that the intention was that the title should pass immediately, and there is nothing in the paper which, either expressly or by implication, indicates an intention to reserve a life estate in the grantor. The language used in the paper, at least down to that portion of it in which the trusts are declared, is just such as is ordinarily used to convey a title in *præsentî*, and the only allusion to the death of the grantor is that found in the following sentence: "In trust, nevertheless, and it is the true intent and meaning of these presents, that the said S. T. McCravy shall hold the said premises, for the term of twenty years from and after the date of my death, for the

sole use and behoof of my said children, or those of them who may be alive at that time, or their children, per stirpes." Then follows the provision that the trustee shall rent out the premises, collect the rents, and divide the net proceeds among the grantor's lineal descendants; and then follows the provision that, at the expiration of 20 years from the death of the grantor, the trustee is empowered to sell the premises, and divide the proceeds of such sale among grantor's lineal descendants per stirpes. Then comes the habendum clause, in these words: "To have and to hold, all and singular, the said premises before mentioned, unto the said S. T. McCravy, as trustee as aforesaid." It seems to us that the words alluding to the death of the grantor were inserted, not for the purpose of fixing the period at which the title was to pass, but for the purpose of indicating the period at which the power of sale conferred upon the trustee might be exercised. The language of the paper which we are now construing differs materially from that used in the paper construed to be a covenant to stand seised to uses in the case of *Watson v. Watson*, 24 S. C. 228, which is relied upon by appellant; for in the *Watson* deed the language was, "Have granted, bargained, and *at my death* by these presents do grant, bargain, and release." (Italics ours.) So, also, in *Chancellor v. Windham*, 1 Rich. Law, 161, the language of the paper was: "*At my death* to have and to hold." And in *Kinsler v. Clark*, Id. 170, the language indicating an intention that the title was not to pass until the death of the grantor was much stronger. In *Dinkins v. Samuel*, 10 Rich. Law, 68, there was an express reservation of a life estate. So that none of these cases are in conflict with the construction placed upon the deed from Jane Harrison to S. T. McCravy, by the circuit judge. In the case of *Cribb v. Rogers*, 12 S. C. 564, Dempsey Cribb, by his deed, conveyed to Margaret Lewis a certain tract of land in the following words: "I, Dempsey Cribb, * * * for and in consideration of the love, good will, and natural affection which I have and bear to Margaret Lewis, have given, granted, and conveyed, and by these presents do give, grant, release, convey, and deliver, to the said Margaret Lewis, a certain tract, piece, or parcel of land, containing 467 acres, more or less, reserving for myself the use of said lands during my natural life only,"—followed by a description of the lands. The question was as to the effect of the words, "reserving for myself the use of said lands during my natural life only," which, it was contended, had the effect of postponing the vesting of the title until the death of the grantor, and thus rendered the deed void as an attempt to convey an estate of freehold in futuro. But the court, saying that the usufruct might be separated from the fee, held that the title to the fee passed in *præsentî*, burdened with a use in favor of the grantor for his life. See, also, *Jenkins v.*

Jenkins, 1 Mill, Const. 48. Inasmuch as the grantor in the case before us made no provision in the deed as to the use of the land, or the rents and profits thereof, during her life, it might be implied that her intention was to reserve for herself the usufruct during her life; and, if so, then, under the cases just cited, that would not validate the deed as an attempt to convey a freehold to commence in futuro. But, be that as it may, we see nothing in the paper which warrants the conclusion that the title did not pass in present, and hence we do not think there was any error in the construction adopted by the circuit judge.

Under this view, it is unnecessary to consider the additional ground upon which respondents ask this court to affirm the judgment below, even if we were at liberty to do so in a case where the appeal is from a judgment entered upon the verdict of the jury, based upon alleged error of law in the charge of the circuit judge; but as to this we are not to be understood as expressing any opinion. It is the judgment of this court that the judgment of the circuit court be affirmed.

HIGHTOWER v. BAMBERG COUNTY.

(Supreme Court of South Carolina. March 28, 1899.)

COUNTIES—DIVISIONS—SHERIFFS AND CONSTABLES—COMPENSATION—FEES—MILEAGE.

Act Feb. 25, 1897 (22 St. at Large, p. 580), establishing Bamberg county from territory formerly included in Barnwell county, provided for the election and appointment of necessary officers and the administration of justice therein; and Act March 2, 1897 (22 St. at Large, p. 474), declared that magistrates and constables of Bamberg county should receive annual salaries, payable quarterly, "in lieu of all costs and fees in criminal cases." *Held*, that a constable of such county was not entitled to mileage fees for conveying prisoners from a magistrate's court to the county jail, under Act 1889 (20 St. at Large, p. 462), giving constables of Barnwell county, in addition to salaries, mileage for such service.

Appeal from common pleas circuit court of Bamberg county; O. W. Buchanan, Judge.

Action by R. L. Hightower against Bamberg county. From a judgment of a magistrate in favor of plaintiff, which was reversed on appeal to the circuit court, plaintiff appeals. Affirmed.

Miley & Williams, for appellant. John R. Bellinger, for respondent.

McIVER, C. J. The plaintiff brought this action before a magistrate of Bamberg county to recover the sum of \$7.35, alleged to be due him as constable by said county for fees due as mileage for conveying prisoners from the magistrate's court at Denmark to the county jail at Bamberg. The magistrate having rendered judgment in favor of the plaintiff, the defendant county appealed to the circuit court for the county of Bamberg,

where the appeal was heard by his honor, Judge Buchanan, who rendered judgment sustaining the appeal and dismissing plaintiff's case, with costs. From this judgment plaintiff appeals to this court upon the several grounds set out in the record, which need not be specifically stated here, as they raise substantially but two questions: (1) Whether the circuit judge erred in holding that the county of Bamberg is not liable to constables for mileage fees; (2) whether there was error in holding that the matter was *res judicata* by the judgment of the county board of commissioners, to whom the claim was first submitted by the plaintiff, disallowing said claim.

It is well settled that claims for fees or costs are based entirely upon statutory provisions, and therefore, unless some statute can be found authorizing such a charge against the county of Bamberg, the claim cannot be allowed. No such statute has been brought to our attention by counsel, nor have we been able to find any statute authorizing a constable to claim from the county of Bamberg mileage fees for transporting prisoners from one point to another in said county. Counsel for appellant cites and relies upon Act 1889 (20 St. at Large, p. 462), entitled "An act to provide for payment of salaries, in lieu of costs and fees in criminal cases, to the trial justices and constables of Barnwell county," in the second section of which, after fixing the amounts of the salaries of the several constables for that county, there is the following proviso: "That said constables shall be entitled, in addition to their salaries, to the mileage which is now, or hereafter may be, allowed for conveying prisoners to jail under commitment;" and the argument is that, inasmuch as the territory now embraced within the lines of the new county of Bamberg was all taken from the territory formerly embraced within the lines of the county of Barnwell, the proviso still applies to constables appointed for Bamberg county. This would be a somewhat strained construction, even if there were no other legislation upon the subject. But there is other legislation which, in our judgment, puts the matter beyond all dispute. By Act Feb. 25, 1897 (22 St. at Large, p. 580) establishing Bamberg county, full and ample provision was made for the election and appointment of all the necessary officers of such new county and for the administration of justice therein; and when that act went into effect, to wit, 31st December, 1897, the county of Bamberg became a separate and distinct county, just as distinct from the old county of Barnwell as the county of Aiken or any other county. Hence from that time forward all legislation specially applicable to the county of Barnwell *ipso facto* ceased, and was no longer applicable, within the territory embraced within the lines of the county of Bamberg.

But what is still more conclusive is that by Act March 2, 1897 (22 St. at Large, p. 474), special provision was made for the comper-

sation of magistrates and constables of Bamberg county in these words: "Said magistrates and their constables shall receive annual salaries from the county, payable quarterly upon the orders of the county board of commissioners, as compensation for their services *in lieu of all costs and fees in criminal cases.*" (Italics ours.) The language which we have italicized necessarily excludes the idea that a constable of Bamberg county can make any claim against said county for mileage fees or any other costs or fees in addition to his salary. Under this view, it becomes unnecessary to consider the second question, based upon the conceded fact that the appellant first submitted his claim to the county board of commissioners, by whom it was disallowed, and no appeal was taken. The judgment of this court is that the judgment of the circuit court be affirmed.

MILLWOOD v. DEKALB COUNTY.

'Supreme Court of Georgia. March 15, 1899.)

COUNTIES—LIABILITY TO SUIT.

A county is not liable to suit unless there is a law which in express terms or by necessary implication so declares; and this is true whether the alleged cause of action arises from the negligent performance of duties which the county authorities are compelled to perform, or a negligent discharge of duties voluntarily assumed in the exercise of a discretion vested in them by law.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by M. E. Millwood against Dekalb county. Judgment for defendant, and plaintiff brings error. Affirmed.

W. W. Braswell, for plaintiff in error.
Candler & Thomson, for defendant in error.

COBB, J. Mrs. Millwood sued the county of Dekalb for damages, alleging that the county authorities had exercised the right they had under the law to work the convicts in a county chain gang upon the public roads of the county; that a named road, which crossed a private way, had been worked by the chain gang in such a manner as that persons traveling the private way were liable to be injured; that in coming along such private way at night, having no knowledge of the condition in which the public road had been left at the point where the private way intersected it, she fell, and was injured. There were allegations that the county authorities had failed to provide railings or other safeguards to protect persons who were travelling along the private way. The court, upon oral motion, at the trial term dismissed the petition, and to this the plaintiff excepted.

At common law, counties were not liable in a private action for damages sustained by any one in consequence of a failure to keep in repair the highways and bridges within the county. *Russell v. Men of Devon*, 2 Term

R. 667. The Code of this state which went into effect on the 1st day of January, 1863, contained a provision which declared that "every county which has been, or may be, established, is a body corporate, with power to sue or be sued in any court." Code 1863, § 463. This provision was carried into the Code of 1868, and the following clause, which appears to have been taken from an act passed in 1863, was added to the section: "And all inhabitants of counties in this state, who are competent jurors in other cases, are declared and shall be holden to be competent jurors in any case, in any court, where such counties are parties to the suit or interested therein in their capacity as corporations or quasi corporations." Code 1868, § 525. The Code of 1873, as well as the Code of 1882, contained this law in exactly the same language as is found in the Code of 1868. Code 1873, § 491; Code 1882, § 491. Does this section impose a liability upon a county to be sued in all cases where ordinary corporations are so liable under the law? Or is it simply a declaration that a county may be sued, but the right to sue is limited to those cases only where the general assembly has given the permission? This question was presented to this court in the case of *Scales v. Chattahoochee Co. Ordinary*, 41 Ga. 225. Judge McCay, speaking for himself and Chief Justice Brown, there said: "Counties, as corporations, stand upon an entirely different footing. They are, as we have said, mere subdivisions of the state. The people have no privileges or immunities not granted to all citizens. They are, in fact, merely convenient modes by which the state governs the people. The corporate existence cast by law on counties is not asked for, and cannot be set aside, but is the law of the state; and it cannot be inferred that, in consideration of the grant and of the privileges conferred in the charter, the people of the county have undertaken the public duties cast upon them." Again, on page 228, he says: "That the state is never suable except by express enactment, and this is also true of subdivisions of the state. They are parts of the sovereign power, clothed with public duties which belong to the state, and for convenience divided among local organizations. We are the more clear in this view of the law from the fact that the Code provides two cases in which counties may be sued for damages caused by neglect to keep bridges in repair. * * * It seems to us that the declaration of the Code that the county shall be liable in these two cases is a strong legislative intimation that it was not liable in other cases." Judge Warner dissented, and in his opinion he contends that the section of the Code above referred to, construed in connection with section 526 of the Code of 1868, which declares that "suits against a county must be against the inferior court," etc., makes the county subject to suit, it being apparent to him that "it was the clear and manifest intention of the

legislature in making the several counties in this state bodies corporate, with power to sue and liable to be sued, to alter and change the common-law rule, as held by the court in *Russell v. Men of Devon*." In *Dent v. Cook*, 45 Ga. 323, Judge McCay uses this language: "The county, it is true, is a corporation. Code, § 525. But this is only for certain specific purposes. This section of the Code is not even to be understood as putting counties on a footing of ordinary municipal corporations, such as cities and towns. They are created, and have special duties and special privileges, regulated by the charter of each, are sought for, and their charters may be forfeited or lost by nonuser and the judgments of courts. But the counties are subdivisions of the state, imposed upon the people for state purposes. They are, in fact, but quasi corporations, and this section of the Code is not to be understood as conferring any powers except the right to sue and be sued, since the other powers are all conferred and regulated by other statutes and provisions of the Code. Indeed, the act of 1863-64 calls them corporations or quasi corporations." In the case of *Hammond v. Richmond Co.*, 72 Ga. 188, it was held that, "In cases where the statute provides for the liabilities of counties, a recovery may be had against them,—as when no sufficient bond is given to keep bridges in repair." In the case of *Smith v. Wilkes and McDuffie Counties*, 79 Ga. 125, 4 S. E. 20, an action was brought against two counties, alleging that they had constructed a bridge across a river which was the county line; that plaintiff had a mill upon the stream; and that the mill was damaged by obstructing the river, the damage resulting from placing in the river certain pliers for the bridge, and from throwing in a great quantity of stones, thereby causing a raft to form, etc. Chief Justice Bleckley, in the opinion, says: "Besides, there is no statutory provision for any such action as this. The counties, to be liable in an action at law for damage done by those who construct or repair the public roads or bridges, would have to be subjected to such action by statute. It is very improbable that a county can be sued in the superior court for the acts of the road workers and overseers of roads if they turn water on adjacent land by digging ditches or placing obstructions where they ought not. We cannot suppose that there was any intention on the part of the framers of the constitution to turn the citizens loose against the counties without any statutory regulation, for all such causes of action as would be recognized by holding that anybody who, in behalf of the public, damages another's property, thereby subjects the county to answer for it." In the case of *Monroe Co. v. Flynt*, 80 Ga. 489, 6 S. E. 173, Justice Blandford uses this language: "The liability of the county to be sued for damages is a statutory liability. There is no liability on the county for any cause whatever, except such as

created by statute. Counties are not liable at common law, and it is for the reason that the several counties of the state are political divisions, exercising a part of the sovereign power of the state; and they cannot be sued except where it is so provided by statute." See, also, *White Star Line Steamboat Co. v. Gordan Co.*, 81 Ga. 47, 7 S. E. 231.

What is above set forth shows what was the law of this state in reference to suits against counties when the Code of 1895 was adopted. In that Code there is a section which declares that "a county is not liable to suit for any cause of action unless made so by statute." Pol. Code, § 341. This section is codified, as is shown by the note on the margin of the page on which the section appears, from the decisions of this court in 72 and 79 Ga., cited *supra*. It is but a brief and concise statement of the law as it has been evolved by the decisions which have been alluded to. It is contended, however, that the restriction contained in this section upon the right to sue a county only applies in cases which arise from the negligent performance of a work which the county authorities are compelled by law to do, and that, where the county authorities are engaged in doing an act about which they have a discretion either to do or not to do, the negligent performance of such work will render the county liable in damages to the party aggrieved. This contention cannot be sustained. It is based upon a fallacy that the county is liable in all cases unless it is declared not to be liable, and that the Code declares it not to be liable in cases where the authorities are compelled by law to do the work which was the cause of the damage. The correct position is this, as fully appears from the decisions above cited: The county, being a political division of the state, is not liable to be sued, unless special authority can be shown; and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring the suit. The case of *Hammond v. Richmond Co.*, *supra*, seems to be directly in point on this contention, and controlling in the present case. The alleged cause of action there was the negligent management of the county chain gang, which resulted in the plaintiff's injury. It seems to us that the language of the Code is entirely free from ambiguity, and that the case is absolutely controlled by it, and we were inclined to dispose of the case by a brief ruling to this effect. The earnestness of counsel for plaintiff in error in presenting his view of the case has, however, impelled us to a close investigation of the authorities, but we can find nothing which, in our opinion, authorizes the bringing of such an action as that brought in the present case. In every case where a county has been held liable, except the case of *Smith v. Floyd Co.*, 85 Ga. 420, 11 S. E. 850, it has been by virtue of an act of the general assembly authorizing the suit for the cause of action alleged. In the case

last referred to it was held that: "Constructing the constitution of 1877 and the Code together, a right of action exists against a county for damaging private property for public uses in constructing the approaches to a county bridge, thereby elevating the roadway above an adjacent lot, so as to hinder access to the lot from the road." Chief Justice Bleckley, in the opinion, distinguishes this case from the cases of *Smith v. Wilkes Co.* (Ga.) 4 S. E. 90, and *Monroe Co. v. Flynt*, supra, saying that the decisions made in those cases are not inconsistent with what is then decided, "inasmuch as the supposed causes of action involved in those cases were not within the terms of the constitution. The violation by a county of a constitutional right of the citizen must, by necessary implication, raise a cause of action in favor of the citizen against the county, unless some means of redress other than suit has been afforded by the legislature." Judgment affirmed. All the justices concurring.

SOLOMON et al. v. CARROLL.

(Supreme Court of Georgia. March 17, 1899.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This being the first grant of a new trial, and an examination of the record disclosing nothing taking the same out of the provisions of section 5585 of the Civil Code, the judgment below is affirmed.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by Henry Solomon & Son against Ann Carroll. From an order granting a new trial, Solomon & Son bring error. Affirmed.

Wilson & Rogers and Denmark, Adams & Freeman, for plaintiffs in error. Twiggs & Oliver, for defendant in error.

PER CURIAM. Judgment affirmed.

GRAHAM v. NIAGARA FIRE INS. CO.

(Supreme Court of Georgia. March 17, 1899.)

INSURANCE—ACTION ON POLICY—CONDITIONS PRECEDENT—WAIVER.

1. Stipulations in a policy of insurance to the effect that no suit or action for the recovery of any claim by virtue of the policy should be sustainable in any court of law or equity unless such suit or action should be commenced within 12 months after loss of the property insured, that a particular statement of the loss should be presented to the company by the insured at its office as soon thereafter as possible, and that payment should be made 60 days after due notice and satisfactory proofs of loss had been received at the company's office, are conditions precedent to a recovery on such policy.

2. After there has been a failure by the insured to comply with such conditions, and the time has elapsed within which the insured has a right of action against the company under the provisions in the policy, a local agent of the company, through whom application was made and the insurance obtained, has not the power

to bind the company by any waiver of any of the conditions named in the policy, a failure to comply with which by the insured had already resulted in a forfeiture of his right of action.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by C. F. Graham against the Niagara Fire Insurance Company. Judgment for defendant. Plaintiff brings error. Affirmed.

W. R. Leaken, J. M. Dreyer, and E. S. Elliott, for plaintiff in error. Denmark, Adams & Freeman, for defendant in error.

LEWIS, J. Charles F. Graham brought suit against the Niagara Fire Insurance Company, a corporation under the laws of New York, on an insurance policy for the sum of \$1,500. This policy was issued on the 24th of June, 1892, and insured the plaintiff against any immediate loss or damage that might occur by tornadoes, cyclones, and wind storms to certain houses located on Tybee Island, Chatham county. The policy extended for a period of five years. On the trial of the case it appeared, from the testimony introduced in behalf of the plaintiff, that these houses, which were worth an amount largely in excess of the sum for which they were insured, were totally destroyed by a storm which occurred August 27, 1893. Plaintiff at the time was abroad, but upon reaching home, about a month afterwards, thought of a policy he had taken out on these houses. After looking for the same, and being unable to find it, he concluded that no such policy existed, or it had lapsed. Some 4 or 5 days before the expiration of the 12 months after the destruction of the houses, he found this policy, and at once applied to the firm of Dearing & Hull, who were the local agents of the company at the time he applied for and obtained the insurance, and asked if the policy was still in force. Upon being informed that it was, he advised with one of the members of this firm as to what he should do, in view of the fact that the 12 months within which he had to bring suit under the terms of the policy would very shortly expire. The agent replied that he had better get up proofs of loss, and protect himself. Acting upon this suggestion or advice, the plaintiff immediately brought suit upon the policy, and made out proofs of loss, and had them forwarded to the company's office in New York, which, it seems, were received there about the expiration of the 12 months. The above facts appearing from the testimony, the court, after the plaintiff had closed his case, granted a judgment sustaining the defendant's motion for a nonsuit, to which the plaintiff excepts. It further appears from the record that the defendant transferred all its business in certain territory, including the matter relating to this policy, to another company after

plaintiff's loss, and before defendant knew of his loss.

1. It appears from the terms of the policy that no payment was to be made thereon until 60 days after due notice and satisfactory proofs of loss were received at the company's office in the city of New York; that a particular statement of the loss should be rendered the company at its office in New York City as soon thereafter as possible, signed and sworn to by the insured, stating such knowledge or information as he had been able to obtain as to the time, origin, and circumstances of the same, etc.; and that no suit or action against the company for the recovery of any claim by virtue of the policy should be sustainable in any court of law or equity until after a full compliance by the insured with all the foregoing requirements, nor unless such suit or action should be commenced within 12 months next after the tornado, cyclone, or wind storm took place, and, should any suit or action be begun against the company after the expiration of the aforesaid 12 months, the lapse of time should be taken and deemed conclusive evidence against the validity of such claim. There can be no question about the proposition that these stipulations in the policy were conditions precedent to a recovery thereupon. This principle has been so often recognized by this court that any further discussion of it is entirely unnecessary. In the case of *Jackson v. Insurance Co.*, 36 Ga. 429, it appeared that suit was brought upon a policy of insurance obligating the insurance company to pay a certain sum within 60 days after due notice and proof of the death of the insured, and it was held that an allegation and proof of such notice and death were conditions precedent to a recovery on the policy. In *Southern Home Building & Loan Ass'n v. Home Ins. Co.*, 94 Ga. 167, 21 S. E. 375, it was held that a stipulation in a fire insurance policy that a loss by fire should at once be made known to the company was a condition precedent to payment of the loss. It appears from the record in the present case that no notice of loss was given until about 12 months thereafter. Hence there was an utter failure by the insured to comply with the condition in the policy that such notice should be immediately given, and proofs of loss submitted to the company as soon thereafter as practicable. This suit was instituted before the company received any notice or proofs of loss. Here was a failure to comply with the stipulation in the policy to the effect that no action should be commenced until after full compliance by the insured with his obligation to give due notice and submit proper proofs of loss. Under the express terms of the policy, the loss was not "due and payable" until "sixty days after the full completion by the assured of all the requirements" therein specified. It was the misfortune of the insured that he so long delayed that, at the time he was aroused to action, he did not have time sufficient to submit his proofs of

loss at least 60 days before the expiration of the 12 months within which he could bring his action in the event the company declined to pay the loss. Not only did he violate the terms of the policy in instituting suit before compliance on his part with the requirements therein specified, but obviously, aside from this consideration, his action was prematurely brought, as at the time it was filed 60 days had not expired after notice to the company of the loss, and accordingly his claim was not then "due and payable."

2. But it was insisted by counsel for the plaintiff in error that the conduct and sayings of the company's local agent, suggesting that suit be at once filed and proofs of loss forwarded to the company, amounted to a waiver of the conditions expressed in the policy which was binding upon the company. It appears from the testimony that this alleged local agent had not represented this particular company for several months prior to bringing this suit, and hence the defendant insisted it could not be held bound by any waiver he might make. Certain testimony offered by the plaintiff to show that the relation of principal and agent still existed between the defendant company and Dearing & Hull, through whom the policy sued on was issued, was ruled out by the court, over his objection, and error is assigned accordingly. Under the view we take of the case, however, it is unnecessary to go into a consideration of the questions thus presented. Treating the case as if it were established by proof that Dearing & Hull were still the agents of this company at the time referred to, for the purpose of soliciting insurance and receiving and forwarding to the company applications therefor, we are clearly of the opinion that they were without authority to bind their principal by any waiver of the terms of the policy after a forfeiture of all rights thereunder had taken place. The idea of a waiver of material conditions in a contract being binding upon the parties is based upon the right of the parties to change the terms of their agreement, though in writing, by a subsequent agreement, whether had in parol or in writing. To support such subsequent agreement, it is just as important that there should be some consideration for it as it is that there should be a consideration for the original contract. This consideration may be either a benefit to one party or an injury to the other. Hence, it has been often held that, where an insurance company waives certain terms of forfeiture in its policy at a time when the forfeiture had not taken place, and the insured thereupon acts upon such waiver to his injury, there is sufficient consideration to support the waiver, and the courts will not declare a forfeiture of the policy. For instance, in this case, had there been a direct waiver by the company of proofs of loss, made at a time when the insured had ample time to submit the same and bring his suit within the period of limitation prescribed by

the policy, but refrained from doing so on account of the understanding had with the company, it could not afterwards be heard to set up in defense to an action on the policy a breach of a condition it had thus waived. If, however, the forfeiture had already taken place, and the contract had become, as it were, a "dead letter," we question very much whether, by the most formal acts of the governing body of the corporation, a waiver of such a defense would be binding upon the company. It was accordingly held, in the case of *Williams v. Insurance Co.*, 20 Vt. 222, that "a cause of action upon a policy of insurance, for a loss by fire, which has been barred by suffering the time limited in the charter of the insurance company for commencing actions to expire, is not capable of being revived by an acknowledgment or a new promise." It appears from the report of that case that it was contended in behalf of the insured that the company had revived his policy by a formal action of its board of directors. To the same effect, see 1 *Joyce, Ins.* 588. In the case of *Insurance Co. v. Searles*, 100 Ga. 98, 27 S. E. 779, it was decided that, when proofs of loss were not furnished within the time stipulated, a subsequent refusal to pay would not amount to a waiver. In the case of *Underwriters' Agency v. Sutherlin*, 55 Ga. 266, 267, it was held that it was not within the power of local or adjusting agents of an insurance company, without express authority from the managing officers thereof, to waive a stipulation in the policy requiring suit to be commenced within 12 months after a loss occurred. See, also, *Ritch v. Association*, 99 Ga. 112, 25 S. E. 191, and *Southern Home Building & Loan Ass'n v. Home Ins. Co.*, 94 Ga. 167, 21 S. E. 375. There is certainly nothing in the record now before us to show that the company conferred any express authority upon Dearing & Hull to make the waiver insisted on by the plaintiff in error.

It appears from the record that the case was in default, and at its trial term a verdict was taken, and judgment rendered in favor of the plaintiff for the full amount sued for. After the rendition of this judgment, the company moved to set the same aside, on various grounds which it is not necessary to set forth. This motion was granted, and the judgment set aside, to which action by the court no exception was taken by the plaintiff. After the case was thus reinstated, counsel for the defendant filed a demurrer to the petition, whereupon plaintiff's counsel moved to "dismiss the demurrer," and asked that the defendant be at once required to pay costs, and plead to the merits of the case, in accordance with the rule of the superior court. That rule applies to opening a default, and does not refer to a case of this sort, in which judgment had been obtained against the defendant, and, on his motion, afterwards set aside. While the demurrer was sustained by the court, the plaintiff was nevertheless per-

mitted to afterwards amend his petition. It seems that, upon this amendment being made, counsel for the defendant no longer insisted upon its demurrer, and the case actually went to trial on its merits, resulting in a nonsuit. If there was any error in refusing to strike defendant's demurrer, manifestly, under the facts above stated, such error was cured, and rendered harmless, by the court allowing the plaintiff to amend his petition and try the case on its merits.

There were other grounds in the motion for a new trial, but none of them need be considered, as the principles of law announced in the headnotes are applicable to the facts appearing, and necessarily lead to an affirmance of the judgment granting a nonsuit. Judgment affirmed. All the justices concurring.

OZBORN v. WOOLWORTH et al.

(Supreme Court of Georgia. Feb. 10, 1899.)

ACTION FOR SLANDER—LIABILITY OF FIRM.

An action for slander does not, in this state, lie against a partnership.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Phema Ozborn, by her next friend, against H. G. and F. M. Woolworth. Judgment for defendants, and plaintiff brings error. Affirmed.

P. F. Smith and R. R. Shropshire, for plaintiff in error. Frazer & Hynds, for defendants in error.

LUMPKIN, P. J. This case presents the single question whether or not an action for slander will lie against a partnership. The trial judge held, as we think correctly, that such an action was not maintainable. Whatever may be the law in other jurisdictions, we are quite certain that under our Code there can be no action against a partnership for slanderous words uttered by one of its members. Slander is essentially a tort, the principal ingredient of which is malice. "Partners are not responsible for torts committed by a co-partner." Civ. Code, § 2658. There is authority for the proposition that a corporation may be held liable for the publication of a libel; but it cannot be held responsible for a slander perpetrated by an agent, unless it be affirmatively shown that the corporation, as such, expressly directed the agent to speak the identical words used by him. See *Behre v. Register Co.*, 100 Ga. 218, 27 S. E. 986, and authorities cited. In speaking slanderous words, each member of a partnership acts for himself alone, and upon his own responsibility. In view of the above-cited section of our Code, he can in no sense be regarded as the "agent" of his co-partners to utter a slander. The provision therein, that "for the negligence or torts of their agents or servants part-

ners are responsible under the like rules with individuals," immediately following the language above quoted from this section, was manifestly intended to apply to "agents or servants" who are not members of the partnership, and not to the partners themselves.

The petition in the present case contained an allegation that the partnership, as such, was liable, because, after the speaking of the slanderous words complained of, the members of the firm had ratified the same. In reply to this, we have to say that, while a partnership may ratify an act done by an agent in its behalf and for its benefit, without previous authority having been given for the doing of the act, it must be one such as the partnership could in the first instance have authorized the agent to do; for a principal cannot ratify that which he had no power to authorize. See, in this connection, *Harrison v. McHenry*, 9 Ga. 164, 170. Since the Code expressly declares that a partnership is not liable for the torts of its members, the mere fact that all the partners approved of a tort committed by one of their number cannot make the partnership liable for such tort upon the idea of ratification. Hence, the allegation in the plaintiff's petition last referred to was not sufficient to give the plaintiff a standing in court, as its effect is simply to assert as a fact a legal impossibility.

The questions dealt with in this case were not involved in that of *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284, 4 S. E. 905; and, though Chief Justice Bleckley, in delivering the opinion of the court, observed that, "On principle, we can think of no reason why a partnership might not slander a third person, through agents or members authorized and empowered to defame orally, or by adoption and ratification after defamation by slanderous words," it is evident that his attention was not in that connection directed to our peculiar Code provisions above stated. Certain it is that the court did not undertake to then pass definitely upon the question. It may be true that, "on principle," a given proposition should be regarded as sound law; yet it cannot be allowed to control, if in conflict with a plain provision of a statute. Judgment affirmed. All the justices concurring.

EDGAR v. WALKER.

(Supreme Court of Georgia. Feb. 10, 1890.)

SURFACE WATER — OBSTRUCTION — FLOODING ADJOINING LANDS — DAMAGES — HARMLESS ERROR — NEW TRIAL.

1. On the trial of a complaint for damages growing out of alleged negligent conduct of defendant in closing the natural course of surface water on one side of plaintiff's lot, and in not providing sufficient drainage to carry off such water, thus causing it to flood plaintiff's land during rainy seasons, it was not error for the court to charge the jury that, "if the defendant used ordinary care in constructing the drain pipe, and that the damage, if any, was caused by plaintiff's negligence, then the plaintiff cannot

recover." There was sufficient evidence in this case to authorize the submission of this issue to the jury.

2. In a suit for damages, where a count in the petition alleges injury resulting to plaintiff in consequence of foul and impure matter being allowed by defendant to accumulate on his premises in such manner as to be washed by rains on land of the plaintiff, it is not error for the judge to instruct the jury that there could be no recovery on this ground, if such offensive matter was accumulated by defendant's tenants on that portion of the premises rented from plaintiff and over which he had no control; it not appearing that the nuisance complained of on the premises of the tenant existed at the time they were rented, nor that the tenant was licensed by the landlord to erect or maintain the nuisance.

3. As to the charges of the court complained of, which deal with the right of the plaintiff to recover at all, the jury having found the plaintiff was entitled to recover, the charges, even if erroneous, were harmless, and are not, therefore, sufficient cause for a new trial.

4. The testimony did not demand a verdict for any amount against the defendant; certainly not a larger sum than the jury found. The charge of the court fairly covered the issues involved, and the judge did right in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; J. D. Berry, Judge.

Suit by Mrs. N. C. Edgar against B. F. Walker. Judgment for defendant, and plaintiff brings error. Affirmed.

L. R. Ray, for plaintiff in error. King & Spalding, for defendant in error.

LEWIS, J. Mrs. N. C. Edgar brought suit against B. F. Walker for \$5,000, making by her petition, substantially, the following case: Petitioner was the owner of a life estate in a certain lot of land lying north of the city of Atlanta, and has occupied the same for a home for herself and family since the year 1875. Defendant is the owner of adjoining lands on the north, east, and south of petitioner's lot. At the time petitioner built upon her lot, in 1875, the same was higher than the adjoining land of Walker, and the natural flow of surface water caused by the rain was from petitioner's lot on and over the lands of Walker, into a deep ravine, which ran through the lands of Walker. In 1892, Walker graded his lands so as to elevate the same from two to five feet higher than her lot, with such an incline towards her lot as to cause rainwater to flow upon her land, thus injuring and damaging her property, which was wrongfully and maliciously done, with intent to injure petitioner. Petitioner further complained that said Walker allowed to accumulate on his premises offensive matter from privies and other sources, which, exposed to the sun, filled the air with a foul odor, making petitioner's premises unhealthy and undesirable as a home, and that by each heavy rain said foul accumulations and poisonous matter were gathered up by the water, and carried into petitioner's yard, and in and around the door of her dwelling; that Walker constructed a sewer for the purpose of carry-

ing off the drainage, but that it was too small to carry off the rainwater; that water would frequently rise to such an extent as to enter her house; and that these acts not only damaged her land greatly, diminishing it in value, but likewise caused sickness of herself and children, impairing their health, diminishing her capacity to earn a living, and otherwise causing expense. The defendant answered, in detail, the allegations in plaintiff's petition, denying his liability, and the wrongs and injuries therein complained of, and alleging that he had done everything in his power to protect the property claimed by petitioner, and that, if there was any failure of the drain pipe to carry off the water, it was due to the negligence and wrongful conduct of petitioner, and those in her family, in purposely filling up the mouth of the drain pipe, and in not using care or proper caution to keep the same from filling up; that offensive odors and matter upon petitioner's lot was not caused by any act of defendant, but by petitioner, and those constituting her family and living upon said lot, her lot being in no wise provided with sewerage or other usual facilities indispensable to residence premises. Evidence as to the value of the premises varied from \$250 to \$1,000. There was quite a volume of testimony introduced, in which there was considerable conflict. The jury returned a verdict for plaintiff for the sum of \$125; whereupon plaintiff moved for a new trial, and assigns error on the judgment of the court overruling her motion.

1. The general rules of law governing the rights and liabilities of adjacent landowners, growing out of injuries occasioned by changing or averting the course of surface water upon such land, is so well settled by the decision of this court and the lucid opinion of Justice Fish in the case of *Farkas v. Towns* (Ga.) 29 S. E. 700, that it is unnecessary for us to enter upon a further discussion of the subject. We will, therefore, confine ourselves to a brief consideration of such grounds in the motion for a new trial as may seem to have any merit whatever in them. In one of the grounds of the motion for a new trial, exception is taken to the court charging, in effect, that if the plaintiff had title to the property, and the defendant negligently constructed a drain pipe to carry off the water from her premises which usually passed off in natural channels, and that, by reason of this negligent construction, water was forced back on plaintiff's lot, and she was injured thereby, plaintiff could recover, but if the defendant used ordinary care in constructing the drain pipe, and the damage, if any, was caused by plaintiff's negligence, then plaintiff cannot recover; that it was the duty of the plaintiff to exercise all ordinary care and diligence in and about her lot in order to prevent debris, or material of any kind, from getting into or obstructing that drain, and also in order to keep the premises in such condition that the water coming to the drain

pipe would not bring debris and matter calculated to choke up the drain pipe from plaintiff's lot, and if plaintiff was negligent in this particular, and by reason thereof her land was overflowed, she could not recover for such damage so caused by her own negligence. In behalf of the defendant, there was much testimony tending to establish the fact that the reason why the drain pipes constructed by the defendant did not at all times carry off the surface water accumulated from rains was because of the quantity of debris which the plaintiff had suffered to accumulate on her lot at place where the flow of water washed the same down by the mouth of the drain, and thus obstructed it, and prevented the free flow of water. There was a conflict of evidence on this particular point, and the issues of fact presented demanded such a charge as was substantially given by the court. The rule of law that no one can recover for an injury resulting from his own negligence, or which he could have avoided by the exercise of ordinary care and diligence, is too well established to require any discussion. It is insisted, however, in this case, that the defendant was bound to exercise extraordinary diligence in protecting the lands of the plaintiff by a proper system of drainage, and that the court erred in giving in charge the rule of ordinary diligence as the measure of the degree of care which the defendant should exercise. The rule of extraordinary diligence is a harsh one, and is never applied except where it is expressly enjoined by statute. As a general principle, when one is in the exercise of a legal right, he is not responsible for injuries that may incidentally result to others, when he has exercised all ordinary and reasonable care and diligence, and we know of no law or authority which would require the application of a different principle to this case.

2. It is further complained in the motion that the court erred in instructing the jury that the defendant is not liable for any damage inflicted on plaintiff by reason of the dumping of offensive matter by the tenants upon the property of plaintiff, or in such a place on their premises leased by them that said offensive matters, if washed by rain, would be carried on plaintiff's land; but that if any such acts were done by defendant's tenants, and plaintiff was damaged thereby, the tenants, and not the defendant, Walker, would be liable for that part of the damage. Under the facts in this case, there was no error in this charge. It was undisputed that some of the debris or material claimed by plaintiff to be offensive was on that portion of the premises owned by the defendant, which he had rented to tenants, and over which he, at the time, had no control. There was no pretense that this matter was on that part of the premises when the same were rented to the tenants, nor that there was any re-rental of these premises to the tenants after the accumulation of the offensive mate-

rial. "A party is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty. If such consequences were caused by the acts of others, so operating as to produce the injury, he would not be liable." *Brimberry v. Railway Co.*, 78 Ga. 641, 3 S. E. 274. As a general rule, a landlord is not liable to third persons for any injury they sustain, occasioned by the wrongful act of his tenant in keeping the rented premises in a dangerous or unhealthy condition. The only exceptions to this rule are (1) when the landlord has contracted with the tenant to repair; (2) when he has let the premises in a ruinous condition; (3) when he has expressly licensed the tenant to do acts amounting to a nuisance. 2 *Woodf. Landl. & Ten.* pp. 735, 736; 2 *Wood. Landl. & Ten.* § 536; 12 *Am. & Eng. Enc. Law*, p. 719, and citations.

3. There are various grounds in the motion for a new trial complaining of charges of the court which relate to the right of the plaintiff to recover anything. For instance, it was insisted that the court erred in charging the jury that, if the plaintiff was not the owner of the property, as alleged, at the time the suit was filed, then she could not recover for any damages to the premises; and, further, that, in order for the plaintiff to recover, she must prove the substance of the material allegations in her petition by a preponderance of the evidence. If she fails to do so, she cannot recover. If there was any error in these charges of the court, it was harmless; the jury having found that the plaintiff was entitled to recover. An error which works no harm to a complaining party is not sufficient cause for a new trial.

4. We do not deem the other grounds in the motion, complaining of omission to charge, of sufficient importance to merit any special consideration. The charge of the court, as a whole, fully and fairly presented to the jury the law bearing upon the issues between the litigants. The evidence was conflicting. It certainly did not require a finding that the defendant was liable in damages for any larger sum than was recovered by the verdict. Judgment affirmed. All the justices concurring.

CLEMENTS v. STUBBS et al.

(Supreme Court of Georgia. Feb. 10, 1899.)

EXECUTION—CLAIM OF THIRD PARTY—EVIDENCE—PRESUMPTIONS.

1. On the trial of an issue raised by the levy of an execution on land and the interposition of a claim, the question to be determined is one of title; and, where it is proven that at the time of the levy the defendant in execution was in possession, a prima facie case is made, which, in the absence of contrary proof of title, authorizes a verdict subjecting the property to sale under the execution.

2. The presumption which arises on showing the land to have been in the possession of the

defendant at the time of the levy is not rebutted by the introduction of a single deed, executed by a stranger to the proceeding, which purports to convey title to the claimant, when the same is unsupported by any evidence showing the grantor to have been in possession prior to or at the time of the execution of the deed.

(Syllabus by the Court.)

Error from superior court, Telfair county; C. O. Smith, Judge.

Action by Stubbs, Tison & Co. against James E. Clements. Judgment for plaintiffs in execution, and claimant brings error. Affirmed.

D. C. McLennan, for plaintiff in error. Eason & McRae, for defendants in error.

LITTLE, J. On the 7th day of April, 1896, the claimant, on the levy of the execution, interposed a claim, in which she averred that the land levied on had been set apart for a homestead for deponent and her family, in terms of the law. On the 17th of April, 1897, she amended her claim by averring that the property levied on is the property of claimant individually, and not the property of the defendant in execution. The plaintiffs in fl. fa. made a prima facie case by the introduction of the execution, and showing that the defendant was in possession at the time of the levy. The burden being then put upon the claimant, she introduced a deed dated October 15, 1894, recorded in 1897, from James E. Clements to her, purporting to convey the title of the land in question. It must be noted that James E. Clements was a stranger to this proceeding, and the claimant in no manner proved title in him at the time he made the deed to her; nor was there any attempt made to prove the fact that Clements was in possession of the land at the time he made the deed, so as to raise the presumption of ownership. The question at issue was one of title, and it is not sufficient to introduce a deed from a third person, conveying the title of the property to the claimant, without more, to authorize a verdict that the property was not subject to the execution. Such facts as vested title in the claimant must have been proven, or, by the proof of possession in her grantor, raise a presumption that the title followed the possession, in order for her claim to prevail. Not having done either, the presumption of title in the defendant which arose by proof that he was in possession of the land at the time of the levy must prevail.

Error is assigned because, after the claimant rested her case, the plaintiffs in execution were allowed to introduce the original petition of claimant, with her affidavit thereto, praying that a homestead might be assigned her out of the land in question, together with the action of the ordinary thereon. The admission of this evidence was immaterial. The claimant did not rest her right to the property under the allowance of the homestead, but under the deed made to her by James E. Clements; and while we do not agree with the ruling of the court that the petition for allowance of homestead, as it appears in the

record, necessarily estopped her from otherwise claiming the property, there was no error in admitting the petition for homestead, and the subsequent proceedings had thereunder, because, under one construction of the petition, schedule, and affidavits attached, it could be contended that she at that time admitted title in her husband, who was the defendant in execution. But inasmuch as the plaintiff in *fi. fa.* made a *prima facie* case, which the claimant failed in any way to rebut, but one verdict could have been returned by the jury, under the evidence, and that was that the property was subject to the execution; and the court committed no error in directing the jury so to find. Judgment affirmed. All the justices concurring.

SOUTHERN RY. CO. v. COOK.

(Supreme Court of Georgia. Feb. 10, 1899.)

NEW TRIAL—OBJECTIONS—SERVICE OF PROCESS—TRAVERSE OF RETURN—WAIVER OF SERVICE—NUISANCE.

1. Exception to the overruling of a demurrer to a petition cannot properly be taken in a motion for a new trial.

2. While the entry of an officer of court may be traversed, it is necessary that the officer whose entry is thus attacked should be made a party to the proceeding, and a dismissal of such traverse on the ground that the officer was not a party was proper.

3. Demurring generally to the plaintiff's petition is such an appearance and pleading as to amount to a waiver of all irregularities of the process, or of the absence of process and the service of the same.

4. The petition alleging that a nuisance which had been erected by the defendant caused injuries to the plaintiff's property, and the evidence showing that the nuisance had been erected by a predecessor in title of the defendant, a verdict in favor of the plaintiff was contrary to law.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Action by I. L. Cook against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

De Lacy & Bishop, for plaintiff in error. E. D. Graham, for defendant in error.

COBB, J. On June 27, 1896, Cook brought suit in Coffee county against the Southern Railway Company, alleging, in substance: He is the owner of a certain lot of land through which the railroad runs, in said county, and which comprises a field containing about 50 acres of fertile arable land, lying on the western side of, and contiguous to, the railroad. A short distance south of this field, and near the railroad, is a basin or pond, with an outlet extending eastward, through which outlet the water of the basin or pond formerly flowed, without obstruction, across a point where the railroad is now situated, and in no way interfered with plaintiff's field. The defendant built its railroad bed across this outlet to a certain point upon said lot, so that the outlet

is completely stopped up by the roadbed, and the water of the pond or basin thereby prevented from flowing through it, and the defendant has maintained its roadbed across the outlet in this manner, without plaintiff's consent, from January 1, 1894, to the time of filing this suit. By reason of the railroad bed being maintained across this outlet, the water of the pond rises higher than it formerly did, and frequently overflows a large part of the plaintiff's field, so that the plaintiff is deprived of the use of the field for the purpose of tillage, and by reason of these facts the field has been worthless to plaintiff ever since January 1, 1894. In the spring of 1894 plaintiff planted the field in corn, cotton, and other crops, and for two or three months the crops were in fine condition; but about the month of May in that year, during a rainy season, the water in the pond, by reason of the roadbed being across said outlet, rose, and overflowed a large part of the field, thereby destroying plaintiff's crops. The railway company could have prevented this damage by putting a culvert in its roadbed at the point where the roadbed crosses said outlet, but it fails and refuses to adopt this usual and ordinary means of preventing damage to the plaintiff. By reason of the premises, plaintiff has been damaged \$1,000, for which he prays judgment. The declaration, as originally filed, alleged: The defendant has not an agent in said county, but has agents in the county of Appling, in the county of Telfair, and in other counties in said state. Upon the petition there was an entry of service as follows: "Georgia, Coffee County. I have this day served the defendant, the Southern Railway Company, by giving H. S. Tucker, agent for Southern Railway Co., a copy of the within and foregoing petition and process, personally, this September 17th, 1896. [Signed] W. M. Tanner, Sheriff Coffee County, Ga." At the October term, 1896, the plaintiff amended the petition by striking from it the allegation that the defendant "has not an agent in said county," which he alleged was inadvertently made, and by adding the allegation that the defendant at the time of the filing of said petition had, and now has, an agent in said county of Coffee. At the appearance term the defendant demurred to the petition on various grounds, and the demurrer was overruled. The trial of the case resulted in a verdict for the plaintiff for \$265, and, a motion for a new trial, filed by the defendant, being overruled, it excepted.

1. One ground of the motion assigned error upon the decision of the court overruling the demurrer filed by the defendant to the plaintiff's petition. That a ruling of this character cannot properly be made a ground in a motion for a new trial is so well settled that the mere citation of one of the more recent decisions upon the subject is sufficient. *Mayor, etc. v. Johnson*, 84 Ga. 279, 10 S. E. 719.

2. Another ground of the motion complained of the court's disallowing a traverse of the

entry of service which had been filed by the defendant. It does not appear from the record that the sheriff who made the entry was made a party to this traverse, or that any notice of its filing was given to him. This alone was a sufficient reason for disallowing the traverse. Civ. Code, § 4988; *Lamb v. Dozier*, 55 Ga. 377; *Sindall v. Thacker*, 56 Ga. 51.

3. Even if the failure to make the sheriff a party was not a sufficient reason for disallowing the traverse, as it appears from the record that a general demurrer to the petition had been filed before the traverse was filed, this would be such a pleading to the merits of the case as to amount to a waiver of service, or of any defect in the service. Civ. Code, § 4981; *Lyons v. Bank*, 86 Ga. 485, 12 S. E. 882; *Railway Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010.

4. The petition of the plaintiff claimed damages from the defendant growing out of the erection of a nuisance. That such is the cause of action set forth in the petition is clear. At the trial the evidence showed that the railroad which was the cause of the nuisance was not erected by the defendant, but by one of its predecessors in title, either the Macon & Brunswick Railroad Company or the East Tennessee, Virginia & Georgia Railroad Company, and that that which is claimed to be a nuisance was in existence when the defendant acquired title and came into possession of the railroad. The Code declares that: "The alienee of a person owning the property injured may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case there must be a request to abate before action brought." Civ. Code, § 3862. One who erects a nuisance, and also maintains the same, is liable to any one who is injured thereby, and no notice of the harmful effects resulting from the nuisance, or a request to abate the same, is necessary to maintain an action against such person. If, however, a person come into possession of property upon which there is an existing nuisance, before an action can be maintained against such person for continuing the nuisance it is essential that there should be a request to abate it before any liability for maintaining the same would arise. *Bonner v. Welborn*, 7 Ga. 296, 314; *Railroad Co. v. Cox*, 93 Ga. 561, 20 S. E. 68; *Middlebrooks v. Mayne*, 96 Ga. 449, 452, 23 S. E. 398. It follows, therefore, that where the petition alleges that damage has been sustained by the defendant's erecting a nuisance, and the evidence shows that that which is claimed to be a nuisance was not erected by the defendant, but by its predecessor in title, there would be such a variance between the allegations and the proof as to prevent a recovery by the plaintiff. It is true that in the case of *Railroad Co. v. English*, 73 Ga. 366, it was held that: "Where one railroad company erected a nuisance, and was subsequently leased to another company,

which continued to maintain such nuisance, if the owner of the property on which it was situated notified the president and officers of the lessee company of it, and his tenant also notified the section master of the company, this was sufficient notice and demand for abatement, and the tenant could bring an action for injuries resulting to him without more. Notice of the nuisance is sufficient." And Judge Blandford, in the opinion, says: "If the plaintiff in error had notice of the nuisance, then this is all that is required before action brought." In that case, however, there was a distinct allegation that the railroad company had continued to maintain the nuisance after having been notified to abate. A similar allegation was contained in the declaration in the case of *Railroad Co. v. Cox*, supra. In the present case the plaintiff saw fit to rest his case upon the allegation that the defendant had erected a nuisance, and, failing entirely to support this allegation by proof, a verdict in his favor was contrary to law. Judgment reversed. All the justices concurring.

STOVALL v. STATE.

(Supreme Court of Georgia. Feb. 10, 1899.)

CRIMINAL LAW—CONTINUANCE—NEW TRIAL—MURDER—MALICE.

1. A motion for a continuance is addressed to the sound discretion of the presiding judge. It does not appear, in this case, that he abused such discretion in his refusal to continue the case.

2. A ground of a motion for new trial, which is based on the admission of testimony contained in a letter which was admitted in evidence over the objection of defendant's counsel, should set out, in words or substance, the contents of the letter objected to. Certainly, when a letter is referred to as being contained in the approved brief of the testimony at the foot of page 76, and it appears that there is no such page of the brief, the exception made is not good, and cannot be considered. This court will not pass on questions raised to the admissibility of evidence, when the identification of the evidence objected to is left uncertain.

3. Where one voluntarily fires a loaded pistol at another, without excuse, and not under circumstances of justification, and kills the person at whom he shot, the law will hold the slayer responsible for the consequences of his act. It conclusively presumes malice on the part of the slayer, and the grade of the homicide so committed will not be reduced to involuntary manslaughter, even if the intent of the slayer, under such circumstances, was to wound or cripple the deceased, and not to kill.

4. The verdict of guilty of murder in this case is fully supported by the evidence.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

J. J. Stovall was convicted of murder, and brings error. Affirmed.

Allen Fort, Busbee & Busbee, and D. A. R. Crum, for plaintiff in error. F. A. Hooper, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LITTLE, J. Besides the general ground that the verdict is contrary to law, and without evidence to support it, the motion for new trial shows that exceptions were taken to the ruling of the court in refusing to continue the case, and in admitting in evidence a certain letter purporting to have been written by the accused before the homicide, and which was addressed to C. E. West, brother of the deceased, and because the court erred in failing to charge the jury the law applicable to involuntary manslaughter.

1. The motion for continuance was based on two grounds: (1) That the accused had been confined in the common jail of the county since the 23d of April, 1898; that he was in feeble health; had been a sufferer from hemorrhoids for 30 years, accompanied by a nervousness and indigestion; that the confinement had aggravated his complaint, and he is physically unable to assist counsel in the conduct of the case and to go through the trial of the case, and for these causes he has not had full opportunity to consult with his attorneys and prepare his case. (2) Because of the absence of a material witness, John Bennett, by whom he expects to prove matters important to his defense, which were set out in full. The latter ground, however, was taken out of the case by an agreement in writing made by the solicitor general, admitting that the absent witness, if present, would swear to the statements contained in the motion for continuance, with a further agreement that the state would not contest the truth of such statements, in accordance with the provisions of section 963 of the Penal Code. The question then remains, was it error for the presiding judge to refuse to continue the case on the ground of the physical condition of the accused? We cannot say it was. To the evidence submitted on the part of the movant, a counter showing was made by the state. The question involved was one of fact, the truth of which it was the province of the judge to try. The accused was in his presence. He could, therefore, determine in what apparent physical condition he was. The judge, from the sources of information afforded him, ruled the accused to trial, and we cannot say that he erred. The motion was addressed to his sound legal discretion. It does not appear to have been abused. The evidence relating to the physical condition of the accused did not afford any reasonable expectation that he would, at any time in the future, be in a better physical condition than at the time he submitted his motion. There was no error in its ruling which calls for the interference of this court.

2. The second ground in the amended motion for new trial assigns error in that the court allowed a certain letter to be admitted in evidence when offered by the state, over the objection of defendant's counsel. The letter is not set out in the ground assigning error. This court has repeatedly ruled that, when evidence is admitted over objection, and error is assigned to such admission, such evidence must be

stated in the ground of the motion. This is obviously the better practice. Indeed, it verges near the line of being absolutely necessary for a true and perfect identification of the evidence which was admitted. Courts ought not to deal with uncertainties, nor pass upon any question when it does not clearly appear what was the subject-matter of the exception. The maxim, "*Id certum est quod certum reddi potest*," ought not to be made applicable in cases of this character. If the exception is taken in the ground of the motion for a new trial, and the evidence excepted to is not set out in such ground, but is referred to as being contained in the brief of evidence, it is not alone the inconvenience which it causes this court to search the brief of evidence to ascertain what is the objectionable matter, but it must always leave such matter, to a degree at least, uncertain. It is therefore not alone a question of practice whether this court will consider such exception, but the substantial merits of the question involved must, to a limited extent, at least, always be left in some doubt. Hence, as before said, this court has ruled that it will not consider exceptions taken to the admission of evidence, unless such evidence is set out in the ground of the motion which contains the exception. One of the latest of such rulings is found in the case of *Herz v. H. B. Claflin Co.*, 101 Ga. 617, 29 S. E. 33. See, also, *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501. In the present case, a copy of the alleged letter, which was admitted in evidence, to which admission exception was taken, is, by this ground of the motion, referred to as being contained in the approved brief of the testimony, at the foot of page 76 thereof. A reference to the brief of evidence contained in the record discloses the fact that the brief of evidence ends on page 65, and there is no page 76 of the brief of evidence. And while we find in the brief of testimony, on another page, a letter which seems to meet the reference in the ground of the motion in other particulars, we are not at liberty to assume that a copy of a letter found upon another page of the brief than that designated contains the objectionable matter. This being true, it must be ruled that the ground of the motion is not properly taken, and cannot be considered.

3. Another of the grounds of the motion alleged error on the part of the judge in failing to charge the jury the law relating to involuntary manslaughter. It is argued that the statement of the accused advances the theory that, while he shot the deceased, he did not do so with any intent to kill him; that he did not intend to inflict any wound on him in a vital part of the body, but that his purpose in shooting was to disable the deceased from shooting him; and that such a theory calls for a charge on the law of involuntary manslaughter, so that, if the jury believe the statement in this regard, they would be authorized to fix the grade of the homicide as that of involuntary manslaughter. The proposition is not a sound one. If one shoot another with an intent to

wound or cripple him, and without any intent to kill, other than is manifested by the act of shooting, but does kill, and there is no justification or excuse for the shooting, such killing will never be involuntary manslaughter. To intend even a slight personal injury, and to inflict it without excuse, involves malice. Killing another with a deadly weapon may be murder, though there was, in fact, an intention not to kill. This is so because the law will, in the absence of excuse, presume or imply the intention to kill, even when to do so is contrary to the actual fact. The purpose of the law is to hold the slayer responsible for the consequences of his act,—not the consequences which might have ensued, but those which did ensue. *Gallery v. State*, 92 Ga. 463, 17 S. E. 863; *Lanier v. State* (present term) 32 S. E. 335. Should the effect of the shot, fired under such circumstances, be to wound, but not kill, then the intention with which the shot was fired becomes a material question, under an indictment for assault with intent to murder. But where one, without excuse or justification, shoots at another for the purpose of maiming or wounding him, and without any actual intention to kill the person at whom he fires, but the shot does produce death, the person so shooting is guilty of murder, because death ensued as the result of his act, and, the killing being the natural result of the shooting, the slayer could not avail himself of the plea of want of intent to kill. There was no element of involuntary manslaughter shown by the evidence in this case. The accused will be held responsible for the consequences of his act. The shooting being shown to be voluntary, the offense will not be reduced because other consequences might have ensued from such voluntary shooting.

4. The remaining ground of the motion for new trial is not certified to be true and correctly taken by the presiding judge, and therefore cannot be considered. The evidence in the case shows the grade of homicide of which the plaintiff in error was guilty to be murder, and that beyond any reasonable doubt or question, and the judgment refusing a new trial is affirmed. All the justices concurring.

MALLARD v. ALLRED.

(Supreme Court of Georgia. Feb. 11, 1899.)

VENDOR AND PURCHASER—DEFECTIVE TITLE—RELIEF IN EQUITY—PRESUMPTION—ACTION FOR PRICE.

1. A purchaser of land, who is in possession under a bond for titles, cannot have relief in equity against his contract to pay, on the mere ground of a defect in title, unless he alleges that the vendor is insolvent or a nonresident, or some other fact which would make it inequitable for the vendor to enforce the payment of the purchase money. (a) When a plea seeking relief of the character above referred to fails to allege that the vendee is out of possession, "the conclusion of law is that he is in possession under the contract of purchase set forth."

2. Where a purchaser of land, who is in possession under a bond for title, seeks to defeat an

action on a promissory note given as a part of the purchase price on the ground that his vendor is insolvent, and unable to respond in damages for a breach of the bond arising from a defect in title to the property, the insolvency must be distinctly alleged. An allegation, "on information and belief," of facts which do not clearly show an insolvency, is too uncertain.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by E. W. Allred against W. J. Mallard, Jr. Judgment for plaintiff. Defendant brings error. Affirmed.

Anderson, Felder & Davis, for plaintiff in error. Maddox & Terrell, for defendant in error.

COBB, J. Allred brought suit against Mallard on a promissory note for \$24,000. The defendant pleaded that the note was given as a part of the purchase money of certain mining lands; that he had paid \$1,000 cash, and had given two notes,—the one sued on, and another for the sum of \$25,000,—and had taken from the plaintiff a bond for titles. At the time of making the trade, plaintiff represented that he was the owner of all the property, except one parcel, known as "Part of the W. B. Tate Tract." Since the signing of the note, defendant has learned that the plaintiff has only a bond for titles to other parts of the property which he contracted to sell defendant, and which constitutes the larger portion of the land bought, and is known as the "Darnell Place." Plaintiff is indebted in the sum of \$19,000 for the purchase of the part of the W. B. Tate tract, above mentioned, and in the sum of \$10,000 for the purchase of the Darnell place. Defendant is "not very well acquainted with the financial condition of the plaintiff," but charges, on information and belief, that he is a man of small property,—not owning enough to afford this defendant any security for paying him the large sum of money demanded in the suit,—and if defendant should pay the same to the plaintiff, who is not in a position to bind the title by contract of sale, defendant would lose all of the money paid by him, unless the said plaintiff should pay up all of the purchase money due by him to the real owners of the land. The prayer of the plea was "that the said plaintiff be nonsuited, and his case dismissed, for the reason that the same is prematurely brought, and that defendant be hence dismissed, with his reasonable costs." The plaintiff demurred to the defendant's plea on the ground that what was therein contained did not amount to an allegation that the plaintiff was insolvent, and that, in the absence of a distinct averment to that effect, the plea set up no valid defense to the note sued on. The court sustained the demurrer and struck the plea, and to this the defendant excepted.

1. There was no error in sustaining the demurrer. The plea is an anomaly. It seems to be an effort to set up facts which would amount to a plea in bar, but its prayer is in

abatement. There is no prayer for a rescission of the entire contract, nor an abatement of the purchase price for the loss of that part of the land to which plaintiff has no title. It seeks to hold the plaintiff to his contract of sale, but at the same time denies his right to enforce it. As a plea in abatement, it has no parallel. As a plea in bar, it fails for want of essential averments. However classified, it is insufficient. To make it perfect as a plea in bar, it was necessary that the defendant should distinctly allege either that he is out of possession, or some ground of equitable interference recognized as available to one in possession. Where there has been anything like a substantial payment made on the purchase price, it might be inferred that the holder of a bond for titles is in possession. *McGehee v. Jones*, 10 Ga. 127, 133. But it is not necessary in the present case to rely on such an inference to show that the plea was defective. The failure to allege in the plea that the defendant is out of possession authorizes the conclusion that he is in possession. In the case just cited, Nisbet, J., says: "The bill does not show that Jones went into possession of these lands, but that fact is inferable from his complying, to so large an extent, with the contract, in paying the greater part of the purchase money. Not much reliance, however, is placed upon this inference. To place himself out of the operation of the rule which I am about to state, I conclude that the complainant in equity must show by his bill that he is out of possession. Coming into equity for relief, the complainant must make a case within the rule of law which authorizes the relief. If out of possession, I may concede, for the sake of the argument, that he is entitled to relief; but not otherwise. Not averring that fact, the conclusion of law is that he is in possession under the contract of purchase set forth. The rule, then, is this, to wit: A purchaser of land, who is in possession, cannot have relief in equity against his contract to pay, on the mere ground of a defect of title, without a previous eviction. When he goes in under a deed with covenants of warranty, and apprehends a failure of title, and wishes relief before eviction, he must resort to his covenants; if under a bond for titles, he must resort to his bond." See, also, *McCauley v. Moses*, 43 Ga. 577; *Smith v. Hudson*, 45 Ga. 208; *Booth v. Saffold*, 46 Ga. 278; *Black v. Walker*, 98 Ga. 31, 28 S. E. 477. The case of *Clark v. Croft*, 51 Ga. 368, relied on by counsel for plaintiff in error, is clearly distinguishable from the one now under consideration, as well as the cases cited *supra*. In that case there was a stipulation in the contract of sale that the removal of certain liens and incumbrances which were on the property should be a condition precedent to the payment of the purchase-money notes. Suit was brought on the notes before these incumbrances had been removed, and the defendant was properly allowed to plead the agreement

between himself and the plaintiff. A resort to the courts by the plaintiff to collect the money before paying off the incumbrances was in itself a breach of the bond. The case of *McLaren v. Irwin*, 63 Ga. 275, was also relied on by the plaintiff in error. In that case it was alleged that there was outstanding paramount title in a stranger, and that the obligor in the bond was insolvent. In the present case, as we shall presently show, there was no sufficient allegation of the insolvency of the maker of the bond. The defendant not alleging that he was out of possession, he should, as a reason for refusing to pay the note given as a part of the purchase money of the land, allege in his plea that the plaintiff is insolvent, or a nonresident of the state, or some other fact of similar nature which would make it inequitable for the plaintiff to enforce the contract of sale by compelling the defendant to pay the purchase money, when the plaintiff was not clothed with title to the land which is the subject-matter of the contract.

2. The inability of the plaintiff to respond in damages for a breach of the bond being a fact essential to make the defense set up in the present case available, it is absolutely necessary that such insolvency should be unequivocally charged. *McGehee v. Jones*, *supra*. We do not think that the allegations in the defendant's plea as to this matter are sufficient. In the case last cited it was alleged that the plaintiff had been informed and believed that the defendant resided, or at least remained a greater portion of his time, out of the jurisdiction of the courts of the state, viz. in Alabama, that the great bulk of his property was there, and "that he has not sufficient property within the jurisdiction aforesaid to respond to your orator in damages for a breach of the condition of the bond aforesaid; nor has he in hand, remaining, enough of the assets of the estate to make good such damages,—most of the assets having been distributed or otherwise disposed of by him." Judge Nisbet, in discussing this point, says: "He does not aver that the executor has no assets to pay the damages. He says that he has not in hand sufficient for that purpose, and adds that most of the assets have been paid out or distributed. There is no certainty in the averment." In the present case the defendant charges, "on information and belief," that the plaintiff is "a man of small property,—not owning enough to afford this defendant any security for paying him the large sum of money demanded in his suit." This averment commits the defendant to "almost nothing." *Martin v. Lamb*, 77 Ga. 252, 3 S. E. 10; *Stancel v. Puryear*, 58 Ga. 445, and cases cited. It is true, the defendant does go further, and aver that he "would lose all of the money paid by him, unless the said plaintiff should pay up all of the purchase money due by him to the real owners of the land." But this allegation relates back to, and depends upon, the former

avermment, that plaintiff is "a man of small property, and unable to afford defendant security," and this charge is based merely "on information and belief." Equity would, of course, interfere and grant relief against a palpable fraud on the part of the obligor in the bond for titles, but there is no allegation in the plea in the present case sufficient to constitute a charge of fraud. An allegation that the plaintiff represented that he was the owner of certain land, which he contracted to sell to the defendant, whereas in fact he was in possession of it under a bond for titles, would not be sufficient, without more, for this purpose. Especially would this be true in the case now under consideration, where the only prayer in the plea is to dismiss the suit in order that the vendor may have an opportunity to acquire title to the property which he has contracted to sell, and there is no prayer for a rescission of the contract on account of the facts alleged to constitute a fraud upon the defendant. There was no error in sustaining the demurrer. Judgment affirmed. All the justices concurring.

ARMSTRONG v. HIGH et al.

(Supreme Court of Georgia. Feb. 11, 1899.)

APPEAL—REVIEW.

This being a close case, and the court having erred both in admitting and in rejecting evidence, there should be another trial.

(Syllabus by the Court.)

Error from city court of Atlanta; J. D. Berry, Judge.

Action by Harry Armstrong against J. M. High & Co. Judgment for defendants, and plaintiff brings error. Reversed.

Shepard Bryan, for plaintiff in error. Dorsey, Brewster & Howell and Arthur Heyman, for defendants in error.

LUMPKIN, P. J. This was an action by Armstrong against J. M. High & Co. for a balance upon a salary alleged to be due by the defendants to the plaintiff as a clerk, the petition alleging that the plaintiff had been wrongfully and without cause discharged before the expiration of his term of employment, which was for a period of one year. It was further alleged that a part of the consideration of the contract of employment was the entering of a retraxit by the plaintiff in a former suit brought by him against the defendants upon another and distinct cause of action. The alleged contract relied on by the plaintiff in the present action was in parol, and according to its terms was not to be fully performed within a year from the time it was made. The evidence introduced by him showed, however, that the contract had been entered upon and to a large extent performed. The defendants denied having made with the plaintiff any contract for an entire year's service, and also set up the statute of frauds.

The evidence at the trial was conflicting, and the jury returned a verdict in favor of the defendants.

It appeared that the plaintiff had placed the claim upon which this action was brought in the hands of an attorney, named Thomas Wright, for collection. The court, over the objection of the plaintiff, permitted McClelland, a member of the defendants' firm, to testify as follows: "I told Mr. Wright, if he would get a reputable witness to state that which he stated to me, I would give him a check for the amount. Mr. Wright stated to me that Mr. Armstrong could show by John Morris, who was the only witness, that I had talked with Mr. Morris, and had stated that I had hired Mr. Armstrong for a year; and I said, 'Tom, if Mr. Morris will say that I said I hired [Armstrong] for a year, I will give him a check for it.' I knew he would not state it. * * * When Mr. Armstrong failed to substantiate what he had told him, Mr. Wright said: 'I will drop it; I will have nothing more to do with it.'" Exception was taken specially to the evidence embraced in the last sentence of the above-quoted testimony. We think the court erred in allowing the witness to state as a fact that "Armstrong failed to substantiate what he had told" his attorney. The witness manifestly derived his whole knowledge on this subject merely from hearsay. Indeed, he did not profess to know, otherwise than from his conversation with the attorney, what had passed between the latter and his client. We also think it was erroneous to allow the witness to testify that Wright, the plaintiff's former attorney, had said, in effect, that, being convinced his client had falsely represented to him what Morris would swear, he (the attorney) would therefore abandon the case. We do not understand that an attorney at law, employed to collect a claim, has, as agent for his client, authority to admit that the latter had made false statements about his case, or that such attorney can bind his client by the expression of an opinion that the claim in his hands for collection is not a just one.

The court refused to permit the plaintiff to introduce in evidence any portion of the record of the former suit in which the retraxit had been entered, except the judgment entered therein. We think this ruling was erroneous. In view of the allegations in the plaintiff's petition, he was entitled to show the precise character of the former action, as well as the disposition of it. This evidence was certainly relevant upon the question of the statute of frauds, and was also admissible as corroborative of the plaintiff's testimony in support of the contention that his term of employment was for one year.

The foregoing covers all the material questions in the case. Another point made was that the court allowed Holt, another member of the defendants' firm, to testify as to the custom of the house relatively to making contracts with its employes. It appears, how-

ever, that the witness alluded to this custom merely as illustrating his knowledge of the matter in hand, and that the court distinctly informed the jury that Armstrong was not bound by any such custom, if it existed. Judgment reversed. All the justices concurring.

GANNON v. SCOTTISH-AMERICAN MORTG. CO.

(Supreme Court of Georgia. Feb. 11, 1899.)

USURY--WHAT CONSTITUTES.

The fact that the borrower, in addition to the maximum legal rate of interest reserved on a given loan, also paid the attorneys of the lender their fee for examining titles to the land conveyed as security for the debt, did not render the transaction usurious as to the lender, especially when the latter neither authorized the charge nor shared in the fee. This is true, notwithstanding the borrower did not know who the attorneys for the lender were, and did not agree to pay their fees until after the papers for the loan had been prepared, and the money had been forwarded by the lender.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Scottish-American Mortgage Company against Annie Gannon. Judgment for plaintiff, and defendant brings error. Affirmed.

T. C. Battle and W. I. Heyward, for plaintiff in error. King & Anderson, for defendant in error.

LEWIS, J. The Scottish-American Mortgage Company brought suit against Annie Gannon for \$4,520, besides interest, upon certain promissory notes given by the latter to the former. Petitioner alleged that the defendant had executed a deed to certain land to secure the notes and coupons sued upon, and that petitioner executed back to defendant a bond for titles, conditioned to reconvey the property upon payment of the indebtedness. Judgment was prayed for the full amount due, and that the right and title to the land as security for said indebtedness be recognized and established. Defendant answered, admitting that she borrowed of plaintiff the sum of money sued for, and executed the papers set out in plaintiff's petition, but alleging that, when the money was paid over to her, there was deducted from the original amount the sum of \$50, the fee charged for examining the titles by King & Anderson, the plaintiff's regular attorneys; that she did not employ the attorneys to act for her, and did not know until after the loan had been obtained, and papers prepared, who the attorneys were, nor did she agree to pay the fees of such attorneys to examine said titles or to draw up the papers, defendant having agreed to pay others a commission of \$175 to procure for her the amount of money she desired, which commissions she paid; and that the sum of \$50 deducted for plaintiff's attor-

neys is usury in the note sued on, and in the loan deed executed by her to plaintiff. To this plea of defendant the plaintiff demurred, and to the judgment of the trial judge sustaining the demurrer and striking her plea the defendant excepts.

It will be noted that there is no allegation in the plea that the lender authorized the charge made by its attorneys for examining the titles, or that it had any knowledge of the same, or that it shared in the fee paid by the borrower. Under the ruling of this court in *McLean v. Camak*, 97 Ga. 804, 25 S. E. 493, the plea insisted upon by the defendant below constituted no legal defense to the action. The court therefore did not err in sustaining the demurrer to the defendant's plea. See, also, *Merck v. Mortgage Co.*, 79 Ga. 213-232, 7 S. E. 265; *Hughes v. Griswold*, 82 Ga. 290-308, 9 S. E. 1092; *Sanders v. Nicolson*, 101 Ga. 739, 28 S. E. 976 (Syl., point 2).

Judgment affirmed.

BALDWIN FERTILIZER CO. v. THOMPSON et al.

(Supreme Court of Georgia. Feb. 11, 1899.)

SPECIAL AGENT--NOTICE OF AUTHORITY--RATIFICATION.

1. One who deals with a special agent is chargeable with notice of the extent of the latter's authority, and, if such agent makes a settlement not within the scope of his agency, the settlement is not binding upon the principal.

2. A principal, who, in law, is entitled to the possession and control of personal property, is not bound by an unauthorized agreement of an agent, by which the principal obtains the possession thereof; nor will the principal, merely by retaining possession of such property after receiving the same from the agent, be charged with a ratification of the act of the agent. This is so because it was the right of the principal, either with or without such an agreement, to hold and possess the property.

(Syllabus by the Court.)

Error from superior court, Dodge county; F. H. Burch, Judge pro hac.

Action between the Baldwin Fertilizer Company and Thompson & McAlister. From the judgment the company brings error. Reversed.

Roberts & Milner and W. M. Clements, for plaintiff in error. E. Herrman and J. H. Martin, for defendants in error.

LITTLE, J. 1. The first question to be considered is whether the plaintiff in error was bound by the action of its agent, Bostwick, in agreeing to accept from the defendants in error certain notes given for fertilizers, in the possession of the latter, in payment of their debt. The law is that the principal is only bound for the acts of his agent within the scope of his authority. Civ. Code, § 3021. The evidence for defendants in error did not show that Bostwick had any authority to make the contract by which it was claimed their note was settled. That on the part of

the fertilizer company distinctly showed that Bostwick, who was connected with it as a salesman, had no such authority, and that a written contract existed between the fertilizer company and Thompson & McAllister, which fully covered the subject of the contract; and in dealing with Bostwick as the agent of the fertilizer company Thompson & McAllister did so at their own risk. If Bostwick had the authority to make such a contract, then, of course, the act of the agent was the act of the principal. If he did not, then the fertilizer company was not bound by the contract. It seems to us that it is clearly established under the evidence that the agent exceeded his authority in making the alleged settlement with Thompson & McAllister, and that the fertilizer company, the principal, was not bound by such contract. *Camp v. Trust Co.*, 97 Ga. 582, 25 S. E. 362.

2. But it is claimed that the fertilizer company, after the making of the alleged contract between Bostwick and Thompson & McAllister, by retaining possession of the property which Bostwick received under the terms of that contract, ratified the same, and is, therefore, bound by its terms. As a proposition of law, it is undoubtedly true that a principal may ratify the acts of an unauthorized agent, and, when ratified, the principal is as much bound by the terms of the contract entered into as if at the time of its execution the agent was authorized to make the contract. It is also true, as a proposition of law, that the principal may so conduct himself that the law will presume that he did sanction and confirm the act of the agent, and adopt it as his own. These principles are invoked by the defendants in error to maintain the contract entered into between themselves and Bostwick. The contention is that when Bostwick came to Thompson & McAllister to procure the notes they held for fertilizers sold the latter declined to give up such notes until their own note, which they had previously given to the fertilizer company, was surrendered as paid; that the agent agreed to do this, and under that agreement received from Thompson & McAllister the farmers' notes for fertilizers, which he delivered to the company; that the latter retained the notes, and collected the amounts due on a number of them, and by such retention and collection the company ratified the act of Bostwick in making the contract, and adopted the terms of such contract as its own; hence, if Bostwick had no original authority, that the company ratified his contract, and is bound by it. However this may be, under a state of facts different from those which appear in the present record, we are sure that such a conclusion does not follow under the facts of this case. A written agreement, executed in January, 1891, between the fertilizer company and Thompson & McAllister, stipulates, among

other things, that the company, about September 1st should return to Thompson & McAllister the notes taken by the latter for the sale of fertilizers to farmers, and that Thompson & McAllister were to collect these notes as the agent of the company, and hold such collections in trust for the account of the company until the note given by Thompson & McAllister to the company should be paid; and it was only when the note of Thompson & McAllister to the company should be paid that the notes given by the farmers should become the property of the former. It was also agreed by Thompson & McAllister that they should hold these notes as the property of the Baldwin Fertilizer Company, subject to delivery to the company or its order. These farmers' notes were the ones which were the subject-matter of the contract between Bostwick and Thompson & McAllister, and by the terms of that contract the defendants in error allege that their original note was paid by the delivery of the farmers' notes. This cannot be true, as matter of law, notwithstanding the terms of the contract, because, at the time the contract was entered into, Thompson & McAllister held the farmers' notes as the property of the company under an agreement to deliver them to the order of the company. Therefore, when they refused to turn over these notes, it was a violation of the written agreement; and when they stipulated with Bostwick to turn them over in payment of their original note to the fertilizer company, and did so, they were but giving to the company its own property; and, even if the company received the notes, and knew of the agreement made between Bostwick and Thompson & McAllister, it was nevertheless entitled to hold and collect the farmers' notes without being held to a ratification of the contract made by Bostwick, because the notes without the contract were its own, and when it came into possession of its own property there was no obligation resting on the company to return such notes to Thompson & McAllister, but it had a right, under the original contract, to hold and retain the same, and to collect the proceeds thereof, without regard to the contract made by Bostwick. As a matter of course, the fertilizer company could change the original contract, and adopt the contract made by Bostwick, although unauthorized. But the point which we decide is that, as a matter of law, it did not do so by retaining the farmers' notes and collecting the proceeds thereof, without any other evidence of ratification, because such notes belonged exclusively to the fertilizer company, and that company had the right and power to collect them. It is, therefore, our opinion that the verdict was contrary to law and the evidence in the case, and that the court erred in overruling the motion for new trial. Judgment reversed. All the justices concurring.

DWELLE et al. v. BLACKWOOD.

(Supreme Court of Georgia. Feb. 11, 1890.)

BILLS AND NOTES—DEFENSES—USURY—BURDEN OF PROOF—TRIAL—CLOSING ARGUMENT—VERDICT.

1. Where it was shown that, concurrently with the execution of a promissory note given to cotton factors for a loan of money, on which the highest rate of legal interest was charged, the parties executed another contract, by which, in consideration of the loan, the maker of the note undertook to consign to the lenders one bale of cotton for each \$10 advanced, or, in default of so doing, to pay in cash the sum of \$2.50 for each bale not shipped under the contract, parol evidence was admissible to show the circumstances attending the execution of the papers and the sayings of the parties at the time, for the purpose of ascertaining their intention as to the shipment of the cotton, and enabling a jury to determine whether the contract of shipment was a device to evade the law relating to usury.

2. If, on the trial of a case, defendant's counsel announce that they will assume the burden, and claim the right to open and conclude the argument, which claim is assented to by the trial judge, without objection on the part of plaintiffs' counsel, the latter, after the trial, will not be heard to object.

3. A verdict rendered in favor of the defendant, when the evidence adduced on the trial shows that there is some amount due to the plaintiff on the note sued on, will be set aside.

(Syllabus by the Court.)

Error from city court of Baxley; T. A. Parker, Judge.

Action by Dwelle & Daniel against Mrs. M. A. Blackwood. From a judgment in favor of defendant, plaintiffs bring error. Reversed.

N. J. Holton and W. W. Bennett, for plaintiffs in error. Thomas & Parker and E. P. Padgett, for defendant in error.

LITTLE, J. Dwelle & Daniel brought suit against Mrs. Blackwood for \$60, besides interest, alleged to be due on a promissory note. The note was for the principal sum of \$261.48, with interest from maturity at 8 per cent. per annum, and was dated April 20th, and became due November 1, 1897. The defendant answered, setting up, as a defense, that she had fully paid off and discharged the note by sending to the plaintiffs \$200 by express, one bale of cotton worth net \$56.30, and money order for \$5.18. At the trial plaintiffs introduced the note, and also copy of the contract between D. & D. and Mrs. Blackwood, in which it was recited that, in consideration of cash and supplies represented by the promissory note, Mrs. B. agreed to deliver to D. & D., at Savannah, for sale for her account, at least one bale of Sea Island cotton for each \$10 that they had advanced to her, and, in case of default, she agreed to pay in cash the above note at maturity, with \$2.50 per bale as liquidated damages mutually agreed upon for nonfulfillment of the contract, but not as a penalty, for such number of bales of cotton as she might fail to deliver. It was recited in the instrument that the \$2.50 per bale was no part of interest on the

sum for which she had given her note, but was intended to compensate D. & D. for the expenses that they are put to in providing warehouse accommodation, etc., for handling cotton, and that all cotton, etc., that she might deliver for sale should, at their option, be first applied to the payment of damages, and that the note should remain in full force until settlement is made and the note surrendered. There was also a stipulation to pay attorney's fees and costs. Parol testimony was admitted showing the payments averred in the plea, and that the interest at 8 per cent. on the sum borrowed was put in the face of the note; that D. & D. were cotton factors in Savannah. It also tended to show that, at the time of the execution of the contract, the defendant informed the agent of the plaintiffs that she would only make about one bale of cotton, and did not desire to sign the contract to ship more; that she was informed that it was necessary to sign the contract to get the money, but that, if no more cotton was made than one bale, it would be all right, and the contract to ship the cotton was signed under this statement; that the contract was executed by Mrs. Blackwood and the agent of D. & D., who, the defendant alleges, made the foregoing statements. The agent testified that Mrs. B. applied to him to procure her a loan of \$250; that he saw the plaintiffs in error, who agreed to make the loan, and gave him the papers to have her execute them; that she told him that, as she did not have but a small quantity of cotton, she did not wish to sign the contract, and her husband told her it was simply a matter of form; that "I told her, 'You just ship all you can; that I had heard one of the firm tell other customers that, if they violated the contract, it would be all right. I think she shipped all the cotton she made.'" The agent further testified that the contract was signed by Mrs. B. for the purpose of getting the money, and not for the purpose, or with any intention, of D. & D. handling her cotton for her; that what she proposed to do was to get the money, and ship what cotton she raised; that, if she didn't have cotton enough, she would pay them in money; that she did not sign with a view of sending 25 bales of cotton. The jury returned a verdict for the defendant, and the plaintiffs made a motion for a new trial on several grounds, all of which it is not necessary to consider in detail.

1. The plaintiff objected to the parol evidence of Blackwood and Crosby as to what was said previous to the execution of the contract, on the grounds that such evidence tended to contradict and vary the terms of the written contract. It must be borne in mind that there were two contracts executed concurrently or about the same time. The first was in the shape of a promissory note, by which she undertook to pay to the plaintiffs in error a given amount of money which she had borrowed, to become due in November

thereafter, and that interest at 8 per cent. on the sum borrowed was added to and became a part of the principal of the note. This note was secured by mortgage. The other was the contract by which she undertook to ship to the plaintiffs 25 bales of cotton, and, in default of such shipment, to pay them \$2.50 for each bale contracted to be shipped, for the handling, etc., and that this sum should not constitute any part of the interest on the money advanced, nor should it be a penalty for a failure to ship the cotton, but should be liquidated damages. The stipulations in this contract that it was not to be interest, that it was not to be a penalty, but that it was liquidated damages, do not free it from inquiry whether or not it was interest or a penalty. But the question is whether or not it was an attempt or device to evade the usury law, or whether the contract was made in good faith, and for the purpose of carrying out its terms as to the shipment of the cotton. This court, in the case of *Hollis v. Swift*, 74 Ga. 595, ruled that it should be left to the jury to decide, under all the facts, whether a commission charged for the sale of produce not already delivered, in connection with a loan of money, was a cover for usury, or was an honest contract for commission business, in connection with the use of money; and in the case of *MacKenzie v. Garnett*, 78 Ga. 251, it was ruled that it must be left to the jury to determine the intention of the parties and the truth of the case,—that is, whether the contracts were made to give and get time, or whether it was to handle the cotton, and make the profits on such handling alone, that caused the making of the contract. In *White v. Guilmartin*, 83 Ga. 640, 10 S. E. 444, it was expressly ruled that the question as to whether stipulations of this kind made in contracts were made as a cover for usury is for the jury to decide from all the facts. The defendant averred that the note had been paid, and it was admitted that the sums set up in her plea had been received. But it was contended that a part of the money so received had been applied, under the stipulations of the written contract, to the payment of the commissions, thus leaving a balance on the promissory note. It was admitted that there was no usury in the note sued on. If any existed, it was contained in the contract, and, if that was usurious, then it was not entitled to have any credit for the sums paid. While, as a rule, usurious contracts, other than deeds to land, are not void, they are so as to the usurious interest which they contain.

While it is true that parol evidence is inadmissible to add to, take from, or vary written contracts (Civ. Code, par. 1, § 3675), it is also provided that all the attendant and surrounding circumstances may be proved. It is also further provided by section 5203 of the Civil Code that parol evidence is admissible to show that the writing was either originally void or has subsequently become so.

So that, from the view we take of the point raised, the evidence was admissible, as illustrating the question whether or not the contract was in fact a device by which the lender of the money should receive for the use of such money more than the lawful rate of interest. It was competent for these facts to go to the jury, and for the jury to pass upon the question, under the principles of law given them in charge. If the contract should be found by the jury to have been usurious, then the sums of money received by the plaintiffs in error, and by them credited on this contract, of right belonged as credits on the original note, and, under the plea of payment, would be so applied. The plea of payment filed to the suit necessarily involved the question of the application of the payments which had been made, and also the question as to whether the contract was or was not usurious. It was not contended that the original note was infected with usury, and there was no plea of usury made to it; but the issue was raised when, in response to the plea, the plaintiffs in error contended that such payments had been properly applied on another debt.

2. It is further complained that the court erred in ruling that the defendant was entitled to the opening and conclusion of the argument of the case. In connection with this ground, it is stated that, at the opening of the case, defendant's counsel assumed the burden and claimed the right to open and conclude the argument; that this claim was assented to by the court, and not objected to by plaintiffs' counsel. It therefore seems that no point was made as to the right of defendant's counsel to open and conclude, and no objection was made to the allowance by the court of such claim. This being true, whether the court erred or did not err in allowing the defendant to open and conclude, it was too late for the plaintiffs' counsel to interpose an objection after the trial was had. Had he desired to contest the right of defendant's counsel to so open and conclude, he should have made the point to the court, and invoked a ruling on the point. Not having done so at the proper time, he will not be heard now to object.

3. It is further complained that the verdict of the jury is contrary to the law and evidence in the case, because, if all sums for which the defendant claims a credit shall be applied to the note sued on, there should be a balance remaining due to the plaintiffs. On examination, we find that the promissory note, for the amount of \$261.48, was to become due on the 1st day of November, 1897, and that after that date the principal of the note bore interest at the rate of 8 per cent. per annum. In the plea the defendant avers that she sent the plaintiffs \$200, to be credited on the note. By reference to the statement of account introduced in evidence. It is shown that this \$200 was received on November 8d. By the same statement it was

that on the 10th day of January, 1898, the plaintiffs received, by express, the additional sum of \$5.18. These sums remitted aggregate the exact principal of the note, but, under its stipulations, plaintiffs are, by reason of accrued interest, clearly entitled to a small sum due on the note, for which amount they should have had a verdict. Other than this, we cannot say that the verdict of the jury was contrary to the evidence in the case. The charges of the court complained of contain no material error, and were pertinent to the issues raised. The verdict of the jury having been rendered for the defendant, and the evidence showing that some amount was due on the note sued on, it must, for this reason, be set aside. Judgment reversed. All the justices concurring.

MORRIS v. IMPERIAL INS. CO., Limited,
OF LONDON.

IMPERIAL INS. CO., Limited, OF LONDON
v. MORRIS.

(Supreme Court of Georgia. Feb. 11, 1899.)

INSURANCE—WARRANTY—OWNERSHIP—IRON-SAFE
CLAUSE—WAIVER—FRIVOLOUS DEFENSES—EVI-
DENCE—BURDEN OF PROOF—NEW TRIAL—APPEAL
—REVIEW.

1. Where, to a suit upon a policy of fire insurance, the defense is interposed that at the time the policy was taken out by the insured he was not the owner of the property thereby covered, the burden of satisfactorily establishing this contention rests upon the defendant, notwithstanding it may be incumbent upon the plaintiff, in order to make out a prima facie case, to show that the property in question, alleged to have been destroyed by fire, belonged to him at the time the same was burned.

2. An absolute and unconditional covenant of warranty by the insured of the truth of certain representations made by him in a written application for insurance is binding upon him, irrespective of the question whether such representations were made in good faith or otherwise.

3. It being a vital issue in the case whether or not the insured had complied with a stipulation in the policy requiring him to keep a set of books clearly and plainly presenting a complete record of the business transacted by him, it was error not to admit in evidence a letter received by the company from his attorney, prior to the commencement of suit, which tended to show that at the trial the insured had assumed a position apparently inconsistent with a statement made in this letter as to certain facts material to this issue. (a) Testimony as to the "usualness or unusualness" of a debtor himself keeping no books, but relying on a creditor to do so for him, was, however, properly rejected, not being pertinent to the issue presented; and the same is true as to an observation by an expert witness, in commenting upon the manner in which the books of the insured were kept, that, though probably going "through fifty sets of books a year," the witness had "never seen anything of that sort before."

4. Though the agent who wrote the policy had at the time full information regarding the method of bookkeeping pursued by the insured, the mere fact that such agent then failed to raise any objection thereto would not amount

policy, to thereafter keep such a set of books as was therein specified; nor, under such circumstances, would the company be estopped from setting up the defense that the insured had failed to comply with his covenant, if, upon being called upon to indemnify him for a loss, this fact came to the knowledge of the company.

5. It does not follow that, because evidence introduced in behalf of a plaintiff be strong enough to withstand a motion for a nonsuit, it is not within the power of the trial judge, if dissatisfied with a verdict based upon such evidence, to grant the losing party a new trial. Certainly it is true that a judgment sustaining a motion for a new trial, though based specifically upon a single ground thereof, whether meritorious or not, should not be set aside, if it affirmatively appears that, for any reason assigned by the movant in other grounds of his motion, it would have been reversible error to overrule the same.

6. Under the facts of the present case, the court was not authorized to give in charge to the jury any instructions whatsoever with regard to the assessment of damages and attorney's fees against the defendant company.

7. The defendant having failed to establish its contention that the insured, in computing his loss, had endeavored to perpetrate a fraud upon the defendant, the trial judge properly refused to submit this defense to the jury; nor was any error committed in rejecting a memorandum, alleged to have been made by an expert bookkeeper, which was offered by the defendant as "documentary evidence" in support of its contention that the proofs of loss submitted by the insured were unreliable and incorrect.

(Syllabus by the Court.)

Error from superior court, Sumter county;
W. N. Spence, Judge.

Action by Joseph Morris against the Imperial Insurance Company, Limited, of London. There was a verdict for plaintiff, and a new trial was granted, and plaintiff and defendant bring error and cross error, respectively. Affirmed on the main bill of exceptions. Reversed on the cross bill.

Allen Fort, Du Pont Guerry, and E. A. Hawkins, for plaintiff. Glenn, Slaton & Phillips and Hooper & Crisp, for defendant.

FISH, J. Suit was instituted by Joseph Morris against the Imperial Insurance Company, Limited, of London, upon a policy of insurance covering his stock of merchandise, which had been wholly destroyed by fire. A verdict was returned in his favor, and the defendant company moved for a new trial, which was granted; the court being of the opinion that as to one branch of the case the finding of the jury was not warranted by the evidence. The defendant's motion contained various grounds, presenting special assignments of error, but each of these was specifically overruled. Neither of the contending parties being satisfied with the direction thus given to the case, the plaintiff brings here his writ of error, complaining of the grant of a new trial on the ground upon which the court based its action, whereas the movant, by cross bill of exceptions, as confidently asserts that error was committed in not sustain

ing each of the several other grounds upon which it relied. The whole case as made by the defendant's motion is therefore before us for review.

1. Little difficulty has been encountered in disposing of the first question presented for determination. It appears that one of the defenses relied on at the trial was that the stock of goods destroyed by fire was not, at the date upon which the policy was issued, the property of the plaintiff, but really belonged to his brother, Samuel Morris, and accordingly, under the terms of the policy, the plaintiff could not sustain his action. In this connection, the court instructed the jury that the burden of proof was upon the company to establish its contention, and this charge is complained of as error, upon the idea that, in order to show individual loss, it necessarily was incumbent upon the plaintiff to prove his ownership of the property insured. It is true that the plaintiff had to successfully meet the burden of making out at least a prima facie case as to every material allegation upon which he relied for a recovery; but it by no means follows that, in addition to this burden, common alike to all suitors upon whom rests the onus of establishing their complaints, it was incumbent upon him to go further, and negative the several defenses interposed to his action. On the contrary, it is an inflexible rule of practice that, as to all matters purely of defense, the burden of proof is cast upon the defendant. The present case offers no reason why any exception should be made to this rule. It was only incumbent upon plaintiff, in order to make out a prima facie case in this respect, to show possession, coupled with a bona fide claim of right to the goods in question; for satisfactory proof of these facts would doubtless raise in his behalf a presumption of ownership calling for positive evidence to the contrary on the part of the company. At any rate, in order to establish his alleged loss or damage by fire, it was not essential that he should do more than prove the goods burned belonged to him at the time of their destruction; i. e. the date of the fire.

2. The written application for insurance, upon which the policy sued on was issued, contained a covenant on the part of the insured that the statements made by him in reply to the several questions therein propounded concerning the nature of the risk, etc., were true, and were thereby "made the basis and a condition of this insurance, and a warranty on the part of the insured." To the question, "Has the company canceled or refused insurance on the property?" the applicant appears to have answered, "No." On the trial, the company sought to show this statement was untrue; and upon the issue thus presented the court charged the jury: "The defendant must not only show that the plaintiff has been refused insurance,—his application for insurance has been turned down previously to the insurance of this policy by the company,—but you must be satisfied by the testimony

that there was a willful misrepresentation in the case, and you must find, also, that the plaintiff understood that he made that warranty." The vice of this charge, as is pointed out by the exception thereto interposed by the company, is that it lays down the rule that the misrepresentation made must be shown to have been willful, whereas the insured expressly covenanted that his representations, as made in his application for insurance, should become warranties. It is one thing to stipulate that an insurance policy shall not be binding upon the company in the event the insured has knowingly misrepresented material facts, and quite a different thing, from a legal standpoint, at least, to absolutely warrant as true the representations made by him in order to procure the policy. One who, in good faith or otherwise, makes an absolute warranty, does so at his peril; for, in the event of a breach thereof, the party with whom he contracts is legally entitled to hold him strictly to his covenant. As well might the test laid down by the trial judge be applied to the vendor of goods, who sells with an express warranty as to quality, as to the buyer of insurance, who gives to a dealer therein a warranty without which the latter would not sell.

What is said above applies with equal force to another charge of the court, to which exception is taken, wherein the jury were instructed that the insured would not be prejudiced by another alleged misrepresentation, in his written application for insurance, concerning the amount of his sales during the six months prior thereto, unless they should believe the statement in question was made "knowingly and understandingly." Doubtless the company sought to elicit and contract with reference to the truth,—not vague or incorrect impressions which the applicant might have as to the subject-matter of inquiry; and it would seem that, if the latter was not in a position to furnish the character of information desired and insisted upon, he alone should suffer, for he has expressly agreed with the company that it shall not, if what he warranted to be true was not in fact so.

3. Apparently the most hotly contested issue in the case was whether or not the insured had failed to comply with a stipulation in the policy termed the "Iron-Safe Clause," wherein he covenanted, among other things, to "keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," and "in the event of failure to produce such set of books for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." There was evidence on the trial to the effect that he did in fact undertake to keep a record of his cash sales, but he did not himself attempt to enter in either of two books which he kept in his store any statement of his purchases. Testimony was, however, introduced to the effect

that the insured was a foreigner, not long resident in this country, and not sufficiently familiar with the English language or experienced in bookkeeping to undertake successfully to keep a complete set of books showing all his business transactions; and accordingly his brother, who lived in an adjoining city, agreed to keep for him a complete and accurate statement showing the status of his business. In pursuance of this arrangement, it was further claimed by the insured that his brother did in fact devote certain pages in his individual ledger to a record of the business transactions conducted by the insured, showing clearly all purchases of goods made by the latter, as well as the amounts realized from time to time from sales thereof as regularly reported by him. It appears that this brother, Samuel Morris, had formerly been the owner of the business conducted by the insured in the town of De Soto, but had sold the same on credit to the latter, and had furnished him from time to time with the goods necessary to carry on his business, really backing the enterprise, and being his chief creditor. Samuel Morris was carrying on a mercantile business in the city of Americus, and furnished out of his store many of the goods required. In other instances, he stood security for goods purchased by the insured from other business houses, paid the bills therefor when due, either out of his own means or with money remitted to him by the insured, and made the proper entry on the ledger, which at all times showed how accounts stood between them. The insured was furnished invoices of all goods purchased by him, as well as receipts for money sent to Samuel Morris, and in this way was kept informed as to the status of the business. These papers were kept on file by the insured in his store, and were burned in the fire which destroyed the premises, so that the sole record of his purchases was that kept by his brother, as above indicated. The insurance company, being skeptical as regards the existence of such arrangement as that testified to with reference to the keeping of books by the insured, contended that the ledger kept by Samuel Morris itself showed that the real truth of the matter was that he, as any other creditor would have done, merely kept a record of a running account he had with the insured, and in no sense undertook to act as the agent of the latter in the capacity of bookkeeper. In this connection, a letter addressed to the company by the plaintiff's attorney was offered in evidence as having a bearing on the issue, to the extent, at least, of tending to show that at the time this communication was written there was no contention that the books of Samuel Morris were anything save a record of his individual business transactions, but, on the contrary, that it was practically conceded that his ledger merely showed his dealings, as a creditor, with the insured, who admittedly had had business transactions with other parties as well. This letter, the execu-

tion of which was admitted, purported to present to the company an inclosed "claim of loss" made by the insured, with the explanation that: "The reference to pages of ledger upon the detailed statement of the amount of stock has reference to the ledger of S. Morris, from whom he bought most of his goods. Mr. Joseph Morris kept his invoices upon a wire hook in the store, and they were destroyed; but the amounts claimed by him are verified by the books of S. Morris, the Americus Grocery Company, Windsor-Whiteley-Hudson & Bros.' books, and others in Americus with whom he dealt." We cannot agree with the trial judge that this letter was irrelevant, upon which idea it was excluded. Indeed, it appears to be peculiarly pertinent, as tending to show a possible "change of front" by the insured, as evidenced by his contentions at the trial. At any rate, we think the document should have been allowed to go before the jury for what it was worth.

Complaint is made by the company that the court improperly excluded other evidence bearing upon this branch of the case. One of its witnesses, John C. Ruse, an "expert bookkeeper, who was testifying in reference to the books of the plaintiff," was not permitted to answer the question: "What about the usualness or unusualness of a creditor keeping books for the debtor, and no books kept by the debtor?" We are not informed what answer to this question the defendant expected to elicit, and so cannot say the ruling complained of was accompanied with injury; but, were this otherwise, we would be constrained to hold the question was improper, as it sought to obtain information having not the remotest relevancy to the issue. The question for determination was, as we understand it, whether or not the insured had kept, either in person or by an agent, such books as were called for by the policy. A question assuming the negative, and calling for the expression of an opinion concerning the "usualness" of such a state of affairs, might be calculated to bring out instructive and interesting information, but not relevant evidence. Nor do we think the court committed error in ruling out an answer of this witness in which he asserted, commenting upon the peculiarity of the books kept by the insured, that, though he (witness) probably went "through fifty sets of books a year," he had "never seen anything of that sort before." What this witness had or had not seen, in the respect he alluded to, was wholly immaterial, unless he was, as an expert, prepared to swear that it was impossible to correctly keep books under the system adopted by the insured.

4. The plaintiff sought further to meet and overcome the defense last above referred to by an attempt to prove that the company had waived all right to insist upon a strict compliance with the terms of the policy in regard to the keeping of a full and complete set of books. To this end testimony was introduced in his behalf to the effect that, though the

agent who wrote the policy well knew the character of records which the insured had been making of his business dealings, no objection to this system was urged, but the agent apparently elected to issue the policy notwithstanding the fact that the point might be raised that the set of books kept by the insured did not present a satisfactory record of his business transactions. Touching this matter the court instructed the jury as follows: "It is contended by the plaintiff that the defendant company issued to him the policy sued on with full knowledge on the part of their agent who wrote the policy of the character of the books that the plaintiff was keeping. I charge you, gentlemen, if you believe that, if you believe from the evidence in this case that the agent of the Imperial Insurance Company was invited to examine the books of Joseph Morris before they wrote this policy, did examine them, and had notice of the character of records he was keeping, the books that he was keeping, they would be bound by it, they would be estopped from now setting up this as a defense, and you ought not to sustain that defense in that case. If you believe that they had notice of the kind of books he kept, whether it was in strict compliance with the express terms of that policy or not, if they accepted his money, wrote the policy, and accepted the premium with full knowledge of the character of books he was keeping, they could not afterwards come up, and set up as a defense that he had failed to comply with the stipulation of the policy about keeping books." To this charge the defendant excepts upon various grounds, one of the assignments of error urged thereto being that the doctrine of estoppel was not applicable under the circumstances stated. We think this position is well taken. Suppose the insured, prior to the issuance of the policy, kept no books whatsoever; could it be said that, merely because the company's agent knew this fact, the insured was under no duty of fulfilling the express obligation, assumed by him when he accepted the policy, of thereafter keeping a set of books such as is therein specified? Certainly not, for the stipulation in question calls for compliance with this requirement in the future, without regard to how he may have conducted his business in the past. In the present case, not only was the agent under no duty, legal or moral, of objecting to the manner in which the insured had previously seen fit to keep a record of his business, but such a course was wholly unwarranted. His conduct could not have misled the insured, for the policy delivered to the latter plainly stated what the company required of him as to keeping a record of his business in the future. It would be idle to say the company "waived" anything. It had no right to object to the method pursued by the insured previously; and, until a right on its part subsequently arose to object to the manner in which he kept his books, no waiver could logically be made. So

far as the record before us discloses, the company has never made such a waiver. On the contrary, from the defense interposed, it has no intention of releasing the plaintiff from his obligation to comply with his express covenant.

5. When this case was here at the October term, 1897, it was held that: "It being, under the evidence, an issuable question of fact whether or not the plaintiff below sufficiently complied with that stipulation in the policy of insurance sued upon requiring him to 'keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit,' and the right of the plaintiff to a recovery depending upon the solution of this question, it was error to grant a nonsuit." See 29 S. E. 927. The jury, at the trial subsequently had, having found a verdict in his favor, it is contended by counsel in his behalf that the judgment of the court below granting a new trial, which the judge based solely on the ground that the evidence upon this branch of the case did not warrant the finding of the jury, is directly contrary to the ruling made by this court, as above stated. We do not think this is necessarily so. The conclusion then reached by us was that, accepting as true the testimony upon which the plaintiff relied, as the trial judge necessarily had to do in passing upon the motion presented, it was error to hold, as matter of law, that the insured had not complied with the terms of the policy. As will have been seen from the statement of facts set forth in the third division of this opinion, the plaintiff relied solely upon parol evidence to sustain his contention that the record of his purchases, as made in the books of his brother, was kept by the latter, not in the capacity of creditor, but as the accredited agent and book-keeper of the insured. The insured himself and this brother were the only witnesses introduced to prove this vital contention. The presiding judge, as is well known, is vested with a very wide discretion in the matter of granting new trials, and if, in his opinion, the witnesses testifying in behalf of the prevailing party be not entitled to credit, it is clearly within the power of the judge, and it may oftentimes be his imperative duty, in a wise exercise of the discretion with which he is clothed, to order that the case undergo another investigation. We are not prepared to say that in the present instance the court abused its discretion. But, be this as it may, it is certainly true that if, for any reason presented by the defendant's motion, a new trial was properly granted, the judgment of the court below should not be disturbed, whether the ground upon which the judge based his ruling be meritorious, or quite the reverse.

6. Aside from the errors above pointed out, which unquestionably were of sufficient gravity to demand the grant of a new trial, we are of the opinion that the court should not have instructed the jury that they were authorized

to assess damages and attorney's fees against the defendant company, in the event they should believe it had acted in bad faith, and "that there was absolutely no occasion for the defense set up in this case." This charge is assailed by the defendant upon two distinct grounds. In the first place, it is contended that the statute (Civ. Code, § 2140) upon which this charge was predicated is violative of the constitution of the United States, in that an attempt is thus made to deprive insurance companies "of property without due process of law," and to deny to them that "equal protection of law" to which they are entitled, in common with all other classes of litigants; and in this connection the case of *Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, is cited and relied on. Secondly, it is strenuously insisted that "there was no evidence to warrant any charge on the subject of bad faith." Without attempting to deal with the first point made, suffice it to say that we fully agree with counsel that, without regard to whether this statute is or is not unconstitutional, the charge excepted to was unwarranted under the facts disclosed by the record before us. Surely, the defenses relied on by the company cannot justly be said to be frivolous, nor obviously without merit. Indeed, counsel for the plaintiff, possibly because of the difficulty experienced in meeting these defenses, seem to concur in this view; for in a supplemental brief filed by them they expressly state that, while they regard the statute as valid, "the finding of damages and attorney's fees is not insisted on," notwithstanding the jury saw proper to include the same in the verdict returned against this company.

7. In regard to that ground of the motion which alleges error on the part of the court in refusing to give in charge to the jury a written request to the effect that, if they should "find there was any fraud on the part of the plaintiff or his authorized agent in computing the loss," they should find in favor of the company, it need only be said that, in our opinion, the defense set up, that in this respect the plaintiff had violated the terms of the policy, was not sufficiently made out. Nor is it necessary to more than briefly deal with the remaining point presented by the defendant's motion for a new trial. What purports to be a mere memorandum of a more or less abstruse and complicated calculation, apparently having no connection with or bearing upon the case on trial, was tendered as "documentary evidence," the "purpose of said evidence being to show that the amount of the loss sustained under the policies sued on did not equal the face value of the policies, and the character of the business transacted." This document was offered as "a tabulated calculation made by John C. Buse, an expert accountant, from the proofs of loss." At best, even with this explanation, the paper appears to be no more than an argument in writing intended to show the

incorrectness of forth in the proof to the company. ed, or having h preparation of, th against him as a to perceive upon properly be admi on main bill of bill, reversed.

McBRIDE
(Supreme Court

AP
It affirmative demanded a finding under the pleading his recovery about thereon from Oct spective of the el such a recovery,— be set aside, but been amended so: in laid down. Di (Syllabus by th

Error from s county; W. B. B Action between McBride and oth and defendants direction.

A. C. Pate, El. Jas. K. Hines, f M. Stubbs, for d

PER CURIAM direction.

RUDOLPH
(Supreme Court LIMITAT

A written account upon whi and which was b tions, will not, u pay, or an ackno the account from this is true, thou reasonable certain question as that brought.

(Syllabus by th Error from su J. L. Sweat, Jud Action by P. Judgment for pl error. Reversed.

Ward & Smith in error. Geo. R ror.

OOBB, J. In : in a justice's cou which the court and the statute was as follows: of dwelling hov

year, \$50. 1896, August 17. By cash \$20. 1897, April 26. By cash to Gus. L. Brack or order, \$16. Balance, \$14." The plaintiff introduced a letter from the defendant to the plaintiff, dated May 19, 1897, which was as follows: "Inclosed you will find receipt from G. L. Brack for \$16. Mr. Brack, without notice to me, has sued me for \$14, with interest. I have already paid you a great deal more than I got from the place; still, I intended to pay what you claimed. Though as your attorney, Gus Brack, has sued me without notice, I will see you when you get it." There was evidence that, in the year 1892, the plaintiff had leased his house and lot to the defendant for the price stated in the account; that they had no written contract; that the defendant had paid the amounts credited, but that none of the credits were entered on the account by the defendant. The jury rendered a verdict in favor of the plaintiff for \$14, with interest. The defendant carried the case to the superior court by certiorari, alleging that the verdict was contrary to law and the evidence. The certiorari was overruled, and the defendant excepted.

The sole question in the case is whether the letter quoted above amounts either to a "new promise," or such a "written acknowledgment of [an] existing liability" as would be equivalent to a new promise, and have the effect to relieve the account from the bar of the statute of limitations. Civ. Code, §§ 3788, 3789. Conceding that the letter relied upon for this purpose identifies the debt with reasonable certainty, it does not contain either a new promise or such an acknowledgment of liability as would relieve the account from the bar of the statute. It not only does not contain an unequivocal promise to pay the account, or an acknowledgment that would amount to such a promise, but, on the other hand, distinctly sets forth a deliberate purpose never to pay. The expression, "I will see you when you get it," can only mean a repudiation of all liability and an absolute refusal to pay. The expression, "still, I intended to pay what you claimed," taken in connection with what precedes it, could, at most, mean that there was, at some time in the past, an intention to pay an account which the defendant was under no obligation whatever to pay. It follows, therefore, that the justice of the peace should have held that the action was barred by the statute of limitations, and the certiorari complaining of his refusal so to do should have been sustained. Judgment reversed. All the justices concurring.

GOMEZ v. JOHNSON et al.

(Supreme Court of Georgia. Feb. 11, 1899.)

WITNESSES—TRANSACTIONS WITH DECEASED—WORK AND LABOR—GRATUITOUS SERVICES—CONTRACTS.

1. Upon the trial of a suit against the representative of a deceased party upon an account

embracing items for services rendered, and for board and rent of room furnished, by plaintiffs to deceased, it is not error to permit one of the plaintiffs to testify that they operated a boarding house during the time named in the account, when it appears that such fact in no wise involved any transaction or communication had by plaintiffs with deceased.

2. On such a trial it is error for the court to charge the jury "that if services were rendered by any one,—a stranger to the suit, or a sister of the plaintiffs,—even though they were not hired servants and were not compensated by the plaintiffs, and although they claimed nothing as compensation from either the deceased or the plaintiffs, that, if such services were rendered by such person at plaintiffs' request, they could recover"; it not appearing that the deceased was any party or privy to such an understanding had between the plaintiffs and their sister, and the testimony showing that the services rendered by the latter were merely gratuitous.

3. The testimony did not require, even if it authorized, the verdict of the jury, independently of the above charge; and, there being strong reason to infer that this error of the judge influenced the jury to the injury of the plaintiff in error, the judgment overruling the motion for a new trial is reversed.

(Syllabus by the Court.)

Error from city court of Atlanta; J. D. Berry, Judge.

Action by Annie Johnson and another against G. P. Gomez, administrator of the estate of John Bryson, deceased. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Simmons & Corrigan, for plaintiff in error. P. F. Smith, for defendants in error.

LEWIS, J. Annie Johnson and Georgia Carroll filed a complaint against G. P. Gomez, as administrator of the estate of John Bryson, deceased, alleging an indebtedness of \$220 on an open account. The items of the account were as follows:

To room rent from July 1, 1893, to July 6, 1894, at \$10 per month.....	\$120 00
To nursing said John Bryson in August and September, 1893, at his special instance and request.....	41 00
To nursing said John Bryson from April 3rd, 1894, to May 27, 1894, at his special instance and request.....	55 00
To one week's table board, ending May 27, 1894	4 00
	<u>\$220 00</u>

To this action the defendant pleaded, denying the allegations in plaintiffs' petition. The jury returned a verdict for the plaintiffs for \$59.50, besides interest, whereupon defendant moved for a new trial, and alleges error in the judgment of the court overruling his motion.

It appears from the testimony in the record that the plaintiffs were keeping a boarding house, and that the deceased was one of their boarders at the time of his death. He was boarding with them a portion of the time during the year 1893. During the fall of that year he went to Florida, and requested them to keep his room for him at the rate of \$10 per month. He returned to plaintiffs' boarding house in the spring of the following year.

and there died on May 27, 1894. There was some evidence to the effect that he admitted owing plaintiffs, that they had been kind to him, and that he desired to compensate them by making them a deed to a lot which he owned. It further appeared that one of the plaintiffs was engaged in a store all day, and the other was engaged about her household duties. There was evidence of some slight service rendered by plaintiffs in waiting on deceased while he was sick; but the testimony tended to show that the principal attention he had was from a sister of the plaintiffs, who administered to him medicines, and otherwise gave him some attention. This sister, who was also boarding with plaintiffs, testified that she rendered the service simply because she was requested to do so by the plaintiffs; that she charged nothing therefor; expected no compensation either from the deceased or the plaintiffs. There was evidence, on the other hand, that the deceased, shortly before his death, drew \$10 from the bank, and stated that he owed the plaintiffs one week's board, and desired to pay the same. He left about half this sum of money drawn from the bank in his possession at the time of his death. Other boarders with plaintiffs testified that they did not pay their room rent and table board separately; that it was all included together, at a rate of about \$4 per week. This is substantially the material portion of the evidence bearing upon the issues of law presented by the motion for a new trial.

1. Besides the general ground in the motion for a new trial that the verdict was contrary to the evidence, it was alleged that the court erred in permitting one of the plaintiffs to testify over objection of defendant's counsel; the suit being one against the representative of a deceased person. The only testimony of this witness, except a few facts brought out on cross-examination in the interest of defendant, was that she and her sister, the other plaintiff in the case, operated a boarding house, and paid \$40 per month therefor for the year 1893, and up to the summer of 1894, and that the rooms were all comfortably furnished and carpeted. It will be noticed that the evidence act contained in Civ. Code, § 5269, subd. 1, does not provide that, when a suit is defended by the personal representative of a deceased person, the opposite party is an incompetent witness for any purpose, but the act renders him incompetent only as to transactions or communications with such deceased person. The testimony of this witness did not in any wise relate to any transaction or communication with the deceased. Under repeated rulings of this court, she was clearly competent to testify to other matters which did not relate to such transaction. *Purvey v. Foster*, 91 Ga. 444, 18 S. E. 318; *Trimble v. Mims*, 92 Ga. 103, 18 S. E. 362; *Woodson v. Jones*, 92 Ga. 662, 664, 19 S. E. 60; *Ullman v. Loan Co.*, 96 Ga. 628, 24 S. E. 409.

2. Another ground in the motion for a new trial was alleged error in charging the jury that if services were rendered by any one,—a stranger to the suit, or a sister of the plaintiffs,—even though they were not hired servants, and were not compensated by the plaintiffs, and although they claimed nothing as compensation from either the deceased or the plaintiffs, if such services were rendered to such person at plaintiffs' request they could recover. In the light of the testimony, this instruction of the court was clearly erroneous. Apart from the fact that it did not appear that the deceased was a party or privy to any understanding between the plaintiffs and their sister with reference to rendering him service, the only legitimate inference that can be drawn from the testimony is that the services rendered by this sister were purely gratuitous, and not with the idea that any debt would thereby be created against the deceased in favor of either herself or the plaintiffs.

3. It is insisted, however, that, regardless of the above error, the evidence demanded a verdict for even more than the amount found by the jury. Upon a careful review of the testimony, we do not think it demanded a finding for any amount, and certainly not any specific or definite amount. The charge, therefore, was calculated to injure the defendant, and the court erred in overruling the motion for a new trial. Judgment reversed. All the justices concurring.

BROWN v. GEORGIA MIN., MFG. & INV. CO. et al.

(Supreme Court of Georgia. Feb. 11, 1899.)

APPEAL—REVIEW—EQUITY—DIRECTION OF VERDICT.

1. A judgment of the superior court overruling exceptions of fact to a report made by an auditor in an equity case will not be disturbed by this court merely because of a conflict in the evidence introduced before the auditor; but such judgment will, when there was sufficient evidence to sustain the report, be upheld, unless it plainly appears that there was an abuse of discretion on the part of the trial judge in declining to approve the exceptions.

2. When, in such case, the judge overrules all the exceptions to the auditor's report, there is nothing to be passed on by a jury, and no verdict is necessary or proper. But, while this is true, a mere error of practice in directing a verdict will not be treated as cause for a new hearing when the verdict itself and the judgment entered thereon accomplish the same result as would have been reached by simply entering an order making the auditor's report the judgment of the superior court.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Controversy between Julius L. Brown, receiver, and the Georgia Mining, Manufacturing & Investment Company and others. A judgment was rendered, and the receiver brings error. Affirmed.

John C. Reed, for plaintiff in error. King & Anderson, for defendants in error.

LUMPKIN, P. J. In the litigation arising over the distribution of the assets of the Georgia Mining, Manufacturing & Investment Company, of which Julius L. Brown was receiver, a controversy arose as to the amount of the compensation he should receive for his services in that capacity. This question, together with numerous others, was referred to an auditor, who, upon the evidence heard by him, found and reported that \$300 per month was ample compensation to be allowed Mr. Brown. This finding was supported by direct evidence. There was, on the other hand, quite an amount of evidence, consisting largely of the testimony of expert witnesses, to the effect that Mr. Brown was entitled to much higher remuneration. He presented numerous exceptions of fact to the auditor's report. In one of these it was complained that the auditor had omitted from his report a portion of the testimony of Thomas L. Bishop, a witness sworn before him. The other exceptions attacked the finding of the auditor as to amount, and alleged, in substance, that it was contrary to the evidence, unsupported by the evidence, and against the preponderance of the evidence. The judge overruled all the exceptions of fact, and directed the jury to find a verdict in effect sustaining the auditor's report. After this verdict had been taken, the judge entered a judgment in accordance with its terms. Mr. Brown thereupon brought the case to this court for review.

As to the exception relating to the testimony of Mr. Bishop, the record discloses that the court heard testimony on this subject, and found as matter of fact that the auditor had correctly reported the testimony of this witness; and, further, that, even if the portion alleged to have been omitted were considered, the same should not affect the direction given to the case. There was abundant evidence to warrant the judge in concluding that the auditor's report required no amendment, so far as the testimony of Mr. Bishop was concerned.

1. The main and controlling question in the case is whether or not the judge erred in overruling Mr. Brown's other exceptions of fact, and in refusing to allow the same to be passed upon by the jury. This was an equity case, and we understand the law to be that in such cases the judge may, in a proper exercise of his discretion, approve exceptions of fact, and then send the case to the jury, or disallow the exceptions, and thus practically end the controversy. We do not mean to hold that a judge has the authority to arbitrarily overrule exceptions of fact when it is palpable that the auditor's findings are unsupported by the evidence. To do so in such a case would amount to an abuse of discretion. On the other hand, in cases where the evidence before the auditor was conflicting, the judge's determination to submit the questions at issue to a jury would not, necessarily, amount to a holding on his

part that the auditor's findings were erroneous. Clearly, under our statute, a judge is not bound in every equity case, where the evidence before the auditor was conflicting, to allow the jury to pass upon exceptions of fact. This whole subject is thoroughly discussed in the carefully prepared opinion of Justice Lewis in the case of *Hearn v. Laird* (Ga.) 29 S. E. 973, and therefore does not, at this time, call for further elaboration. As a conclusion deducible from the discussion therein presented, he observes that the law seems to leave much to the discretion of the judge, and adds: "If, upon examination of the auditor's report of the testimony, he discovers such conflict in the testimony that, in his judgment, the issue should be submitted to a jury, such discretion, unless abused, would not be interfered with by a court of errors. A decision allowing exceptions, and submitting issues of fact to a jury, might properly be reached, though the judge might not be prepared to say that the auditor erred, and though he had reached no definite conclusion on the subject himself. On the other hand, where there is sufficient evidence to support the auditor's rulings, and no error of law has been committed, this court will not reverse the judgment of the court below dismissing the exceptions and confirming the auditor's report." It was earnestly insisted before us that the judge ought to have allowed the jury to pass upon Mr. Brown's exceptions of fact, because the claim for compensation which he set up was overwhelmingly supported by the testimony of expert witnesses. The reply is that neither the auditor nor the judge was bound to accept as correct, and be governed by, the opinions of these witnesses. In this connection, see what is said with reference to testimony of this character in *Baker v. Mill Works* (Ga.) 31 S. E. 426.

2. The court did commit an error of practice. After overruling the exceptions of fact, there was no issue to be tried, and the case should not have been submitted to the jury at all. Section 4595 of the Civil Code declares that exceptions of fact to an auditor's report shall, in equity cases, be passed upon by the jury when approved by the judge. In other words, the jury are to pass upon them only when approved by the judge. Accordingly, the proper practice would have been to enter an order sustaining the auditor's report, and making it the judgment of the superior court. The error just indicated amounted, however, to no more than a mere irregularity, and affords no cause for reversing the judgment rendered. Indeed, we understand the real complaint of the plaintiff in error to be an exception, not to the form, but to the substance, of the action taken by the judge. Inasmuch as the result reached by directing a verdict which, in effect, sustained the auditor's report, and then entering a judgment in accordance with the verdict, was precisely the same as would have been reached by entering such a judgment without a verdict, we

will allow what has been done to stand. In so doing, however, we have thought it proper to call attention to the practice which should be observed in such cases. Judgment affirmed. All the justices concurring.

THORNTON et al. v. ABBOTT et al.

(Supreme Court of Georgia. Feb. 11, 1899.)

SECOND NEW TRIAL—SUFFICIENCY OF EVIDENCE.

When a case, because of conflicting evidence, is, upon the issues of fact involved, close and doubtful, and its determination depends entirely upon questions of credibility, and there is no decided weight of evidence in favor of either side, a second new trial should not be granted to the same party, "upon the ground that the verdict was not authorized by a preponderance of the evidence."

(Syllabus by the Court.)

Error from city court of Atlanta; J. D. Berry, Judge.

Action between J. J. Thornton and others against Abbott, Parker & Co. From the judgment and a grant of a second new trial, Thornton and others bring error. Reversed.

Y. A. Wright and J. L. Key, for plaintiffs in error. Dorsey, Brewster & Howell and Arthur Heyman, for defendants in error.

PER CURIAM. Judgment reversed.

RAY v. SEITZ.

(Supreme Court of Georgia. Feb. 11, 1899.)

ACTIONS—DISMISSAL—REINSTATEMENT—DISCRETION.

In view of the evidence appearing in the record, there was no abuse of discretion in granting the motion to reinstate this case.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by L. A. Seitz against A. F. Ray. From an order allowing reinstatement after dismissal for failure to prosecute, defendant brings error. Affirmed.

L. R. Ray, for plaintiff in error. C. A. Read and Arnold & Arnold, for defendant in error.

LUMPKIN, P. J. A case was pending in the trial court wherein Seitz was the plaintiff in execution and Ray the claimant. It came on to be heard, and the levy was dismissed for want of prosecution. On the next day the trial judge entered an order reinstating the case, and this is complained of as error. An examination of the evidence introduced at the hearing of the motion to reinstate fully satisfies us that there was no abuse of discretion in granting the order to which exception is taken. Mr. Reuben R. Arnold, one of the attorneys for the plaintiff in execution, who had special charge of the case, was in attendance upon the supreme court on the day the levy

was dismissed. His name did not appear on the docket as one of the counsel in the case, and consequently a brother attorney, Mr. Harvey Hill, whom he had requested to have his cases checked on account of his absence in the supreme court, did not know, when this particular case was called, that it was one he was expected to request the judge to pass. The only flaw in Mr. Arnold's showing for a reinstatement was his failure to have his name marked on the docket as counsel for Seitz, or else to inform Mr. Hill that this was one of his cases. There was, however, evidence tending to show that counsel for the claimant knew of Mr. Arnold's employment in the case, and of his absence in the supreme court, but did not call the attention of the court to these facts. We therefore think the trial judge very properly allowed the case to be reinstated. No substantial right was lost to the claimant, for the dismissal of the levy could not operate as an adjudication upon the merits of the case. If the dismissal had stood, the plaintiff would doubtless have caused another levy to be made, and this, in turn, would have given rise to another claim. Nothing, therefore, is involved except questions of cost and delay, and these have been eliminated by allowing the present claim case to proceed to a hearing without more ado. Judgment affirmed. All the justices concurring.

LITTLE ROCK COOPERAGE CO. v. HODGE.

(Supreme Court of Georgia. Feb. 11, 1899.)

PLEADING—DEMURRER.

The plaintiff's petition was, in substance, good, and as against the demurrer thereto, which was not only general in its nature, but vague in its terms, set forth a cause of action. The defects in the petition, if any, should have been specifically pointed out by an appropriate special demurrer.

(Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Action by the Little Rock Cooperage Company against M. T. Hodge. Judgment for defendant, and plaintiff brings error. Reversed.

W. L. & Warren Grice, for plaintiff in error. J. H. Martin, for defendant in error.

PER CURIAM. Judgment reversed.

RAY v. HOME & FOREIGN INVESTMENT & AGENCY CO. et al.

(Supreme Court of Georgia. Feb. 11, 1899.)

PLEADING—VERIFICATION—PAPERS—FAILURE TO PRODUCE—CROSS BILL—DISMISSAL OF PETITION—EFFECT—NONRESIDENCE OF PARTIES—DEFENSES—VERDICT—EVIDENCE.

1. Prior to the practice act of 1895 (Civ. Code, § 5055), when an equitable petition expressly waived discovery, an answer to the same was not required to be verified by affidavit, although the petition was so verified.

2. Before a judgment dismissing a case or striking an answer can be entered for failure to produce documents called for in a notice to produce, it must appear that there was a peremptory order of court requiring the production of the papers described in the notice and a failure to comply with such order.

3. Where a petition prayed for an injunction against the defendant to restrain him from exercising a power of sale in a deed given by the plaintiff to secure the payment of promissory notes, an answer of the defendant, in the nature of a cross bill, which prayed for a general judgment on the notes and a judgment setting up a special lien on the land, contained matter germane to that set up in the original petition.

4. The dismissal of such a petition did not carry that part of the answer which was in the nature of a cross bill with it, nor did the fact that the relief sought therein was not of an equitable nature require its dismissal.

5. Such an answer would remain in court for determination, notwithstanding the person who filed the petition was a resident of another county than that in which the suit was pending.

6. When the grantor in a security deed containing a power of sale attempts to obstruct the sale made under such power, refuses to surrender possession to the grantee, who is the purchaser, and in every way attacks and impeaches the validity of the sale, he will not, when the grantee abandons all rights under the sale and brings suit on the debt, be allowed to set up as a defense that a sale was had under the power contained in the deed.

7. The evidence warranted a finding in favor of the defendant for the amounts for which judgment was finally rendered, after the excess in the verdict had been written off under order of the court. The court committed no error in the case.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Bill by L. R. Ray against the Home & Foreign Investment & Agency Company and others. There was judgment for defendants, and, from an order overruling plaintiff's demurrer to defendants' cross bill, his motion for a new trial, and striking his plea to the jurisdiction, he brings error. Affirmed.

L. R. Ray and Reed & Hartsfield, for plaintiff in error. Payne & Tye, for defendants in error.

COBB, J. On July 19, 1895, Ray brought his petition against the Home & Foreign Investment & Agency Company, Payne & Tye, and Alonzo Richardson, praying for an injunction to restrain the defendants from proceeding to sell certain realty under a power of sale in a deed given by the plaintiff to the first-named defendant to secure the payment of certain promissory notes. This petition waived discovery, and was sworn to by the plaintiff. The defendant first above mentioned answered, denying the right of the plaintiff to the injunction prayed for, and set up, by way of cross bill, that certain sums were due it as principal and interest on the promissory notes referred to in the petition of the plaintiff, and that the deed referred to in the petition had been executed to secure the payment of the notes. Defendant prayed that it have judgment against the plaintiff for the amount due on the notes, and also a judgment setting

up a special lien on the land embraced in the security deed. This answer was filed on September 5, 1895, and was not sworn to. On September 27, 1895, the court refused plaintiff's application for injunction, and this refusal was subsequently affirmed by this court. 98 Ga. 122, 26 S. E. 56. On the 28th day of September, 1896, the court, on motion of plaintiff, granted an order that the petition "be dismissed without prejudice to any rights of the defendants which they may have from the filing of an answer in the nature of a cross bill." The plaintiff then filed a demurrer to the defendant's answer in the nature of a cross bill, on the following grounds: (1) "It having been determined by this court that there is no equity in plaintiff's bill, and the sole prayer for relief therein having been refused, there is and was no cause pending in this court, and nothing upon which to base a cross bill." (2) "Because the judgment prayed for in said cross bill is not germane to the cause in the bill filed by plaintiff." (3) "Because the relief asked for by the defendants in said cross bill is not of an equitable nature, and they have a plain common-law remedy." (4) "Because it does not appear from said cross bill that the plaintiff, L. R. Ray, is a citizen of Fulton county, and that this court has jurisdiction to give judgment against him as prayed." The court overruled the demurrer. Plaintiff then filed his plea to the jurisdiction of the court, and this plea was, on motion of defendant, stricken. The plaintiff thereupon filed his answer to the defendant's cross petition, alleging that since the refusal of the injunction the defendant had gone through the form of selling the land described in the deed, which sale it claimed to have made under the power of sale contained in the deed; that at this sale the property was knocked down to the highest bidder for the sum of \$2,500; and that the sale has never been set aside. The case then went to trial, and the Home & Foreign Investment & Agency Company introduced in evidence the original note made by the plaintiff to it for the principal sum of \$2,000, dated February 11, 1892, and due February 1, 1895; also three coupon interest notes, for \$160 each, all bearing the same date as the principal note, with interest at 8 per cent. per annum after maturity, and due on the 1st days of February, 1894, 1895, and 1896, respectively, each being for the interest due on the principal note for the year ending on the day the coupon note became due. Defendant also put in evidence the deed executed by the plaintiff, to secure the notes above mentioned, and the plaintiff's petition for injunction, with all orders granted thereon. Plaintiff testified that, after the dismissal of his petition, the land was sold, and bought in by Alonzo Richardson, an agent of the investment company, for the sum of \$2,500; that at the sale notice was given, at the instance of plaintiff, that the sale was illegal, and would be contested; that he, by his tenants, was still in possession of the land; and

that Richardson had been trying to get possession of the property. There was testimony for the defendant to the effect that no deed had ever been made pursuant to the sale referred to in the plaintiff's testimony, and that defendant, ascertaining that plaintiff intended to contest the legality of the sale, and finding out that it could not get possession of the land, concluded to abandon the sale under the power of sale in the deed, and that it claimed no further rights under it. The jury returned a verdict for the defendant for \$2,000 principal, \$640 interest coupons, \$63.75 interest on coupons, and \$270.03 attorney's fees, and also found that defendant have a special lien on the land embraced in the deed. Judgment was entered accordingly. Afterwards, the defendant having written off part of the recovery, the judgment was amended so as to strike from the amount recovered as interest \$160, and from the amount recovered as attorney's fees the sum of \$15.66. The plaintiff filed a motion for a new trial on the general grounds, and incorporated therein the grounds stated in his demurrer, and the further grounds that the court erred in refusing to "dismiss or nonsuit defendant's answer" on the ground that it had not complied with plaintiff's notice to produce its charter, and because the court overruled plaintiff's motion to dismiss defendant's answer on the ground that it was not verified, and because the verdict was excessive. This motion was overruled, and the plaintiff excepted, assigning error upon the decision of the court overruling his demurrer, striking his plea to the jurisdiction, and refusing to grant his motion for a new trial.

1. The plaintiff in error contends that the defendant's answer in the nature of a cross bill should have been dismissed, because it was not verified by affidavit, the plaintiff's petition being so verified. The answer was filed before the practice act of 1895 (Acts 1895, p. 44) went into effect. Prior to that time there was no law requiring an answer to be verified by affidavit simply because the petition was sworn to. When discovery is prayed, the answer must be verified. In the present case, however, discovery was expressly waived, and for this reason it was not necessary that the answer should be verified. Civ. Code, § 5056.

2. The court was right in refusing to "dismiss or nonsuit" defendant's answer in the nature of a cross bill on account of its failure to comply with the plaintiff's notice to produce its charter. Even if the notice was in all respects sufficient, it does not appear that there had been a peremptory order of the court requiring the defendant to produce the paper described in the notice. This being true, the motion was not well taken. Such an order is absolutely necessary before a motion to dismiss the case can be entertained by the court. *Georgia Iron & Coal Co. v. Etowah Iron Co.* (Ga.) 30 S. E. 878, and cases cited.

3. It is further contended by the plaintiff in error that the answer in the nature of a cross bill should have been dismissed because the

matter set up therein was not germane to the case made by the original petition. That issues entirely independent of those raised by the original petition cannot be raised and determined by a cross bill is well settled. "A cross bill should not introduce new and distinct matters not embraced in the original suit." *Josey v. Rogers*, 13 Ga. 478. "A cross bill is a bill brought by a defendant against a complainant or other parties in a former bill depending, touching the matters in question in that bill." *McDougald v. Dougherty*, 14 Ga. 674. See, also, *Carlton v. Insurance Co.*, 72 Ga. 371, 392; *Brownlee v. Warmack*, 90 Ga. 775, 17 S. E. 102; 2 *Daniell*, Ch. Prac. 1548. "It is treated, in short, as a mere ancillary suit, or as a dependency upon the original suit." *Story*, Eq. Pl. § 399. See, also, *Cross v. De Valle*, 1 Wall. 1. Applying these rules to the present case, we think the court properly refused to dismiss the answer in the nature of a cross bill on the ground that the matter set up therein was entirely independent of, or not germane to, the case made by the original petition. The petition sought to enjoin the defendant from exercising a power of sale in a deed given to secure the payment of certain notes. The defendant answered denying the plaintiff's right to an injunction, and, by way of cross bill, asked for a general judgment on the notes and a judgment setting up a special lien on the land. This was not a new and distinct matter, entirely independent of that set out in the original petition. The subject-matter of the petition and the answer in the nature of a cross bill was one and the same. The issues raised in each involved the same debt, the same deed, the same land, and the same controversy. The petition sought to enjoin the defendant from collecting the debt by pursuing a remedy given in the deed. The effect of the answer was to abandon the remedy sought to be enjoined, and rely upon a remedy to be given by the court, into which the defendant had been drawn by the petition of the plaintiff. A mere statement of the case seems to us to be all that is necessary to show that the answer in the nature of a cross bill "did not introduce new and distinct matters not embraced in the original suit."

4. The answer in the nature of a cross bill containing matter germane to that set up in the original petition, the dismissal of the plaintiff's petition did not carry such an answer with it. The plaintiff had the undoubted right to dismiss his petition, and such dismissal carried with it so much of the defendant's answer as was purely defensive. But that portion of the answer which was in the nature of a cross bill, and prayed for affirmative relief against the plaintiff, remained in court, in order that the issues raised therein might be determined. This would be true without regard to that part of the order of the court which declared that the dismissal of the petition should not operate to prejudice the defendant's right to proceed. Civ. Code, § 4970; *Evans v. Sheldon*, 69 Ga. 100, and cases cited.

Nor was it any ground for the dismissal of such an answer that the relief prayed for was not of an equitable nature. It has long been the law that, where a court of equity obtains jurisdiction for one purpose, it will retain it until complete justice has been done to all parties. Civ. Code, § 3925; *Mays v. Shivers*, 7 Ga. 238; *Martin v. Tidwell*, 36 Ga. 332. But without regard to this rule of law, under the practice prevailing in this state since the passage of the uniform procedure act of 1887, the superior courts have full power in all cases to grant complete relief to all suitors, applying in aid thereof either legal or equitable remedies or both. *Georgia Iron & Coal Co. v. Etowah Iron Co.*, *supra*, and cases cited.

5. The plaintiff's plea to the jurisdiction could not avail him. He came voluntarily into the superior court of Fulton county, seeking its aid in his behalf, and thus submitted himself to its jurisdiction in relation to all matters directly connected with the case that he had originated. One who goes into the courts of a county other than that of his residence, to assert a claim or set up an equity, must be content to allow that court to determine any counterclaim growing out of the original suit, which the defendant sees fit to set up by a cross action. *Bowman v. Long*, 27 Ga. 178; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 200, 11 Sup. Ct. 61.

6. The sale, under the power in the deed, was never consummated. The plaintiff not only attempted to obstruct the sale, but refused to deliver possession to the purchaser, and in every way possible impeached its validity. This being so, when the defendant sees fit to abandon the sale, and ask for a judgment setting up a special lien on the land, it does not lie in the mouth of the plaintiff to object.

7. The evidence authorized a finding in favor of the defendant for the amounts stated in the judgment finally rendered after the excess in the verdict had been written off under order of the court. There was no error of any character whatever committed by the court during the entire progress of the trial. Judgment affirmed.

ATLANTA LAND & LOAN CO. et al. v. HAILE.

(Supreme Court of Georgia. Feb. 11, 1890.)

VENDOR'S LIEN—CREATION—NOTICE—FORECLOSURE
—AMENDMENT—CONTINUANCE.

1. There were sufficient allegations in the original petition to authorize the amendment proposed by petitioner in this case; and, the same being germane to the issue, and adding no new cause of action, the court did not err in overruling the defendants' objection thereto.

2. When an amendment has been made to pleadings, the opposite party is not entitled to a continuance when he fails to show that he is less prepared for trial than he would have been had such amendment not been made.

3. Where land is sold, and notes are given for a part of the purchase money, with the agreement between the vendor and vendee that

the former should have a lien upon the land for the amount of such purchase-money notes until the same are paid, and where such agreement is recited and recognized both in the deed from the vendor and in the notes given at the same time by the vendee, a valid equitable lien or mortgage is thereby created upon the property in favor of the vendor and his assigns. (a) One who asserts title to the property by a subsequent conveyance from such vendee, which refers to the foregoing deed for "all necessary purposes," is chargeable in law with notice of the existence of such lien, and acquires the land subject to the equity of the original vendor and his assigns.

(Syllabus by the Court.)

Error from superior court, Fulton county: J. H. Lumpkin, Judge.

Action by T. J. Haile against the Atlanta Land & Loan Company and another. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Arnold & Broyles, for plaintiffs in error. Thos. L. Bishop and W. P. Andrews, for defendant in error.

LEWIS, J. T. J. Haile brought suit against the Atlanta Land & Loan Company and Mrs. R. C. Haile for the purpose of foreclosing a lien as an equitable mortgage upon certain land. The material allegations of his petition were as follows: A. J. Haile sold a one-half interest in certain land to the Atlanta Land & Loan Company on the 26th of October, 1892, conveying the same by an instrument purporting to be a warranty deed, which had been duly recorded. By virtue of the terms of this deed it was alleged the same constituted a lien upon the land therein described until the purchase money mentioned in the deed should be paid in full. Mrs. R. C. Haile claims the land under a purported deed executed to her, which said deed is alleged on belief to be fraudulent and without consideration, but that, nevertheless, said Mrs. R. C. Haile, before said transaction was made, had actual and constructive notice as to the character of the instrument whereby the land was conveyed by said A. J. Haile to Atlanta Land & Loan Company, the latter being the grantor of said Mrs. R. C. Haile; that she was fully aware at the time, and is so aware of the fact now, that said deed was made as security for the payment of the purchase-money notes held by petitioner upon which he sued the Atlanta Land & Loan Company, and obtained judgment on November 14, 1894. It is further alleged that Mrs. R. C. Haile had full and complete knowledge of the transaction between A. J. Haile and the loan company conveying said land, both as to the nature of the instrument conveying the same, the security retained, and the purchase-money notes. Attached to this petition was a deed from A. J. Haile to the Atlanta Land & Loan Company, executed on October 26, 1892, which recites the consideration to be \$700, \$200 of which had been paid before the sealing of the deed, and \$500 of which was to be paid on or before February 1, 1893, as evidenced by four prom-

ervation of a lien to the grantor, A. J. Halle. The reference in the original petition to these notes, and the description of them given in the petition and exhibit thereto, certainly afforded a sufficient basis upon which to construct an amendment attaching the notes as an additional exhibit to the pleadings.

2. Upon allowing the amendment, the defendants below moved for a postponement on the ground of surprise, and error is assigned upon the judgment of the court overruling this motion. It appears from a note by the court, embodied in the bill of exceptions, that the only reason insisted upon by counsel for the defendants as to whether the case should be continued was that they desired to see their client, Mrs. R. C. Halle, and confer with her. It appeared that she had been fully examined by interrogatories as to the notes, the question of notice, and the whole subject-matter included in the petition and the amendment, and that there was nothing new, and nothing more could be added by delay. Defendants' counsel having utterly failed to bring themselves within the provisions of section 5128 of the Civil Code, on the subject of continuance growing out of surprise on account of amendments to pleadings, the court did not err in overruling the motion.

3. There are other assignments of error, relating partly to admissions of testimony embraced in the bill of exceptions, but they are unimportant. Under the view we take of this case, we think the undisputed evidence demanded a verdict for the plaintiff, and that the court did not err in directing the jury to so find. We think the court below was clearly right in concluding that the contract entered into by the parties when the property in dispute was sold by A. J. Halle to the company created a lien in favor of that grantor and his assigns upon the property for the payment of the purchase money. This contract is evidenced by the deed, and the purchase-money notes specifically recite upon their face that such a lien is retained by the grantor. We do not think, therefore, there can be any question about the right of the grantor, or his assigns, to assert this lien as against the grantee, or any one claiming under the grantee with notice of the existence of the lien. The only other question for consideration is whether or not the defendant Mrs. R. C. Halle was chargeable with notice of the existence of this claim of lien because of the fact that the deed under which she claims the property in dispute refers to the instrument by virtue of which her grantor created the lien and acknowledged its existence. Even without this recital in the deed under which this defendant claims, she could not have obtained any greater title from the company than that company itself had; and we think she is chargeable with knowledge of the recitals in the deed, by virtue of which her grantor held title. It is a well-settled principle of law that recitals in deeds bind not only the parties thereto, but their privies

in estate. Civ. Code, § 5150; *Lamar v. Turner*, 48 Ga. 329; *Cruger v. Tucker*, 69 Ga. 557, and authorities cited in the opinion of Speer, J., on page 562. The recital of the lien, therefore, in the deed from A. J. Halle to the company, not only bound it, but, Mrs. R. C. Halle, as grantee of the company, being its privy in estate, likewise bound her. The more especially is this true when it appears that the deed under which Mrs. Halle asserts title to the premises in dispute refers to the prior deed made to the company, which had been duly recorded, and to which reference was specially made "for all necessary purposes." Judgment affirmed. All the justices concurring.

WRIGHT et al. v. HERRINGTON et al.
(Supreme Court of Georgia. March 4, 1899.)

INJUNCTION—APPEAL.

There was no abuse of discretion in refusing the injunction, and the judgment of the court below is affirmed.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between J. T. Wright and others and A. P. Herrington and others. From the judgment, Wright and others bring error. Affirmed.

Eric Gambrell and Jas. T. Wright, for plaintiffs in error. Jas. K. Hines, for defendants in error.

PER CURIAM. Judgment affirmed.

BARNETT v. NEW SOUTH BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. March 4, 1899.)

APPEAL—RECORD—DIVISION.

When a bill of exceptions brought to this court complains of a portion of a decree rendered by the superior court in a complicated case, having a voluminous record, and involving many issues, and when the parts of the record specified and brought here are not only insufficient to a clear understanding of the error alleged, but do not indicate the portions not specified, but which are essential to a proper decision of the question sought to be presented, this court will not direct the clerk below to send up additional portions of the record. In other words, a "fishing" order for more of the record will not be granted. Under such circumstances, this court will endeavor to deal with the case upon the portions of the record actually brought up; and if the bill of exceptions, when considered in connection therewith, "presents the points to be adjudicated by this court in such a confused, vague, and uncertain manner that the same cannot be clearly understood or intelligently passed upon," the judgment below will be affirmed. See *Bush v. Brantley*, 24 S. E. 846, 99 Ga. 81.

(Syllabus by the Court.)

Error from superior court, Fulton county; W. H. Felton, Jr., Judge.

Proceedings between S. Barnett and the

New South Building & Loan Association. There was a judgment for the latter, and the former brings error. Affirmed.

S. Barnett, in pro. per. Ulysses Lewis and John L. Hopkins & Sons, for defendant in error.

PER CURIAM. Judgment affirmed.

WALTERS v. EAVES.

(Supreme Court of Georgia. March 4, 1899.)

PLEADING—DEMURRER—FRAUD—MISREPRESENTATIONS—SET-OFF.

1. Though an answer may recite that there is attached thereto a described exhibit, the fact that the same is not so attached will not, if such exhibit be really immaterial, render the answer demurrable.

2. Misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake, and innocently, if acted on by the opposite party, constitutes legal fraud, and the party injured in consequence thereof may set up the damages thus arising in defense to an action upon the contract.

3. A plea of set-off is not good unless it alleges facts showing that the demand against the plaintiff, which the defendant therein seeks to set up, was in existence, and due to the latter by the former, at the time his action was begun.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

Action by R. W. Eaves against J. C. Walters. Judgment for plaintiff, and defendant brings error. Reversed.

Jas. H. Skelton, for plaintiff in error. O. C. Brown and John P. Shannon, for defendant in error.

LUMPKIN, P. J. An action was brought by Eaves against Walters upon a promissory note for \$800, signed by the latter, and payable to the former. Upon the note there was a credit of \$23.95. The defendant filed an answer, to which the plaintiff demurred orally. The court sustained the demurrer, and directed a verdict for the plaintiff. The demurrer, save as to a question of practice, which will be hereinafter more specifically noticed, was, in its nature, general. The material allegations of the answer, so far as they related to the main defense relied upon, were, in substance, as follows: The plaintiff and the defendant, as partners, had been engaged in a general mercantile business, the sole management of which had been conducted by the former, the latter knowing nothing of the details or condition of the partnership affairs. They entered into a contract of dissolution, by the terms of which the defendant bought out the interest of the plaintiff in the business, giving therefor the note sued on, assuming all the debts of the firm, and becoming entitled to collect and appropriate to his own use all notes and accounts due to the partnership.

The defendant was induced to enter into this contract of purchase because of representations made by the plaintiff to the effect that the total indebtedness of the partnership did not exceed the sum of \$583. After taking charge of the business, the defendant learned that there were, in addition to the creditors whose claims amounted to this sum, other creditors of the partnership holding against it just claims amounting to \$303.54, which he was compelled to pay. Eaves had represented to the defendant that the creditors last referred to had been paid, when in fact they had not been. He also represented to the defendant that a specified account held by the partnership against a designated person amounted to \$3.15, when it was for but \$1.65, and the defendant collected only the latter sum, thus losing \$2.50. The defendant relied on the foregoing representations in making the contract, and afterwards ascertained that the same were false in the particulars indicated, and, as a consequence, he suffered loss as shown. He prayed that his damages be allowed as a set-off against the note sued on, and that, inasmuch as the amount of such damages was greater than that due upon the note, he have judgment for the balance against Eaves. The defendant further pleaded "that said plaintiff is indebted to him on account \$7.40 for goods he bought of defendant since the dissolution of said firm of Eaves & Walters, which he asks to be allowed as a set-off against plaintiff." The answer alleged that a copy of the list of creditors whose claims amounted to \$583, the total amount of the firm's indebtedness, as represented by Eaves, was attached as an exhibit, marked "A." In point of fact, however, no such exhibit appeared, and the special ground of the demurrer above mentioned attacked the answer as being insufficient, in that the defendant had failed to attach this exhibit as alleged. Attached to the answer as an exhibit, marked "B," was a list of the creditors whose claims, amounting to \$303.54, the defendant had been compelled to pay.

1. We will first deal with the special demurrer. The defendant did not complain of having to pay the creditors of the firm whose claims amounted to \$583. What the answer alleged upon this subject was evidently for the sole purpose of leading up to and making clear so much of the defense as rested upon the fact that the defendant had paid the demands against the firm amounting to \$303.54, held by persons not included among the creditors whose claims made up the \$583. We do not, therefore, perceive why a list of these particular creditors was at all essential to the legal sufficiency of the answer, it being, as to the matter of defense last mentioned, sufficiently definite and complete in itself. There was, as above stated, an exhibit setting forth a list of the claims aggregating \$303.54, and the real controversy between the parties related to these demands.

2. The answer does not undertake to allege

that the representations made by Eaves and acted on by Walters were fraudulent, but simply avers that they were false, and that, by relying upon the same, and purchasing upon the faith thereof, Walters was damaged in the manner set out in his answer. Under the provisions of section 4026 of the Civil Code, a misrepresentation of a material fact, though made by mistake and innocently, if acted on by the opposite party, constitutes "legal fraud." One thus imposed upon is certainly entitled to redress if, in the transaction between himself and the other party thereto, his opportunities for knowing the truth were not as good as those of the person upon whose statements he relied, and the circumstances were such that he had a right to expect that this person would deal with him fairly and conscientiously. It would seem, under the facts alleged, that this was a case of the kind just mentioned. Eaves had been the managing partner, and Walters had just reason for believing that the former was acquainted with the condition of the firm's business, of which he (Walters) personally knew nothing. The following, which we extract from 5 Am. & Eng. Enc. Law, 320, appears to be applicable to the facts in hand: "When any party makes material representations, which he avers to be true, with intent that they shall be acted upon, and these representations are actually relied upon by the other party in completing the negotiations, and then they prove false, to the injury of the party accepting them, relief can be had in a court of equity, although the party who made the representations knew not of their falsity." In this connection, see, also, *Elder v. Allison*, 45 Ga. 13, in which, following the law laid down in our Code, it was held: "Misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake and innocently, if acted on by the opposite party, constitutes legal fraud;" and, further, that a defendant in an action at law might set up as an equitable defense thereto the fact that he had suffered injury by reason of such a misrepresentation. The principle of that case, though the facts thereof are somewhat dissimilar, is applicable here, for it lays down the rule that a party who has sustained damage in consequence of a legal fraud precisely like that which we are discussing may have equitable redress when an action at law to enforce payment of the purchase money is brought against him. Assuming as true the averments of the answer, it seems that to do perfect equity and exact justice between these parties would be to credit Eaves with the amount due upon the note held by him, and debit him with the amount of the actual damages he occasioned Walters by inducing him to enter into the contract on the faith of false representations concerning the firm's assets and liabilities. This is exactly what the defendant's answer, so far as this branch of the case is concerned, sought to accomplish, and we are therefore of the opin-

ion that the court erred in striking so much of the answer as set up this defense.

3. The plea of set-off was obviously defective in that it entirely failed to allege that the defendant's demand upon the account therein referred to originated before the bringing of the present action. The plaintiff therefore could, as he did by his general demurrer, admit the truth of the recitals of fact set forth in this plea, and still not be liable to account in this action for the \$7.40. This is true because, in the absence of such an allegation as that just suggested, it would not affirmatively appear that this particular demand constituted a proper basis of set-off. Judgment reversed. All the justices concurring.

SANDERS et al. v. HOUSTON GUANO & WAREHOUSE CO.

(Supreme Court of Georgia. March 17, 1899.)

TRUSTS—EXECUTION—POWERS OF TRUSTEE—DEBTS—ACTIONS—PARTIES—PLEADING—JUDGMENT.

1. Where one conveys, by deed, property to another, in trust, for the sole use and benefit of the latter's wife and children, including those that might thereafter be born to such husband and wife, the trust remains executory, and the legal title continues vested in the trustee, so long as any of the children are minors, and there is a possibility of further issue of the marriage between the trustee and his wife. The fact that some of the children had arrived at age does not render the trust so far executed as to confer upon them legal title to any interest in the land, especially during the lifetime of the grantor, who enjoins, in his deed creating the trust estate, upon the trustee, the duty of providing a support for the grantor during his life. (a) On the trial of a claim, filed by the children, to property levied on to satisfy a judgment against the trustee, subjecting the trust estate, it was not error for the court to exclude testimony, offered by the claimants, tending to show that, on account of the age of the mother at the time of the trial, there was no possibility of further issue of the marriage; it appearing that the debt upon which the original action to subject the trust estate was based was contracted more than five years prior to such trial.

2. Where such property so conveyed in trust consists mainly of land adapted only for farming purposes, the trustee has the right to carry on the business of cultivating the land for the benefit of the cestui que trust; and any debt contracted by him for the purpose of purchasing such personalty as was necessary to enable him to conduct the farm is an obligation undertaken for the benefit of the trust estate, and, upon a proper case-made, the creditor can subject the trust estate to the payment of such a claim. (a) In a suit for this purpose, it is not necessary to make the beneficiaries parties thereto. Service upon the trustee is binding on a cestui que trust. (b) Nor is it necessary, in such an action, to allege that the income of the estate was insufficient to pay the debt, as the statute makes the corpus subject, regardless of the income. (c) The judgment subjecting the trust estate is not void because the trustee applied the income from the farm only for the benefit of himself and wife; it not being claimed that the creditor had any knowledge of any intention to misappropriate the income, or misuse the trust property, when the credit was extended to the trustee. (d) Even if the petition in such a case was not sufficiently full, but was good against a general demurrer, and simply contained minor defects, that would have

been clearly amendable, had objection been made thereto at the trial, such irregularities or defects are cured by the judgment, which binds, not only the trustee, but also the beneficiaries.

3. Where, in such a suit against a trustee, brought after the passage of the act embodied in section 4961 of the Civil Code, the petition sets forth the cause of action in orderly and distinct paragraphs, as required by this section, and no answer is filed by the defendants denying or calling for proof of any of the allegations in the petition, such petition may be taken as *prima facie* true; and it was not necessary for the plaintiff to introduce further testimony in order to make out his case.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by the Houston Guano & Warehouse Company against John F. Sanders, as trustee, in which there was a judgment for plaintiff. A *fi. fa.* was levied on the property, and Hattie Sanders and others interposed a claim thereto as beneficiaries. There was a judgment for the plaintiff, and claimants bring error. Affirmed.

M. G. Bayne, Nottingham & Polhill, and R. N. Holtzclaw, for plaintiffs in error. L. L. Brown, for defendant in error.

LEWIS, J. On March 21, 1896, the defendant in error, the Houston Guano & Warehouse Company, brought suit in the county court of Houston county, against John F. Sanders, as trustee of his wife and their children (naming them). The purpose of the suit was to subject a certain tract of land, held by the trustee for the benefit of his wife and children, to a certain debt contracted by the trustee with the plaintiff, in January, 1893. The petition described the trust property, referred to the deed creating the trust, and stated where the same was recorded. It was alleged that the trustee was still in possession of the land mentioned in the deed, for the use and benefit of the *cestui que trustent* named; that in the year 1893 he was farming upon the land for the benefit of his *cestui que trustent*, and that as such trustee he bought of petitioner, on January 11, 1893, for use on the farm carried on, mules and wagons; that they were necessary to enable the trustee to carry on the farm for the benefit of the *cestui que trustent*, and that without such articles he could not have conducted the farm. This indebtedness was evidenced by certain promissory notes, given by the trustee, copies of which were attached as exhibits to the petition. The petition set forth the cause of action in orderly and distinct paragraphs, 15 in number, and we refer above to only some of its allegations, as they are the only parts material to be considered in connection with the issues involved in this case. The petition was duly served upon the trustee as defendant, and, he having failed to file any answer to the suit, the judge of the county court, at the trial term, rendered a judgment finding for the plaintiff the amount of

the debt sued for (subjecting thereto the trust property mentioned in the petition), and directed that the *fi. fa.* issued thereon be levied upon the trust property described in the petition. This judgment shows upon its face that it was predicated upon the fact that there was no denial by the defendant of the allegations contained in the petition. A *fi. fa.* was issued upon the judgment, and levied upon the land described in the trust deed. The plaintiffs in error, who are all the beneficiaries named in that deed, except the mother and a minor child, filed a claim to the property, which came on to be tried at the April term, 1898, of the superior court of Houston county. After the testimony had closed the judge directed a verdict finding the property levied on subject. This case is brought here by direct bill of exceptions, assigning this direction of the court below as error, and complaining of certain rulings made by the court below in the progress of the trial. The deed by virtue of which claimants assert title was executed November 19, 1885, and was a conveyance from W. L. Sanders to John F. Sanders, in trust for his wife and their children (naming them), "and any children they may have born to them in future." The consideration named in the deed was for services rendered the grantor by the mother of these children, in waiting upon and nursing him for years, and also his late wife, then deceased, and it was also for the future consideration that the said mother and her husband, the trustee, would continue to wait upon, take care of, and support the grantor out of the property conveyed by the deed. The deed then recited a conveyance to the trustee, "in trust for the sole, separate use and benefit of the said Hattie Sanders and her children above mentioned, and any that may in future be born, and her assigns, forever, free from and exempt from all debts, etc., of her present or any future husband." On the trial it was admitted that the claimants were all of the *cestui que trustent* in the deed named, except one of the children, who was still a minor; that the claimants were all of age on January 1, 1893; that none of them lived on the land in dispute, except Hattie Sanders, who was the wife of John F. Sanders, and that none, except her, received any of the benefits of the proceeds of the land, since January 1, 1893; that all the claimants were of age on that day; and that the minor who did not join in the suit was 15 years old at the time of the trial.

1. One question presented by this record was whether or not, in 1893, when this trust debt under consideration was contracted, the trust was then of an executed or executory nature. It is insisted by counsel for plaintiff in error that the trust was executed, and that, therefore, the trustee had no power to bind the estate by any contract, whether made for the benefit of the estate or the beneficiaries. The only reason, in the light of the record, that can be assigned for such a posi-

tion, is that these claimants were then of age, and were receiving then no benefit from the land; but it was admitted that there was a minor child then living, and who even now lacked several years from attaining her majority. It further appears that the trust was created, not only for the benefit of the children in life at the time of the execution of the deed, but also for the benefit of any other children that might thereafter be born to the trustee and his wife; and it does not appear, at the time the trustee had the management of this property, in 1893, that possibility of further issue of the marriage between him and his wife had then become extinct. Besides this, the grantor in the trust deed, as one of the considerations moving him to make the conveyance, placed the title in the trustee, not only for the benefit of the mother and children, but also charged him with the duty of providing for the grantor a support out of the property for the remainder of his life. It does not appear from the record that the grantor was not then in life, or, as to that matter, that he is now not living. Apart, then, even, from the minority of one of the beneficiaries, and the possibility of further issue, we think the trust was necessarily of an executory nature, so long as the property was chargeable with the support of the grantor, especially when the duty was imposed upon the trustee, by the terms of the deed, to provide for this support out of the property itself. We think this is really a stronger case, in support of the contention that this trust did not become executed in 1893, than the case of *Boyd v. England*, 56 Ga. 598, where it was decided that "a deed conveying land to a husband, in trust for the separate use of the wife and her children, born and to be born, clothes him with an executory trust, which does not become executed while the coverture exists and the children are minors; and, so long as the trust is executory, the legal title cannot vest in the beneficiaries." It is not necessary, in this connection, to go into a consideration of the question as to whether or not the beneficiaries under such a deed could have asserted, after their majority, a title to any interest in the property, and a right of possession thereunder, by proceedings for partition or otherwise, during the minority of one of the cestuis que trustent. We think, manifestly, they would have had no such right while the property in the hands of the trustee was also charged with the support of the grantor. The rights of the children are subject to this beneficial interest of the maker of the deed, and for this, as well as for the interest of the minor, the title to the property remained vested in the trustee until such uses and purposes were fully executed.

(a) Error is assigned in the bill of exceptions on the ground that the court refused to allow claimants to show that their mother, Hattie Sanders, was 52 years of age, and was in such physical condition that she could

never possibly bear another child. Such was the condition of the mother at the time of the trial, offered to be proven, and, even if the testimony had been admitted, it would manifestly not have followed that such was necessarily her condition five years previously, when the contract in question was made with the trustee. On this particular point the question was whether there was a possibility of further issue in 1893, which would render the trust of an executory nature, and which, in itself, would have authorized a trustee to then take charge of and manage the property, in the interest of those then in life and those that might thereafter be born. Besides, even if the proof offered had extended back to that period, it could avail nothing, as there are other elements of an executory nature in the trust, independent of the possible birth of future children.

2. It is insisted that no authority is shown, either by the deed of trust or otherwise, for the trustee to engage in the business of farming upon the land embraced in the trust estate. In a conveyance of property by one in trust for another, it is necessarily implied that the trustee shall assume the management and control of it for the benefit of the uses named. The real estate conveyed by this trust deed was a farm, and hence was naturally adapted only for farming purposes. There was certainly as much reason and authority for the trustee's operating the farm himself as there would have been for him to rent it out to others for the purpose of cultivation. Indeed, we think it was his manifest duty to make some use or management of the property, so as to cause it to yield an income for the purposes and benefits contemplated in the deed. Any debt, therefore, contracted by him in his capacity as trustee, that was necessary to enable him to carry on such a business, is a debt, in contemplation of law, which is created for the benefit of the trust estate. It is true that the petition which sought to subject this estate did allege that the articles in question were purchased for the benefit of the beneficiaries, but it was distinctly alleged in the petition that they were for use upon the farm, were necessary for this purpose, and that the business could not have been conducted without them; and a fair construction of the entire petition on this subject means that the personality was used on the farm, which was being conducted by the trustee for the benefit of his cestuis que trustent. There is no profit in a farm without cultivation. It cannot be cultivated without live stock, farming implements, etc. Anything is for the benefit of an estate which is necessary to prevent the property from remaining profitless and useless. This class of debts is clearly distinguishable from those arising out of a purchase of goods for the use and benefit of the cestuis que trustent, and in no wise connected with the trust estate, or with the management and control of such property by the trustee.

(a) The position that it was necessary to have made the beneficiaries parties defendant in the suit against the trustee is clearly untenable. The statute nowhere requires service upon the beneficiaries in such a case. Section 3202, Civ. Code, provides that any person having a claim against any trust estate, for services rendered to said estate, or for articles or property or money furnished for the use of said estate, or where a court of equity would render said estate liable for the payment of said claim, may collect and enforce the payment of such claim in a court at law. The sections immediately following provide how such claims may be enforced in a court of law, and simply require that the petition should set forth the grounds of the claim, how and in what manner the estate is liable for its payment, and shall give the names of the trustees and cestui que trust. Section 3206 provides that the judgment thus rendered shall impose no personal liability on the trustee, but shall only bind the trust estate, and execution shall issue accordingly. The only provisions of the statute for making cestuis que trustent parties defendant to such actions is in a case where "there is no trustee, or he is a mere naked trustee and nonresident of the county." Civ. Code, § 3204. It will thus be seen that the law nowhere contemplates that the beneficiaries of such a trust shall be made parties to the suit when there is an active trustee of an executory trust. They are represented by the trustee, and are bound by the judgment of any court of competent jurisdiction over the person and subject-matter, rendered against their representative, subjecting the trust estate, in which they have simply the beneficial and equitable interest. See *Zimmerman v. Tucker*, 64 Ga. 432; *Clark v. Flannery*, 99 Ga. 289, 25 S. E. 312.

(b) It is further insisted by counsel for plaintiffs in error that the petition to subject this property in the hands of the trustee was fatally defective, in that it did not allege that the income of the estate was insufficient to pay the debt. On the trial it appeared, from the petition, that the trustee was realizing from the land an income "sufficient for this purpose. The reply to this is that the statute nowhere requires such an allegation in order to support a suit of this character, but, on the contrary, provides that the estate itself—that is, the corpus—can be subjected to the debts created for property or money furnished for the use of said estate, and also for services rendered the estate. The decision of *Greenfield v. Vason*, 74 Ga. 126, relied upon by counsel for plaintiff in error, is not in point. There it was sought to subject a trust estate at law for necessities furnished the cestuis que trustent. It appears, from the opinion delivered by Justice Hall in the case, that it was an effort to charge a trust estate, in the hands of the defendant as trustee, for the value of goods furnished by the plaintiffs. It will be noted the goods

were not furnished the trustee for the use of the estate, but they were furnished the beneficiaries themselves; and, while it was alleged that they were necessary for the cultivation of the land belonging to the trust estate, it also appeared that they were for the maintenance and support of the cestuis que trustent. It appeared in that case that the trustee demurred to the petition, and the court decided that the demurrer should have been sustained. Among other reasons assigned for defect in the petition is that it did not allege that the trust property yielded any income, or whether an encroachment on the corpus would be necessary and proper. It does not follow, by any means, from this decision, that if the defendant had not appeared and specially pleaded or demurred to the action, and a judgment had been rendered against him subjecting the trust estate, it would have been void simply on account of such a defect in the petition. Besides, as above indicated, the nature of the debt involved in that case was for goods furnished, not to the trustees, but to the cestuis que trustent for their maintenance and support. This class of obligations is clearly distinguishable from those created by the trustee himself, in the purchase of goods for the use of the estate. The statute does not declare that the corpus of the estate in the hands of the trustee can be subjected to a debt for goods furnished beneficiaries, and, indeed, is silent as to the remedy provided for the enforcement of such a claim. When resort is had to equity, therefore, for its enforcement, there is reason for applying, as an equitable rule in such a case, that the estate itself should not be sold unless it should appear that the income was insufficient for the purpose sought. The distinction between the two classes of claims against trust property is clearly recognized by the decision of this court in the case of *Satterwhite v. Beall*, 28 Ga. 525. There it is decided that the act of 1856 (which is embodied in the sections of the Code above cited), authorizing claims against trust estates to be recovered at law, provides for demands only for services rendered the trust estate, or for articles or property or money furnished for the use of said estate, and for the payment of which a court of equity would render said estate liable, and that the judgment in such cases has a lien on the corpus of the trust property, and is to be enforced by seizure and sale under execution issuing thereon, as other common-law judgments. That was an action brought by the plaintiffs against a trustee, on account of goods, wares, and merchandise sold the cestui que trust. Lumpkin, J., in delivering the opinion, stated that the proceeding instituted was founded on an entire misapprehension of the act of 1856, giving a remedy against trust estates in a court of law, and prescribing the mode of procedure thereon; that, in the first place, the claim must be against the trust estate, as for blacksmith work done on

the plantation, medical services rendered the trust negroes, etc., and not for goods furnished the cestuis que trustent. The statutory remedy, therefore, given to creditors for the enforcement of a debt by furnishing a trustee property or money for the use of the estate, is a certain proceeding, instituted by petition at law, for the purpose of obtaining a judgment binding the corpus of the trust estate, and that alone.

(c) Complaint is further made in the bill of exceptions that the court erred in refusing to permit plaintiff to prove that the trustee applied the income for the year 1893 solely for the benefit of himself and wife. There is no pretense that there was any collusion between the trustee and the creditor to misappropriate the income from the trust estate, or that the creditor ever had any knowledge of such intention on the part of the trustee, when he extended him the credit. Manifestly, such a breach of trust or failure of duty on the part of the trustee in disbursing the income would not, under the facts of this case, defeat the creditor's right of action. The remedy of the beneficiaries for this wrong is against the trustee himself, and not against the innocent creditor, who had nothing whatever to do with disbursing the profits or income that the trustee might have realized from the land, which he was enabled to cultivate by the use of the property furnished by the creditor. It is true that the giving of a note in this case by the trustee constituted no evidence that it represented the debt for which this trust estate was liable. Upon its face the note only indicated individual liability of the trustee himself. The owner of the note, however, did not rely upon its possession to warrant a recovery against the trust estate. The fact that he received from the trustee a note would, of course, not preclude him from showing its real consideration to be of such a nature as to render the trust estate liable. As ruled in the case of *Gaudy v. Babbitt*, 56 Ga. 640, 642, where the trustee, as such, has given his promissory note for the debt, and the note is declared upon, the same is admissible in evidence; but the note itself is not sufficient to warrant a recovery against a trust estate. The plaintiff must go further, and establish his whole declaration, proving the existence of the trust estate, of what it consists, and the specific facts which render it liable for the debt. Says Judge Bleckley, in his opinion, on page 642: "In principle it is difficult to say why a trustee who can contract a debt at all cannot do so by note. Why should there be capacity to make a verbal promise, and not a written one?"

(d) The petition which sought to enforce the payment of this claim against the trust estate substantially complied with the requirements of the statute in such cases. As against a general demurrer, we think it was sufficient, and, if it was open to special objection on account of not being explicit and full enough in certain of its allegations, such

defects were clearly amendable, and therefore, in the absence of any such objections, are cured by the judgment of the court. This judgment was necessarily conclusive upon the cestuis que trustent, although the trustee might have neglected to make the proper defense to the action. In the case of *Clark v. Flannery*, 99 Ga. 239, 25 S. E. 312, the present chief justice, rendering the decision in that case, announced this principle: "If the trustee was unfaithful to his trust, in improperly allowing the judgment to be rendered, he and his sureties, if any, are liable to the beneficiaries thus injured." See, also, opinion of Justice Bleckley in *Kupferman v. McGehee*, 63 Ga. 257.

3. It is finally contended that the judgment rendered against this estate is void for the reason that no evidence was introduced to sustain the allegations in the plaintiff's petition. All the authorities relied upon by counsel to support this contention are adjudications made prior to the passage of the act of 1893, embodied in section 4961 of the Civil Code. The petition in question was filed in conformity with the provisions of that act, and set forth a cause of action in orderly and distinct paragraphs, numbered consecutively. It is distinctly provided by the terms of the act that such averments, when not denied by the defendant's answer, shall be taken as prima facie true, unless the defendant states in his answer that he can neither admit nor deny such averments for want of sufficient information. In the absence of any answer at all, then, to such petition, the manifest purpose of the statute was to treat all the allegations of the petition as if established by proof; and in such a case, as decided by this court in *Hight v. Barrett*, 94 Ga. 792, 21 S. E. 1008, there was no error in directing a verdict for the plaintiff. See, also, *Telegraph Co. v. Lark*, 95 Ga. 806, 23 S. E. 116. No exception is made by the statute to a suit of the character we are now considering, and no reason can be urged why the rule should not apply in this case. The judgment attacked in this case was rendered by the judge of the county court, in which court there is no provision for jury trial in civil cases, but the presiding officer of that court is both judge and jury in such cases, and the same principles of pleading and proof touching proceedings in the superior court are likewise applicable to the county court. Civ. Code, § 4204. Under section 3208, if the claim against a trust estate exceeds \$100, it is provided that the petition shall be brought in the superior court, and under section 3206, if it does not exceed that sum, suit may be brought in a justice's court. These sections are simply codifications of an act passed before the statute establishing the county court, and, we think, cannot be construed into any modification of the jurisdiction conferred upon that court by section 4193, which gives it jurisdiction of all civil cases of contract or tort within a certain amount, save where exclusive jurisdiction is vested in

the superior court. No question is presented, however, by this record, touching the jurisdiction of the county court over the subject-matter of suits against trust estates.

The above covers all the material questions presented in the bill of exceptions. They necessarily control the issues involved. The facts disclosed by the record authorized the judge to direct a verdict finding the property subject. Judgment affirmed. All the justices concurring.

STEIN v. NATIONAL LIFE ASS'N.

(Supreme Court of Georgia. March 4, 1899.)

INJUNCTION—TERMINATION OF AGENCY—SOLICITING BUSINESS.

Equity will not enjoin one who has been agent of an insurance association, after the termination of the agency, from using any legitimate means to influence policy holders of the association to forfeit their policies, or transfer their insurance to another association or company, when there is no contractual restraint from doing these things, and when, by so doing, he violates no business secret or trust which had been reposed in him because of his relation as agent.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Suit by the National Life Association against Simon Stein. Judgment for plaintiff, and defendant brings error. Reversed.

Arnold & Arnold, for plaintiff in error. Abbott, Cox & Abbott, for defendant in error.

FISH, J. Simon Stein entered into an agreement with the National Life Association, of Hartford, Conn., whereby he became its general or managing agent in and for the states of Georgia and Alabama, for the purpose of procuring applications for membership in the association, delivering policies issued upon applications so effected, and collecting the first payments thereon. Under the agreement, by which the managing agent's authority was expressly limited, Stein was to solicit and procure the applications of persons to become members of the association, procure the appointment of soliciting agents in his territory, who should have no claim against the association for commissions or otherwise by reason of their appointment, forward all applications to the home office of the association for approval or rejection, receive and deliver policies, and receive the first payment of the premium. The agreement provided certain commissions and charges to be allowed Stein, and specified that all moneys received and collected for the association by Stein and his subagents and employes should be "a fiduciary trust," to be promptly accounted for, reported, and paid over to the association in cash, less the commissions and charges specifically authorized. On the 1st of each month, Stein was to make a full report of the business done, and remit to the association the amount due

it. He was to abide by the rules, regulations, and instructions of the association with reference to the conduct of its business, and to account for, return, and deliver to the association all moneys, policies, receipts, or other property or effects of the association coming into his hands by reason of his appointment as general agent. It was agreed that if Stein should, after one year from the date of the contract, neglect or refuse to promptly and thoroughly work his territory, then the association might, "at their option, by giving thirty days' notice to [Stein], employ other agents in any other portion of said territory so neglected without otherwise affecting this contract," and Stein should have no claim on the business effected by the agents so employed; "otherwise," the association was not to appoint other agents in Stein's territory. There was a provision for the termination of the contract by either party in case of the inability of Stein to fulfill its conditions, and for a certain disposition of the "renewals." It was further provided that all of Stein's interests, except renewals, might be terminated by mutual consent, evidenced by 30 days' written notice of each party to the other, or by the association for misconduct, neglect of duty, failure to fulfill any of his agreements, or violation of any of the conditions of the contract by Stein. Further, Stein was given the privilege "of writing colored risks in all parts of the South, where the same does not come in open conflict with other agents," and his commissions on such business were to be the same as though written in his own territory. The agreement was executed July 12, 1895, and was to "terminate by limitation fifteen years from July 5, 1890," when Stein's interest should entirely cease, except as to renewals.

In August, 1898, the National Life Association filed a petition in the superior court against Stein, to which was attached a copy of the contract above mentioned. This petition alleged that Stein had, under the contract, been appointed general or managing agent for the association for Georgia and Alabama, with headquarters in Atlanta; that his duties were of a nature vital to the association; that, so far from complying with the contract, he had totally neglected his duties as agent, and violated his contract, to the incalculable and irremediable damage of the association, and, unless restrained from further representing the association, would continue to injure and damage it; that books of original entry were necessary to the business, but that Stein pretended that he kept no such books, and refused to show petitioner such memoranda as he had kept; that an agent of the association, regularly accredited and with plenary authority, attempted persistently to obtain from Stein information as to the business, but that Stein as persistently refused to give it; that Stein likewise declined to give such information to the association's attorneys; that Stein attempted to

damage the business of the association, and prevent policy holders from paying their premiums, intending to force the association to buy him out. He declined to make report for the last month or two, and made conflicting statements as to the amount due. The petition alleged that Stein was due a large sum; that he was a man of small means, with his property incumbered; and that there would be no means at law of estimating the damages which would accrue if Stein were allowed to continue to interfere with and damage the business of the association. It prayed for injunction, receiver, accounting, and general relief, but waived discovery.

Stein, in his answer, alleged that he had never abandoned the contract until long after the petitioner had done so, and had committed breaches of it which made it impossible for him to continue as its agent under the contract. He claimed that the association had violated its contract with its policy holders, and admitted in letters to such policy holders that it had done so. He attached to his answer a copy of the statement of the insurance commissioner of Connecticut, the state of the association's incorporation, showing that the officers of the association had attempted to mislead and deceive the insurance department and the general public by the suppression of death claims, reporting as payments to beneficiaries payments to other people, entering lapsed insurance, and in other ways; that it was their policy to use improper means to induce beneficiaries to accept less than was due them; that the administration expenses amounted to 72 per cent. of the actual payments to death-claim beneficiaries. Stein alleged that the association, by letters to the policy holders, undertook to avoid certain portions of their policies, and that by reason of this breach it became impossible longer to successfully proceed with the business. He denied that there were any books of original entry at his or any other general agency. All the entries were made at the home office from data furnished by the agents, and the agents had never been required to keep books. It was impossible, if not criminal, for defendant to have solicited new business for the association, after the association had in many ways violated its contract. He had repeatedly pledged his personal credit for the solvency of the association, and deemed it his duty to write the policy holders of its insolvent condition. He reported every month on the proper date until the 1st of August, 1898. The association sent letters to policy holders, stating that defendant was no longer in its employ, and defendant, construing this as an additional breach of the contract, wrote the association that he could no longer abide by the contract, and demanded a final statement of account. He had received no answer. The amount paid the attorneys for the association was the balance due by him to the association. Defendant had no objections to being enjoined from acting as agent of the associa-

tion, or to the appointment of a receiver. He denied indebtedness, except on certain notes not due. He resisted the prayer that he be restrained from "in any manner influencing its policy holders against said petitioner."

The case was tried upon the petition and answer, and an affidavit signed by certain policy holders. Exception is taken to the admission in evidence of the affidavit; but, under the view we take of the case, it is not necessary to decide whether or not it should have been admitted. It tended to show only that Stein had attempted to dissuade affiants from continuing their policies. The judge granted an order, to be of force until final decree in the case, restraining Stein from acting as agent of the association or collecting any moneys or assets belonging to it, directing the receiver to turn over the property in his hands to the association, discharging the receiver and fixing his compensation, and further ordering "that said Simon Stein, his agents, clerks, employes, confederates, and associates, be, and they are hereby, enjoined from in any wise approaching or communicating with policy holders in said company for the purpose of influencing or procuring them to lapse their policies or discontinue the same, and from influencing or attempting to influence policy holders to transfer their insurance in said National Life Association to any life insurance company, and from doing or attempting to do any such acts by himself or through others." To this latter portion of the order Stein excepted.

Careful reading of the contract entered into by Stein and the association reveals no stipulation that Stein should, after severance of his connection with the association, represent no other insurance company, or refrain from influencing policy holders to allow their policies to lapse; nor was there language from which such provision should be implied. Hence the cases cited which hold that certain contracts in partial restraint of trade are enforceable are not here in point. Contracts in restraint of trade are enforced only when the restraint is reasonably limited as to time or place. The order granted in the present case is in restraint of trade, presumably in the enforcement of a contract, when not only is there no limitation in the contract of such restraint, but when there is no stipulation in the contract which can be construed as referring to the question of restraint at all. Courts of equity will sometimes enjoin the commission of a tort, but we cannot see that this doctrine can be applied here; for Stein is enjoined from doing things which, however injurious to the association, are certainly not tortious. It may be that he had been guilty of an actionable tort in making false statements as to the association, and to its injury; but he is enjoined by the judge's order, not from repeating any such statements, but from using any means whatever to injure the business of the association, or to win over its policy holders to any other insurance company. The injunction

must have been granted, as to this matter, by applying to the case the equitable principles stated in High, Inj. § 19, as follows: "The disclosure of secrets which have come to one's knowledge during the course of a confidential employment will be restrained by injunction. And where a confidential relationship has existed, out of which one of the parties has derived information or secrets concerning the other, equity fastens an obligation upon his conscience not to divulge such knowledge, and enforces the obligation when necessary by injunction. Thus, persons who, in the capacity of attorneys, agents, or in other confidential relations, have obtained the custody of the books and documents of their principals, or have come into possession of secrets relating to their affairs, will be restrained from making them public. So, defendants have been enjoined from disclosing the secrets pertaining to plaintiff's business and processes of manufacturing goods, defendants having acquired such knowledge while in plaintiff's employ, under an agreement that, in consideration of the employment, they would not divulge such secrets." Equity interferes in such cases in order to prevent an abuse of confidence, and where there has been no confidential relation, and, consequently, no trust reposed, the rule does not apply.

The order granted in the present case restrains the plaintiff in error from attempting to influence policy holders in the association to discontinue their policies, or to transfer them to any other life insurance company, either by the communication of what he knows of the association or otherwise. Even, however, were it limited to communications of what he knows of the association, it would be erroneous. The relation of Stein to the association was not a confidential one, in the sense that he, by reason of it, acquired a knowledge of any business secrets. The business had been largely built up by him and his employés, and that knowledge of the policy holders which would be useful to him, in the event of his representing as agent another company, was not confided to him by the association, if derived from it at all. Persons may have taken out policies in the association on account of personal friendship for Stein, or confidence in his integrity, and there is no reason why he should not be allowed to solicit their business for another company which he represents, his agency for the association having been terminated. If this injunction was proper, then any general insurance agent, whose contract, as such, had been terminated, could be restrained from further pursuing, in the interest of another company, the business of his calling among those with whom he might be able to do the best work,—those whom he had secured as policy holders in the company he first represented. Under this injunction, Stein could not solicit, upon any ground or for any reason, the transfer of business from the plaintiff association to another company, though he had not so agreed in his contract

with the association. The association's business was at an end; he relied upon no communication to the association for business or trade secrets.

For the reasons stated in the facts as they appear, the judge below granting that plaintiff in error committed the error, the court is accordingly reversing the judgment.

LINTON, Tax:

(Supreme Court
TAXATION—NATION

The words of the president of the state" include the business in the state, is inoperative. The president of the state, organized under the constitution, such associations by congress, and administration of an industry. The business not being subject to the state, and the president by the act in part, the business be carried on, a tax would tend to retard the law which maintenance of state

(Syllabus by the

Error from supreme court.
N. L. Hutchins, Jr.

Action by H. C. Brand, for the plaintiff, against A. K. Childs, defendant, and plaintiff.

C. H. Brand, State Attorney General, for the plaintiff, Strickland and W. Childs, in error.

LITTLE, J. The plaintiff sought to be collected a tax on the president of a national bank. First, that the words which the plaintiff intend to include in the second, that, if the tax is used, meant to limit the national banks, the tax is void, because the tax would obstruct the business of the banks which are agencies of the government, and the impact on the president of the bank operate. If either true, the tax sought by the defendant in error is axiomatic that the plaintiff's tax must be so. In this case, if the tax of the state, a public act, and, unless

stitution, or an interference with an institution created by the federal government, called into existence for the benefit of the people at large, such power manifestly exists. The words of the act impose a tax of \$10 on the president "of each of the banks of the state." Official cognizance will be taken of the fact that there are two classes of banks which are located, operated, and doing business in the state, which have presidents, to wit, banks organized under the laws of this state, and banking associations created under the laws of the United States, which are private associations, authorized by congress, for the joint purposes of convenience and profit to the holders of United States bonds, and of furnishing the public with a convenient and uniform circulating medium. 16 Am. & Eng. Enc. Law, p. 144, citing *Van Allen v. Assessors*, 3 Wall. 573; *Stetson v. City of Bangor*, 56 Me. 274; *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826; *Flint v. Board*, 99 Mass. 141. There can be no question but that the words employed in the act which imposes the tax are broad enough to cover the presidents of such banks as have been organized under the laws of this state, because such are certainly banks of the state. Such institutions not only do business in the state, are protected by the authority of the state, and have access to the courts of the state, but are created by its laws, and their business is regulated by legislative enactments of the state. But it is not to be held that, while organized under the laws of the general government, national banking associations are foreign corporations, nor, in their capacity as persons, are aliens; on the contrary, such associations are established and located, under the law of their creation, at a certain given locality in one of the states or other political divisions of the United States, and such place or point is distinctly named in the certificate of organization (*Bank v. Baack*, 1 Thomp. Nat. Bank Cas. 161, 2 Abb. [U. S.] 232, 8 Blatchf. 137, Fed. Cas. No. 9,052; *Main v. Bank*, 6 Bias. 26, Fed. Cas. No. 8,976), and, for jurisdictional purposes, are to be treated as citizens of the state within which they are located. Such associations are not otherwise citizens of the United States. *Bank v. Baack*, supra; *Gassies v. Ballou*, 6 Pet. 761. Indeed, the business of a national banking association must be done at this designated location, and it cannot lawfully do business, such as cashing checks drawn upon it, elsewhere. *Armstrong v. Bank*, 38 Fed. 883. So that, equally with state banks, national banks are citizens of the state in which they are located, in the sense that corporations are citizens, and this result follows from the act which created such associations. The able counsel for the defendant in error, who furnished us with a concise and comprehensive brief on the points involved, refers to the language employed in the paragraph of the act of the general assembly where a tax is imposed on the "president of each of the express, telegraph, tele-

phone, electric light, and gas companies doing business in this state." He argues from such language, used in the same paragraph which imposes a tax on the president of banks, that if the legislature had intended to impose a tax on presidents of national banks it would have used the words "president of each bank doing business in this state." Such words are, of course, more comprehensive in their nature, but are they needed to include presidents of national banks? If, as we have seen, such banks are to be treated as citizens of the state in which they are located, then there are no banks doing business in Georgia which can properly be denominated foreign corporations. While not domestic corporations, the act which creates national banking associations establishes for them one situs, one domicile; and, while they operate under laws independent of the state, it is only for the purpose of carrying out the objects of their organization within the state in which they are located. It is a matter of common knowledge that, in Georgia, there are railroad, telegraph, telephone, express, and gas companies, doing business, which are not citizens, but foreign corporations. The domicile of such corporations is in another state, and they are here merely by the comity which exists between the states. There might be some question if the act which sought to include such corporations should impose a tax on "the presidents of the railroads of this state," because, while they do business in this state, they are citizens of another state, and carry on business here simply by permission. Judge Cooley, referring to the construction of tax laws, says: "The underlying principle of all construction is that the intent of the legislature should be sought in the words employed to express it, and that, when found, it should be made to govern, not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review." Cooley, *Tax'n* (2d Ed.) p. 264. We cannot doubt but that the general assembly, by the use of the words quoted, intended to impose a tax on the presidents of national banks, as well as state banks.

The inquiry then arises whether the general assembly has power to impose a tax on the presidents of national banks doing business in this state. "Taxes are the enforced proportional contributions from persons and property levied by the state, by virtue of its sovereignty, for the support of government and for all public need. Cooley, *Tax'n* (2d Ed.) p. 1. And, further, as to the subjects of taxation, the same eminent authority declares: "Everything to which the legislative power extends may be the subject of taxation, whether it be person, or property, or position, or franchise, or privilege, or occupation, or right." *Id.* p. 5. The tax in question is, by the statute, imposed on the presidents of each of the banks of the state. The section of the act which imposes the tax lays it also upon "every practitioner of

law, medicine or dentistry, agents negotiating loans," etc., from which it is evident that it is imposed as an occupation tax. As a rule, there can be no question of the right of the general assembly to impose a tax on the occupation of persons. Sometimes it is called a "license fee," and is imposed in the exercise of the police power of the state, and used for regulating certain businesses; or it may be imposed directly as a tax to raise revenue for the support of the government. McCoy, J., delivering the opinion of this court in the case of *Burch v. Mayor, etc.*, 42 Ga. 596, says: "We can see no reason, in the nature of things, why a tax may not be laid upon the land and upon the crop, on the horse and on the work of the horse, on the man and on the income of the man, unless there be some special limitation of this power by the constitution." Under our constitution, the only qualification pertaining to the levy of taxes on occupation is that, while the taxing power may not tax all classes of occupations, yet, when one class is taxed, all in that class must be taxed alike, in order to secure the uniformity required by the constitution. *Mayor v. Long*, 54 Ga. 330; *Cutliff v. Mayor*, 60 Ga. 597. So that, assuming it was the purpose of the general assembly to include presidents of all banks doing business in this state in the imposition of the tax, the question is, do the laws of the United States so limit the power of the general assembly to tax national banking associations as to exclude presidents of national banking associations from the operation of a statute which imposes an occupation tax on such officers? It is not necessary to refer to the method of organizing national banking associations. Their creation, powers, and duties are the subjects of United States statutes, accessible to all. Without doing so, it is sufficient to say that such banks, when duly organized, are "instruments designed to be used to aid the government in the administration of an important branch of the public service." * * * Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as congress may see proper to permit." *Bank v. Dearing*, 91 U. S. 29. In a leading decision of the supreme court of the United States, which has never been modified, so far as the principle we are discussing is concerned, it is said by the court that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of a constitutional law enacted by congress to carry into execution the powers vested in the general government. *McCullough v. Maryland*, 4 Wheat. 316. See, also, *Osborne v. Bank*, 9 Wheat. 788; *Bank Tax Case*, 2 Wall. 200; *Bradley v. People*, 4 Wall. 459; *Tappan v. Bank*, 19 Wall. 490; *Bank of Commerce v. New York City*, 2 Black, 620. In direct harmony with this principle, of the correctness of which there can be no doubt, this court, in

the case of *Mayor, etc., of Macon, v. First Nat. Bank of Macon*, 59 Ga. 648, ruled that: "While the property owned by the bank may be taxed by state authority, and the shares owned by the stockholders may be also taxed, the business of the bank—its right to operate and do banking business—cannot be taxed by the states. * * * The distinction between the right to tax property and that to tax business in cases of agencies working under federal authority is well settled, we think," etc. Again, in the case of *Johnston v. Mayor*, 62 Ga. 650, in discussing the right of the city of Macon to tax the businesses of state and national banks, this court, in reference to the latter, said, "It could not tax the business of the national bank, because it was chartered by congress, and the government of the United States used its business for their fiscal operations, or could use it, and any interference by state taxation might, if allowed at all, amount to prohibition, by making the tax so high as to be prohibitory," etc.

Considering, then, the propositions that a state cannot, by taxation or other legislation, impair or destroy the efficiency of the operation of any federal agency created by a constitutional act of congress to further and serve the purposes of the government of the United States; that national banking associations are one of such agencies, whose business cannot be taxed by the state,—as fully established, it may be well to inquire into the nature of the tax imposed. It was urged by the attorney general that the tax contemplated by the statute was imposed in the exercise of the police power of the state; that such tax is a personal one; and that the bank president is not relieved because of the fact that the bank is a federal agency. And he cites *Bank v. Chipman*, 164 U. S. 847, 17 Sup. Ct. 85. We are of the opinion that the imposition of this tax was not made in the exercise of the police power, which, in the opinion of some authors, is founded on the law of necessity, and which is defined by Blackstone to be the due regulation and domestic order of the kingdom, whereby individuals, like members of a well-regulated and well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners. 4 Bl. Comm. 162. It extends to the protection of lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. *Thorpe v. Railroad Co.*, 27 Vt. 149. While it is true that revenue may be raised by an act passed in the legitimate exercise of the police power, it is our opinion that, in so far as the act in question is concerned, it is a pure revenue law, enacted to procure, in part, funds for the support of the government, passed in the legitimate exercise of the taxing power of the state, and that it applies in all cases where the particular subject is not, by some controlling law, exempt. Nor do we think the case cited supports the contention of the plaintiff in error; but the reasoning in that case leads, logically, to a

conclusion in harmony with decisions we have previously cited. In reference to national banking associations, the court, in the case cited, says: "As long since settled, in cases already referred to, the purpose and object of congress in enacting the national bank law was to leave such banks, as to their contracts in general, under the operation of the state law, and thereby invest them, as federal agencies, with local strength, while at the same time preserving them from undue interference, whenever congress, within the limits of its constitutional authority, has expressly so directed, or wherever such state interference frustrates the lawful purpose of congress, or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States." By the provisions of section 5145 of the Revised Statutes of the United States, the affairs of national banking associations must be managed by directors chosen by the stockholders; and by section 5150, Id., one of the directors, to be chosen by the board, shall be president of the board. So far as direct authority is concerned, the president of a national bank, or, rather, of its board of directors, is only authorized, in terms, to preside at the meetings of the board of directors, and to have charge of the litigation of the bank; otherwise, his power, as given by the acts of congress, is the same as that of any other directors. See 1 Morse, Banks, §§ 143, 144; Gibson v. Goldthwaite, 7 Ala. 281. Under the act of congress, the business of a national bank is to be managed, controlled, and carried on by the board of directors. A member of this board is the president. Without such officers, the corporation could not carry on business. In other words, the directors, including the president, are the instruments designated by the act of congress to carry on the business of the banking association, which is itself one of the instruments called into being for the purpose of performing a part in the business of the government. Now, if the business of the bank cannot lawfully be taxed, nor any tax imposed by a state which would frustrate the lawful purpose of the act of congress, or which would impair the efficiency of the bank to discharge the duties imposed upon it by law, then it would seem to follow that a tax on the directors, or a director, or the president, through whom, alone, such business could be carried on, would be equally obnoxious. If a state could lawfully impose a license or occupation tax on a director, or the president, who is a director, it is a tax on the instrumentality or agency declared by congress to be the only power through whom the business of the bank could be carried on. Without these officers no national bank could transact the business for which it was organized. If the state cannot tax the business of the bank, because it is a necessary creation by the general government for its own use, by what process of reasoning can the right be claimed to tax the instruments which alone can lawfully carry on such business,—not as

individuals, but as officers of the bank? The tax here is laid, not upon the individual as an individual, but upon him as an officer of a national bank. If such a tax could be lawfully laid, it might be laid to an amount which might deter some, if not all, of such officers within the state from performing the duties devolving upon them; and if they should be prevented or deterred by such tax from performing the duties contemplated by the act of congress, necessarily, the business of the bank would be retarded,—nay, might be destroyed. It will be noted that the tax imposed is not one upon the property, real or personal, of the president, nor upon his income, but clearly a tax upon his vocation or calling. In Railroad Co. v. Peniston, 18 Wall. 5, the supreme court of the United States laid down the general rule that: "The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of power to serve the government as they are intended to serve it, or hinder the efficient exercise of their power. A tax upon their property, merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states; a tax upon their operations, being a direct obstruction to the exercise of federal powers, may not be." The agency there in question was a railroad company chartered by act of congress, and it was held that the property owned by it was subject to taxation, but that no tax could lawfully be imposed upon the franchises or rights of the company to exist and perform the functions for which it was brought into being. Page 87. In Allen v. Carter, 119 Pa. St. 192, 13 Atl. 70, it appears that a statute of Pennsylvania provided, "It shall be a misdemeanor for the cashier of any bank of this commonwealth to engage in any other profession, occupation or calling." In construing this statute, the court held it was not intended to apply to national banks, for the reason that, "the power of congress to create a complete system for the government of national banks being conceded, a disqualification may not be imposed upon an officer of such institution by an act of the state legislature, where none has been imposed by the act of congress." In the opinion, Mr. Justice Paxson calls attention to the fact that, if a state be at liberty to impose one qualification upon officers of national banks, it may likewise impose others, until the business be most seriously embarrassed or rendered entirely impracticable. Certainly, the efficiency of such institutions might be impaired by such a state law. This, as we have seen, cannot be done. Our conclusion, therefore, is that the act of the general assembly which imposes a tax on the presidents of each of the banks of the state is inoperative when sought to be applied to the presidents of national banks doing

business in this state, because the ultimate effect of the imposition of such a tax tends to impair the efficiency of such national banks of which they are presidents to discharge the duties imposed upon them by the laws of the United States. Judgment affirmed. All the justices concurring.

DANIEL v. FORSYTH.

(Supreme Court of Georgia. March 4, 1890.)
 NONSUIT—INSUFFICIENCY OF EVIDENCE—INJURY TO EMPLOYE.

The evidence offered by the plaintiff in the present case not being sufficient to authorize a recovery in his behalf, the granting of a nonsuit was proper.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by J. T. Daniel against J. J. Forsyth. From a judgment of nonsuit, plaintiff brings error. Affirmed.

Reed & Hartsfield and L. R. Ray, for plaintiff in error. Mayson & Hill, for defendant in error.

COBB, J. Daniel brought suit against Forsyth, alleging in his petition that on April 18, 1896, he was in the employment of the defendant, engaged in shingling the roof of a house; that the defendant ordered plaintiff to go upon a certain scaffold, and nail shingles to the roof of the house; that plaintiff complied with this command, and had nailed but a few shingles, when the scaffold gave way, and plaintiff fell to the ground, sustaining severe injuries. It is alleged that the scaffold was built by the superintendent of the defendant in a careless and negligent manner, for the reason that the footboard was a 1x10 or 1x12 inch board, about 12 or 16 feet in length, and the braces were three or four shingles, in an almost upright position against the board, whereas 1x3 strips or weatherboarding of sufficient length and strength should have been used for braces. The petition further alleges that plaintiff was an inexperienced man in working on scaffolds and on roofs, and that he did not know at the time that said scaffold was built in an unsafe and negligent manner, nor was he warned by the defendant of the danger. Defendant well knew that his superintendent was a careless and incompetent man, and retained him in his employment after he had notice of the fact, and, if defendant did not know this fact, he should have known it. Plaintiff did not, at the time of receiving the injuries, know that the superintendent was a careless and incompetent man. Plaintiff is 53 years old, and his earning capacity has been reduced one-half. The petition charges that it was gross negligence on the part of the defendant to order him to work upon a scaffold that was unsafe and dangerous; that it was gross negligence not to warn plaintiff,

who was inexperienced, of the danger in going upon the scaffold; and that defendant was grossly negligent in retaining in his employment a negligent and incompetent superintendent. By amendment, it is alleged that it was the duty of defendant to have made the scaffolding so strong, and to fasten it so securely, that it would safely support the weight of all persons put to work thereon, together with the supply of shingles necessary to keep the force then engaged in covering the roof; but that defendant neglected his duty in this respect, and permitted the scaffolding to be so weak and insecurely fastened that it was unsafe and dangerous, and while plaintiff was upon it, engaged in the performance of his duty, the scaffolding gave way, and caused the fall and injuries alleged. By another amendment, the plaintiff alleged that, before receiving the injuries, he earned by his labor two dollars per day; and also alleged that he had received certain other injuries, not enumerated in his original declaration, and which he alleged were permanent. The defendant answered, admitting the employment of plaintiff as alleged, but denied all of the allegations as to injuries and negligence.

At the trial the evidence for the plaintiff was, in substance, as follows: He was employed by defendant to nail on shingles as alleged. Defendant was present where the plaintiff was at work, and ordered plaintiff to begin work at a certain place on the roof. There were two other men at work on the staging on which plaintiff was ordered to work. They moved out of the way to make room for plaintiff, and went to the other end. Plaintiff got upon the staging, between the two men, and began nailing on shingles. He had not nailed on more than 8 or 10 shingles when the scaffold broke. The staging was made of one plank about 1x12, 16 feet long, braced with shingles nailed to the roof. This plank extended about halfway across the roof, where it met another plank of the same size, and braced in the same way. The staging, in falling, broke loose the two lines of staging below it, and all the persons on the staging fell to the ground. Plaintiff fell a distance of about 16 feet. There were 150 or 200 shingles on the staging at the time it fell. Plaintiff did not build it, nor did he see it built. Defendant was present nearly all of the time, and at work. He helped to work, and gave directions. All the orders plaintiff received were from the defendant. Plaintiff did nothing to make the staging fall. He took no notice of the staging, as to how it was built, but, as he knew defendant was in a hurry to finish the work before the rain, went around, and climbed up over several lower rows of staging, and went to work. Plaintiff was 52 years old at the time he received the injuries complained of. His regular business was sawmilling, in which business he had been engaged for 30 years. There was also testimony that plaintiff's in-

juries were severe, and that his earning capacity had been greatly reduced. There was testimony of a witness, who was a carpenter, to the effect that he always made staging secure for as many as would be put on it; that staging ought to be built strong enough to support whatever quantity of people would be put on it. Witness makes his staging out of 2x4 scantling, braced against the roof. This makes a secure staging. At the conclusion of the testimony the court granted a nonsuit, and to this ruling the plaintiff excepted.

There was no error in granting the nonsuit. The evidence shows that the plaintiff was a man 52 years of age, and that he had been engaged in sawmill work for 80 years. There is evidence that he was inexperienced, so far as nailing on shingles was concerned, but there is no evidence from which a jury would be authorized to find that he was such an inexperienced man that he could not tell that a plank 16 feet long, braced to the roof of a house with three or four shingles, was not sufficiently safe for three men to go upon it, when, in addition to this weight, there were from 150 to 200 shingles on the staging. If the plaintiff knew the staging was unsafe, and yet went upon it, he cannot recover. If he ought to have known of the unsafe condition of the staging, and did not, he cannot recover. *White v. Kennon*, 83 Ga. 348, 9 S. E. 1082. It is certain that the jury would not have been warranted in saying that plaintiff ought not to have known of the unsafe condition of the staging. But, even if plaintiff was free from fault, the evidence does not distinctly show that defendant himself built the staging, or that it was constructed in an improper manner, or that he furnished for that purpose material that was unsuitable. This being so, the following rule, laid down in the case of *Hazlehurst v. Lumber Co.*, 94 Ga. 535, 19 S. E. 756, is applicable to the present case: "The evidence showing that the danger of the work in which the plaintiff was voluntarily engaged must have been as obvious to himself as to his employer; that there was no emergency requiring him to expose himself to the danger; that, if free from fault himself, the negligence, if any, which resulted in his injury, was that of a fellow servant,—he was not entitled to recover." The following rule is also applicable: "A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded, generally, as warranting his safety. He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant." *Nelling v. Manufacturing Co.*, 78 Ga. 260. Moreover, there is no evidence showing that the staging from which the plaintiff fell was braced in an unusual or improper manner. An expert witness does say that he braces his staging with scantling, but it does not follow that

that is the usual way of bracing it. "When one enters the service of another, he impliedly assumes the usual and ordinary risks incident to the employment about which he is engaged." *Worlds v. Railroad Co.*, 99 Ga. 283, 25 S. E. 646. We think, therefore, that the plaintiff has failed to make out a case which would authorize a verdict in his favor. The testimony introduced in his behalf falls short of the case made by his declaration. Judgment affirmed. All the justices concurring.

RALEIGH & G. R. CO. et al. v. ALLEN.

(Supreme Court of Georgia. March 4, 1899.)

MASTER AND SERVANT—RAILROADS—NEGLIGENCE—RULES—EVIDENCE—ADMISSIONS—INSTRUCTIONS—HARMLESS ERROR.

1. Where the judge has substantially charged the law as embodied in the Civil Code on the subject of admissions, it is not error for him to omit to add, in the same connection, that admissions, when established to the satisfaction of the jury, constitute a high degree of evidence, and should be entitled to great weight.

2. In the trial of a suit by an employé against a railroad company, when the judge has correctly instructed the jury on the subject of the burden of proof in the case, and as to what facts will raise a presumption of liability against the company, it is not error to omit to charge, in the same connection, the law on the subject of defendant's theory that the injury was a mere accident. It is sufficient if the law bearing on such theory is elsewhere properly given by the judge in his charge.

3. Even if it is, in any case, proper for the judge to submit, to the jury trying an action by an employé against a master for personal injuries, the question whether a given rule prescribed by the former for governing the conduct of the latter in the performance of his work is reasonable or unreasonable, the judge should certainly not do so when the evidence fails to show the existence and terms of the alleged rule with sufficient certainty and clearness to enable the jury to intelligently pass upon the same. When, however, the defense in such a case rested upon the proposition that the plaintiff had violated a rule of the master, and in consequence had received the injuries complained of, it was incumbent on the defendant to show the existence and contents of the alleged rule; and, failing to do so, the latter could not have been injured by an instruction of the nature above indicated, and giving the same is not, therefore, cause for a new trial.

4. The verdict was not contrary to the evidence.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by A. G. Allen against the Raleigh & Gaston Railroad Company and another. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Erwin & Brown and Vasser Woolley, for plaintiffs in error. Arnold & Arnold, for defendant in error.

LEWIS, J. A. G. Allen brought suit for damages against the Raleigh & Gaston and Seaboard & Roanoke Railroad Companies, alleging substantially as follows: In Febru-

ary, 1896, plaintiff was a car coupler, engaged in the service of the defendants. While engaged in the act of coupling two of defendants' cars, he had set the pin against the deadwood, but the pin would not drop in when the cars went together, and he thereupon gave the engineer the stop signal, which meant that he should remain still until he got further notice. Plaintiff went in to put the pin down and adjust it, and at that time the cars were standing perfectly still, and it was impossible to adjust the pin without putting it down with the hand. As plaintiff took hold of the head of the pin, the cars, which had been standing still, were suddenly and negligently, and without any signal from the plaintiff, moved back against him by the engineer in charge of the train, and plaintiff's hand was mashed, the injuries to which he particularly sets forth in his declaration. The petition was amended by the further allegation that the engine was negligently moved off from the cars to which it was to be coupled without any signal, and this pulled the pin back against the body of the car, mashing plaintiff's hand. The defendants, in their plea, denied liability, and alleged that the plaintiff was injured by his own negligence in not using a stick; that the injury was the result of this negligence, and to the natural slack due to the proper operation of the train. The jury returned a verdict for the plaintiff for the sum of \$550, whereupon the defendants moved for a new trial, and they assign error upon the judgment of the court overruling their motion.

1. One ground of the motion for a new trial is that the court erred in charging the jury as follows: "Now, the defendants contend that the plaintiff in this action admitted that the alleged occurrence happened in a certain way, and not as charged in plaintiff's declaration. Well, admissions, gentlemen of the jury, the law says should be scanned with care by the jury. What weight they shall have, if any admissions are shown, and whether they are, or are not, is a question for the jury; but, where they are shown, it is the duty of the jury to scan them with care, and give them just such weight as they think they are entitled to, like all other evidence in the case." The error assigned on this charge is that the court only charged one side of a correct legal proposition, and, when he cautioned the jury they should scan such admissions with care, he should also have charged that, when said admissions were established to their satisfaction, they constituted a high degree of evidence, and should be entitled to great weight before the jury. The ruling of the court that all admissions should be scanned with care is authorized by section 5197 of the Civil Code. But there is nothing in the provisions of this section of the Code, nor in any other statute of the state, which declares that, when an admission is established to the satisfaction of the jury, it constitutes a high degree of evidence,

and the jury should give it great weight. It may be sound philosophy, founded upon human experience and a knowledge of human character, that an admission, made voluntarily by a party against his own interest, constitutes very strong evidence of the fact admitted. It is often the case that learned writers of law books, and even courts, in the discussion of principles involving the weight of testimony and the credibility of witnesses, advance ideas, sound in themselves, which are not intended to be declared as positive law, but as a safe rule to guide mankind generally in reaching conclusions upon stated facts; but it does not follow from this that, however sound the philosophy of such rules may be, a court should adopt them as positive law, apply them to a particular case, and give them as rules by which the jury should be governed in their deliberations. In several of the states the judge is permitted to give to the jury the opinion he entertains of the evidence, and his reasons therefor. In this state, however, any intimation of an opinion by the court to the jury as to what fact has or has not been shown in a case is reversible error. The weight of testimony and the credibility of a witness are peculiarly and exclusively, under the law of Georgia, questions for the jury; and, unless the statute expressly specifies how certain testimony should be received, what weight should be given it, and whether it should be scrutinized with caution or care, it is, to say the least, a safer plan always for the judge to express no opinion upon the subject, but to leave the matter entirely with the jury. In some instances, no doubt, the admissions of a party against his interest are entitled to great weight; but what weight should be given them would depend largely upon the circumstances under which they were made. As to the effect of such circumstances upon the weight of the testimony, the jury alone should judge.

2. Another ground of the motion for a new trial is that the court erred in the following charge to the jury: "Now, if it is affirmatively shown to the jury by the plaintiff (an employé) that he was without fault, then the law would raise the presumption that the defendants were at fault,—that the defendants were negligent; but this presumption would not arise until the plaintiff shows affirmatively that he was without fault himself. If he does so, the presumption would arise against the defendant companies, and the burden would be on the defendants to show, either that they were not negligent, as charged, or that the plaintiff was at fault, or that the plaintiff could, by the exercise of ordinary care on his part, have avoided the consequences to himself of the defendants' negligence, if that is shown." There is no contention that, as an abstract proposition of law, the above quotation from the judge's charge is not correct; but it is insisted that the error consists in the fact that it did not pre-

sent to the jury the alternative of the injury being occasioned by a mere accident or casualty, and that, a part of the defense being that the injury was occasioned by the slack or settling down of the train after the engine had stopped, the defendants were entitled to a charge in this connection which would relieve them from liability if the injury was the result of the accident. The complaint is, not that the court altogether failed to charge upon the theory of an accident, but that it was not given in the particular connection where he was instructing the jury upon the subject of the burden of proof. We can see no merit in this ground. The court cannot well charge the law upon every theory of the case authorized by the testimony and the pleadings in the same breath or in the same connection.

3. Error is further assigned in the motion on account of the following charge of the court: "Now, the defendants contend specifically, gentlemen of the jury, that Mr. Allen, the plaintiff, was at fault, in that he was in the violation of certain rules, which required the use of a stick in making couplings, which they alleged existed. Well, gentlemen of the jury, your first inquiry as to that would be whether the evidence showed you there was such a rule, and whether it was a reasonable and proper rule. If there was such a rule, [and] it was a reasonable rule, it was the plaintiff's duty to obey it, provided it was promulgated and communicated to him; and if it had been communicated to him, and was of force, and you believe it was a reasonable rule, and he got hurt in consequence of the violation of that rule, he would not have the right to recover." The error alleged in this charge consisted in submitting to the jury the reasonableness or unreasonableness of the rule in question. It was contended by counsel for plaintiff in error that this was a question of law for the court to decide, and not one to be submitted to the jury. In the light of the record before us, we deem it neither necessary nor important to discuss or to solve this question in order to decide this case. It is inferable from the testimony in the record that the defendant companies had certain written or printed rules, among which was one relating to the particular subject of coupling with a stick. It does not appear, from the testimony, that such rules were ever furnished to the plaintiff; nor was any rule touching the matter introduced in evidence. The conductor testified that, when the plaintiff was first employed, he directed him to use a stick when coupling. The conductor admitted that he himself often coupled with his hand, and had often seen plaintiff coupling with his hand; and it does not appear that the plaintiff was ever corrected for any violation of the rule. The engineer testified that an order of the Seaboard was posted at a certain depot about coupling with a stick, and that he heard the plaintiff refer to this order, and state that he would quit the road before he would use a stick for coupling. This

order was not introduced in evidence, nor were its contents given orally; and it did not appear by whose authority it was posted. The plaintiff testified that he knew nothing of any stick rule, and had never received, from any source, instructions to use a stick. It further appeared from the evidence that, when the plaintiff was endeavoring to couple the cars, as the one came against the other for this purpose, by some accident the pin failed to fall exactly in place; that after the cars had come to a standstill he simply went between them for the purpose of adjusting the pin, so that it would drop through into a proper place; and that while he was so engaged the engineer, without warning or notice, moved the car, and this resulted in the injuries complained of. Plaintiff further testified that it was impossible to adjust the pin with a stick, and that he had to use his hand for this purpose. There is an absolute want of any testimony whatever showing the extent or application of the rule in question, nor was there any evidence explaining how or when the car coupler was, under this rule, required to use a stick. The court and jury were both, therefore, left absolutely in the dark as to whether the rule applied only in a case of actual coupling, properly speaking,—that is, simply for the purpose of elevating the link, with the view of inserting the same by the stick into the approaching bumper,—or whether, as was the case with the rule in *Railroad Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290, the rule also prohibited the brakeman from going between the cars under any circumstances, for the purpose either of coupling or of adjusting pins, while an engine was attached to the train. In the first instance mentioned, the rule would have had no application whatever to the present case; in the latter, it might have applied. It is manifest, therefore, that neither the court nor the jury had sufficient data before them to determine whether or not the rule invoked had any application to the case, or, if it did apply, whether, under the circumstances, its requirements were reasonable or unreasonable. We think, therefore, that the court erred in giving the jury any instructions whatever touching the matter. When an employer defends against an action of tort, brought by his employé for a personal injury, upon the ground that the injury resulted in consequence of a violation of a rule prescribed by the former to govern the conduct of the latter, it is incumbent upon the defendant to clearly establish, by evidence, the existence, terms, and conditions of the rule. When it signally fails in this particular, this defense necessarily fails. The error, however, in this case, was prejudicial to the plaintiff, rather than the defendants; for it gave the latter the benefit of a theory of defense before the jury to which the defendants were not entitled under the facts. The erroneous charge, therefore, working no harm to the complaining parties, a new trial will not be granted upon this ground.

4. The above deals with all the grounds in

the motion for a new trial, except the general ground that the verdict was contrary to the evidence. After a careful review of the testimony, we think the evidence in behalf of the plaintiff below was sufficient to sustain his cause of action, and the verdict of the jury rendered thereon. If he told the truth,—and his statement was corroborated by other testimony,—the injury he received was without fault on his part, and was the result of the negligence of the engineer in charge of the moving of the train at the time of the occurrence. Judgment affirmed. All the justices concurring, except COBB, J., disqualified.

BENNETT et al. v. TRUST CO. OF GEORGIA.

(Supreme Court of Georgia. March 4, 1899.)
PROCEEDINGS IN ERROR—AMENDMENT—HOMESTEAD—RIGHT TO EXEMPTION.

1. Where a suit was brought in the court below by several persons, as the beneficiaries of a homestead, for the recovery of the alleged homestead property, and, after a judgment against them, a bill of exceptions was taken in the name of one of them only, and the names of the others appear in the record, the names of the plaintiffs omitted in the bill of exceptions may be inserted therein by an amendment thereto in this court, as plaintiffs in error.

2. The statutory homestead or exemption provided for in section 2866 et seq. of the Civil Code cannot be taken in property which does not belong to the head of a family. A wife, living with her husband and children, is not the head of a family; and hence she is not entitled, under the provisions of these sections of the Code, to have property, the title to which is in herself, exempted from levy and sale, for the benefit of herself and minor children.

3. No amendment to the original schedule can give vitality to a statutory homestead which is absolutely void. (a) One not the head of a family, but who has the care and support of dependent females, is not entitled to such a homestead.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Annie Bennett and others against the Trust Company of Georgia. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Mayson & Hill, for plaintiffs in error. King & Anderson, for defendant in error.

FISH, J. The plaintiffs in the court below brought an action against the Trust Company of Georgia to recover a certain house and lot in the city of Atlanta, and the value of the same for rent while in possession of the defendant. They claimed "title to said land as beneficiaries under the homestead laws" of this state. The petition alleged that Annie Bennett was on August 30, 1880, the owner of the lot, and on that day "procured an order from the ordinary setting apart said land as exempt from levy and sale, under the laws of this state, for the benefit of herself and seven minor children" named in the petition. The suit was brought by her and four of these

children. The petition further alleged: That "said trust company on May 9, 1894, obtained a judgment against petitioner Annie Bennett in the city court of Atlanta. Execution was issued thereon, and was levied on said land on July 31, 1894. Said land was sold thereunder on September 8, 1894, said trust company purchasing the same." That on "September 8, 1894, petitioners were dispossessed of said property by said trust company, and it went into possession thereof, and has continued in possession ever since." That the trust company knew of the exemption of the land, and went into possession thereof in defiance of the same. Attached to an amendment to the petition was a copy of the alleged homestead, from which it appears that Annie Bennett made out, and returned to the ordinary, a schedule of real and personal property "claimed by her to be exempt from levy and sale by her for the benefit of herself and family, consisting of her said husband and seven minor children, under section 2040 of the Code of Georgia of 1873, and the amendment thereto"; the lot sued for being the real estate contained in the schedule. This schedule was approved and recorded by the ordinary on August 31, 1880. On June 15, 1898, after this suit was filed, Annie Bennett filed in the ordinary's office a petition for an amendment "to schedule filed and approved August 31, 1880," stating the names of the children, the sex of each, and their respective ages at the time such original schedule was filed, and stating "the ground [of the] application to be because said females were part of the family of petitioner, and were dependent females, being dependent on said petitioner for support," and that the property was "the property of petitioner and her separate estate." On this petition to amend the schedule appears the following indorsement, signed by the ordinary, "Filed, approved, and recorded and allowed June 15, 1898." The defendant demurred to the plaintiffs' petition upon various grounds. The court sustained the demurrer, and the plaintiffs excepted.

1. When the case reached this court only one of the plaintiffs in the court below was a party to the bill of exceptions, and she had made the requisite pauper affidavit to avoid payment of the costs here. The defendant in error moved to dismiss the writ of error "for want of proper parties to the bill of exceptions, in that several of the plaintiffs in the court below were not made parties" thereto; whereupon counsel for the plaintiffs in error applied for leave to amend the bill of exceptions by making the plaintiffs who had been left out of the bill parties plaintiff in the same. This application was granted. The necessary parties having been made, and the costs in this court having been paid by the plaintiffs in error, the motion to dismiss is overruled. The right of the plaintiffs to make this amendment to the bill of exceptions in this court is clear. Civ. Code, § 5567; Sharp v. Findley, 71 Ga. 654; Epping v. Aiken, Id.

682; *Isbell v. Blanchard*, 94 Ga. 678, 21 S. E. 720.

2. It will be seen that the plaintiffs in this case claim to be the beneficiaries of a homestead which purports to have been obtained by a married woman, living at the time with her husband, for the benefit of herself, her husband, and her minor children, under the provisions of section 2040 of the Code of 1873, which provisions are now found in section 2866 of the Civil Code. One question raised by the demurrer was whether a married woman, living with her husband, is entitled to have her own property exempted, under this section of the Code. The section in question provides that "the following property of every debtor, who is the head of a family, shall be exempt from levy and sale by virtue of any process whatever, under the laws of this state, nor shall any valid lien be created thereon, except in the manner hereinafter pointed out, but shall remain for the use and benefit of the family of the debtor," etc. It is perfectly clear that the exemption here provided for cannot be taken in property belonging to one who is not the head of a family. This is sometimes called the "statutory homestead," but is more generally known as the "pony homestead." Under certain circumstances, provided for by the law, the constitutional or *ad valorem* homestead may be set apart out of the property of a person who is not the head of a family, but there are no similar provisions with reference to the homestead in specifics for which this section of the Code provides. In the present case, a wife, living with her husband, attempted to take the "pony homestead," in property which belonged to herself, "for the benefit of herself and family, consisting of her husband and seven minor children." A married woman, living with her husband, is not the head of a family. Where a husband and wife are living together, the law recognizes the husband as the head of the family. *Neal v. Sawyer*, 62 Ga. 352. The homestead set up by the plaintiffs in this case is therefore a mere nullity. Consequently the land sued for by them was not protected from levy and sale under the judgment and execution obtained against Mrs. Bennett by the defendant.

3. The amendment made to the schedule, after the beginning of this suit, by setting out the names and ages of her children at the time the original schedule was filed, and the respective sex of each, and stating "the ground [of the] application to be, because said females were part of the family of petitioner, and were dependent on said petitioner for support," did not help the matter at all. The original proceedings were utterly void, as the schedule showed upon its face that Mrs. Bennett was not the head of a family, and that the exemption was sought in property belonging to her. Hence there was nothing to amend. Besides, while a person having the care and support of dependent females, by proceeding under section 2827 et seq. of

the Civil Code, may obtain the *ad valorem* homestead, such person is not entitled to the kind of exemption which was sought in this case.

There was no error in sustaining the demurrer. Judgment affirmed. All the justices concurring.

DAVIS v. LUMPKIN.

(Supreme Court of Georgia. March 4, 1899.)

HOMESTEAD—SETTING APART TO WIFE—VALIDITY.

The right of a wife, under section 2040 et seq. of the Code of 1873 (Civ. Code, § 2866; et seq.), to have a homestead set apart out of her husband's property, depends upon his refusal to do so. A schedule filed by her for this purpose, in which it was merely alleged that he neglected or refused to file the same, does not unequivocally show a refusal on his part, and consequently a homestead purporting to have been thus set apart was not valid as against one to whom the husband subsequently conveyed the land embraced therein.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Mattie L. Davis against J. Lumpkin. Judgment for defendant, and plaintiff brings error. Affirmed.

C. J. Haden and J. L. Travis, for plaintiff in error. Alexander & Lambdin, for defendant in error.

COBB, J. Mattie L. Davis brought her petition alleging that on June 7, 1879, she, as the wife of Vincent Davis, had applied, to the ordinary, and had set apart for her benefit, and for the benefit of the family of Vincent Davis, certain of his property, under section 2040 et seq. of the Code of 1873 (Civ. Code, § 2866 et seq.). It is alleged that Davis was in possession of the property at the time of the application, and that, being at that time a debtor and insolvent, and "failing and refusing" to apply for the exemption, petitioner had made the application. It is further alleged that Davis, without the knowledge or consent of petitioner, had conveyed the property to one Hill, who had in turn conveyed a part thereof to the defendant Lumpkin. The prayers of the petition are that petitioner have judgment against the defendant for mesne profits which he had received and collected since he went into possession of the property, and that judgment be rendered restoring to her the land, and that defendant be restrained from interfering with her possession. Attached to the petition was a schedule of the property sought to be exempted, which is headed: "Schedule of real and personal property belonging to Vincent Davis (he neglecting or refusing to file the same), as exempt from levy and sale under section 2040 of the Code of Georgia, and amendments thereto, for the benefit of the family of said Vincent Davis, consisting of himself and the said Mattie L. Davis." The defendant demurred to

the petition, on the ground, among others, that "the homestead, as shown by the exhibit attached to plaintiff's petition, is invalid, in that it does not state in express terms that the husband refused to apply for said homestead, or that he had notice of the application therefor." The demurrer was sustained, and the plaintiff excepted.

In our opinion, the demurrer was properly sustained. The Code provides that every debtor who is the head of a family, or, "if he refuses," his wife, may have certain property set apart as exempt from levy and sale. Civ. Code, §§ 2866, 2967. In the case of *Dunagan v. Stadler*, 101 Ga. 474, 29 S. E. 440, it was held that the ordinary, when he approved the schedule and plat required in an application for the constitutional homestead, as provided in section 2827 et seq. of the Civil Code, acted as a court of general jurisdiction, and hence that it would be presumed, unless the contrary appeared, that he had before him sufficient facts and evidence to authorize the setting apart of the homestead. The reasons which brought the court to this conclusion are fully set forth in the opinion of Mr. Justice Little in that case. The ordinary, in this state, has judicial, clerical, ministerial, and executive duties to perform. The duties devolving upon him as judge of the court of ordinary are enumerated in section 4232 of the Civil Code; his clerical and ministerial duties are prescribed in section 4250; and certain of his duties of an executive nature are set forth in section 4238. It becomes necessary, in the present case, to determine the capacity in which that officer acts when performing the duties prescribed in section 2866 et seq. of the Civil Code. The act of December 23, 1822, which was the origin of the law now contained in these sections, provided that certain personal property of every debtor should be exempt from levy and sale. It was further provided that, in cases where any debtor was entitled to the benefit of the exemption, it should be the duty of the officer levying the execution against him to make out a schedule of the exempted articles, and return the same to the clerk of the inferior court, whose duty it should be to record the same in a book kept by him for that purpose. Nothing else was required to be done; but, as soon as the schedule was recorded, the property vested in the inferior court, for the benefit of the family of the debtor so long as he should remain insolvent. Cobb's Dig. p. 385. This law, with various amendments passed from time to time, one of which added an exemption of realty, is contained in section 2031 et seq. of the Code of 1863. By section 2014 of that Code it was provided that, when any debtor refused to seek the benefit of the exemption allowed in the preceding section, his wife, or some person acting as her next friend, might have the exemption allowed, by making out a schedule and description of the property claimed to be exempt, and returning the same to the clerk of the inferior

court, who should record the same in a book kept for that purpose. It was provided by section 2015 that, whenever an application for exemption was made by an insolvent debtor, the county surveyor should lay off the land allowed to the debtor's family, and make a plat of the same, which should be returned to, and recorded by, the clerk of the inferior court. Up to this point, it will be seen that the inferior court, as a court, passed upon no question connected with the setting apart of the exemption; everything that was done being of a clerical nature, performed by the clerk of the court. Section 2016 is as follows: "Should any creditor, for any cause, desire to dispute the propriety of the survey, or the value of the improvements, upon application to the inferior court, and notice to the debtor, the said court may appoint three appraisers to view the survey, and to value the improvements, and on their return the said court may direct the surveyor to make such alterations as shall, in the judgment of the court, be conformable to law." The only jurisdiction that could be exercised by the inferior court in connection with setting apart the exemption was that involved in trying the objections which it was provided could be raised by creditors. The constitution of 1868 abolished the inferior court, and provided that the duties of such court should be transferred to such tribunals as the general assembly might designate. Code 1873, § 5126. The general assembly, acting under authority of this provision, cast upon the ordinary the duties which had devolved upon the inferior court and its clerk, in the matter of setting apart property exempt from levy and sale under the act of 1822 and its amendments. Code 1873, § 2040 et seq.; Acts 1870, p. 74. At this time the ordinary was, and has ever since been, the clerk of his own court. Code 1873, § 341; Civ. Code, § 4247. It will thus be seen that the ordinary, in recording the schedule of the property and the plat of the realty of an insolvent debtor, took the place of the clerk of the inferior court, and that his duty in this respect was purely clerical. When, however, any creditor should appear and "dispute the propriety of the survey or the value of the improvements," the ordinary sat in the place of the inferior court, to hear and pass upon the objections raised. See *Bangs v. McLeod*, 63 Ga. 162. The provisions of the Code of 1863 in relation to these matters are carried forward, without substantial change, into section 2040 et seq. of the Code of 1882, and are now embraced in section 2866 et seq. of the Civil Code. The judicial functions of the ordinary, as has been stated, do not begin until some objection is raised to the survey or the value of the improvements. It is not necessary to decide in this case whether, in passing upon such objections, the ordinary acts as a court of general or of limited jurisdiction, as no objection was raised, and hence no judicial act was performed. Section 2868 of the Civil Code gives to a wife the right to

have property of her husband exempted, "if he refuses." No provision is made for the husband to appear and object. His right to do so, however, is recognized by the decisions of this court cited hereinafter; but as to when such objections should be made, and as to how they should be tried, are questions not necessary to be determined in the present case. Before the ordinary is authorized to record the schedule filed by the wife, it must appear therein that the husband refuses to file the schedule. Upon such refusal, the wife is authorized to file, and the ordinary to record, the schedule of the property sought to be exempted. But, if it does not affirmatively appear in the schedule that the husband refuses to file the same, the ordinary has no authority to record it, and the same, though recorded, is void on its face. *Connally v. Hardwick*, 61 Ga. 501; *Association v. Tanner*, 96 Ga. 338, 23 S. E. 403. It does not distinctly appear from the present record that the husband refused to file the schedule. The petition of the plaintiff does not state that the husband refused to take steps to have the property exempted; but the schedule, which is attached to the petition as an exhibit, states that he neglected or refused to do so. Such an allegation does not unequivocally show that the wife had requested the husband to file the schedule, and that he had refused to do so. The word "neglecting," coupled with the word "refusing" by the conjunction "or," weakens the meaning of the latter word, and deprives it of its ordinary meaning, which carries the idea of an application to the person refusing. This being so, there never has been any legal exemption of the property, and the mere record of such a schedule constituted no obstacle to the making of a deed by the husband to the property described in the schedule. It follows that, as to the husband and those claiming under him, the homestead relied on by the plaintiff in this case was void. Judgment affirmed. All the justices concurring.

JOSEY et al. v. UNION LOAN & TRUST CO.
(Supreme Court of Georgia. March 4, 1899.)
RELIGIOUS SOCIETIES—TRUSTEES—DEBTS—ACTIONS—PARTIES.

A voluntary association of persons, organized for religious purposes, which has regularly appointed trustees to hold and manage its property, is liable to have such property subjected to the payment of money furnished for the use of such trust estate under proceedings authorized by statute. To such proceedings, where the trustees reside in the county where suit is brought, they are the only necessary parties defendant.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Union Loan & Trust Company against Robert Josey and others, trustees. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Simmons & Corrigan, for plaintiffs in error.
M. A. Hale and Jas. K. Hines, for defendant in error.

LITTLE, J. The defendant in error instituted an action, naming certain trustees of Mt. Zion Baptist Church as defendants. The petition contained two counts. In the first count it was alleged that eight persons named were, as trustees of Mt. Zion Baptist Church, indebted to the petitioner in the sum of \$600, besides interest, on a promissory note, and that the same was due, etc.; which note was secured by a mortgage on certain property of the church, being real estate fully described in the petition. The second count alleged that the petitioner held a claim against the trust estate of Mt. Zion Baptist Church to the amount of \$600, besides interest, etc., which estate was held and owned by the trustees named, for the benefit of the church; that this sum of \$600 was furnished for the use of the trust estate, which estate consists of the land described; that the sum of money mentioned was furnished to the trustees for the use of the trust estate, in paying off and discharging a material man's lien held by the Willingham Lumber Company against the trust estate, for material furnished for the building of the church known as "Mt. Zion Baptist Church," on the lot of land described; that the amount so paid to the lumber company was \$349.03; that said money was also used in the payment of a debt of \$64.70, due to Mrs. Payne on a mortgage held by her against the trust estate, and in paying off and discharging claims and demands of the city of Atlanta against said trust estate for Belgian blocks and other street improvements made by the city on the streets upon which the land described abuts, and for all of which the trust estate was liable; that the cestuis que trustent of said trust estate are the members of Mt. Zion Baptist Church, colored; that they prayed a judgment subjecting the trust estate to the payment of the claim. Service of this petition was made on the persons named and alleged to be trustees of said church. The defendants answered the petition, and denied that they were indebted as alleged. They denied the right of the plaintiff to institute an action. They admitted the execution of the mortgage, but averred that it conveyed no greater interest than the defendants themselves had in the property; that there were about 1,000 members of the church, and the plaintiffs were only entitled to have a judgment against the defendants, as trustees, to the extent of the respective interests of the latter in the property. They denied that the plaintiff has any greater claim against the church property, by reason of having furnished money for the use of the trustees, than they would have on the promissory note, and denied the right of the plaintiff to the relief sought. They denied that the Willingham Lumber Company had any lien upon the property, and denied that

the other debts, alleged to have been paid off, constituted any lien on the trust estate. They admit that the property named belongs to the members of Mt. Zion Baptist Church, and contend that, under the law, all the members of the church should be made parties defendant to the suit; that no judgment rendered on the petition against the church will be binding on the church property,—which facts they plead in abatement, and pray that the plaintiff be required to make all the cestuils que trustant parties defendant in the case, and that suit can only be maintained against all of the members of the church, and not against the defendants, as trustees, alone. They further allege the debt claimed to be usurious to the extent of \$40. On the trial of the case, evidence was introduced tending to show that, at the time of making the note, the church owed Venable Bros., for curbing, \$45.81; another bill to the city of Atlanta for curbing, \$25.55; and another bill for street improvements, to the city of Atlanta, \$180.44. That the church also owed, to Willingham & Co., \$349.03 for material used for the improvement of the church; to J. Carroll Payne, \$64.70 on borrowed money. That, in order to obtain the loan to pay off these debts, there was a called meeting of the members of the church, and more than 50 members were present. That there were from 700 to 1,000 members of the church. That the church meeting called to authorize the loan was duly and regularly called, and notice given. That the loan was authorized by that meeting. That Willingham's debt and the debts for the sidewalk and granite blocks were pressing. That Hale, agent of the lienors, paid out, under the direction of the deacons of the church, the debt to Willingham, the debts for the sidewalk and granite blocks, and that due to Mrs. Payne. That more than \$600 was paid out by Hale on these debts of the church. That in Baptist churches a majority vote of the members present controls in the conduct of their business. Hale testified that the loan was made through him; that the trustees, to the number of 10, came to him as a body, and stated that Willingham was about to sell them out on a material man's lien; that they owed interest to Mrs. Payne and taxes for granite blocks and sidewalks; that the amounts were due, and about to be enforced; that they wanted this \$600 to pay these pressing claims; that the trustees executed the notes; that the money was not paid to them, but he was to pay these several claims, and he did pay Willingham \$349.03 for his debt due by the church; to Mrs. Payne, for interest on mortgage, \$64.70; Venable Bros., for sidewalk, \$45.81; to the city for granite blocks and sidewalk, \$180.44,—the amounts paid out amounting to \$639.98. The proceedings of the church meeting were introduced, in which it appeared that the trustees of the church, in their official capacity, were authorized to secure the loan, to execute a note for the same, and that the lien so paid will remain the

property of the lienor until the loan is paid. The note referred to was also introduced in evidence; also an instrument signed by the Willingham Lumber Company, acknowledging the payment of \$349.03, as due thereon, to have been received from the lienor, and transferring to it the interest of Willingham & Co. in such claim against the church. There was also introduced a receipt from Mr. Payne for the interest paid; also a fl. fa. in favor of the city of Atlanta against Mt. Zion Baptist Church for \$141.35, and another in favor of the same against the same church for \$25.55; also the fl. fa. and city marshal's deed to the property, the fl. fa. being in favor of the city of Atlanta, and the deed made by the city marshal to Venable Bros. Upon the latter, there was a transfer to the lienor by Venable Bros. The defendants introduced no evidence, and the court directed a verdict for the plaintiff. To certain rulings of the court, which will hereafter be referred to, and to the direction of the verdict, the defendants excepted.

There was no attempt by the instituted proceedings to foreclose the mortgage executed by the trustees on the church property and held by the defendant in error. While we are not prepared to rule that the plaintiff was entitled, by a common-law judgment rendered on the notes executed by the trustees, to subject the church property to the payment of its debt, we think the allegations made in the second count of the petition, supported by the proof which appears in the record, entitled the petitioner to subject the property of the church to the payment of its debt. It does not appear that this church was incorporated, as it might have been under section 2351 of the Civil Code, nor that the names of the trustees or officers of the church were entered in the clerk's office, as provided by section 2357 of the Civil Code. This church, then, must be considered as a voluntary association of persons, for the purpose of divine worship and the observation of religious duty. It is a matter of common observation that the terms "church" and "society" are popularly used to express the same thing, namely, a religious body organized to sustain public worship. *Society v. Hatch*, 48 N. H. 396. In *Jac. Law Dict.*, "church," it is said, "may be—First, a temple or building consecrated to the honor of God and religion; or, second, an assembly of persons united by the profession of the same Christian faith, met together for religious worship." The latter is contemplated by our statute when the word "church" is used. By section 2361 of the Civil Code, it is provided that, where a congregation has incurred a valid debt, in the absence of other property, the church edifice and site are liable to sale for its payment. *Lyons v. Bank*, 86 Ga. 485, 12 S. E. 882. So that we may take it as established that the congregation of Mt. Zion Baptist Church may incur a debt, and that such debt may, by the courts, be en-

forced against the congregation, even to the sale of the church building, and the lot belonging to the church on which the same is situated. The question then arises as to how such debt may be enforced, and the method of judicial procedure which will subject the property to sale. While the property of such congregation or church belongs to the members, it does so for the particular uses to which it is designed to be put, and is almost universally held and controlled for the use of the members by trustees or other designated officers. It is provided by section 2353 of the Civil Code that deeds of conveyance made to any church or religious society or trustees, for the use of such church or religious society, shall be good and valid, and available in law, for the uses and purposes contained in the conveyance, and the land so conveyed shall vest in the church or religious society. In the case under consideration, it is established that the property is held by trustees, and it is therefore a trust estate in law. By section 3202 of the Civil Code, it is provided that any person having a claim against any trust estate, for services rendered to the estate, or for articles or property or money furnished for the use of said estate, may enforce the payment of such claim in a court of law. And the method of enforcing the same is provided by section 3203 of the same Code. It is requisite, under that section, that the petition shall show the grounds of the claim, in what manner the estate is liable for its payment, and shall also set forth the names of the trustees and the cestui que trust. As to who are proper parties defendant in such an action, it is practically settled by the provisions of section 3204 of the Civil Code. It is there declared that if there is no trustee, or he is a mere naked trustee and nonresident in the county, the cestui que trust shall be made the defendant, and the proceedings shall be, in all respects, the same as when the trustee is defendant. This section was codified from the act of 1856. Acts 1855-56, p. 228. The original act provided, if there is no trustee, the cestui que trust shall be made the defendant. So that the meaning of this provision of the Code is that, in proceeding to subject trust estates to the payment of a claim for services rendered the estate, or for property or money furnished for the use of the estate, the cestui que trust need not be made a party if there is a trustee resident in the county. This is, undoubtedly, a correct interpretation of this provision; for, besides the words used, it is provided, in section 3206 of the Civil Code, that the judgment thus rendered imposes no personal liability on the trustee, but only binds the trust estate, and that execution shall issue accordingly. This court, in the case of *Beckwith v. McBride*, 70 Ga. 642, in discussing the powers incident to the trustees of a church, says: "The object in creating this trust was to remove the property from the power and control of the congregation and

parish, and place it elsewhere. From its very nature, this charitable provision must have a trustee to look after and administer it. This is unlike an ordinary trust. It is perpetual, and the estate conveyed cannot exist without it. Such a manager of charitable donations is not and cannot, from the very nature of things, be a mere dry trustee, charged only with the duty of protecting the title to the property." For these reasons, as well, also, as from the necessity of the case, the trustees who hold and manage the property belonging to a voluntary association organized for religious purposes are the only necessary parties defendant in a proceeding to subject the trust property to a claim for which it is liable. If it were a rule that every member of the congregation should be a party defendant, it would practically be impossible that the proceedings so instituted should terminate in a judgment. Here, according to the evidence, about 1,000 members constitute the congregation. Necessarily, by withdrawal, removal, death, and other changes, this congregation is daily diminishing or increasing. Besides, such congregation usually consist of minors as well as of adults. So that it is impractical to require these members, some of whom are not subject to suit in the ordinary way, to be made parties defendant. For these reasons, we apprehend, the statute has otherwise provided.

It is argued that the claims paid off by the defendant in error, under the evidence in the case, were not liens binding the property. It is not necessary, to maintain this action, that they should be. The provision of the statute is that such proceeding may be maintained where a person has a claim against the trust estate for services rendered, as for articles or property or money furnished, for the use of said estate. One of the claims paid, according to the evidence, was for material furnished in the building or improvement of the church edifice. Another of the claims was for the interest on borrowed money which was secured by a mortgage. The others were for the improvement, required by law, on the streets in immediate proximity to the church building. The trustees did not owe these sums individually, but such claims were, both in law and in equity, the debts of the trust estate; and, when the defendant in error advanced the money to relieve the trust estate from these pressing demands, it had a claim against the trust estate for the amount advanced. The proceeding to enforce it was regular, and authorized by the statute.

A number of objections were urged by the plaintiffs in error to the introduction of testimony. We have carefully noted each of these objections, and find no error in the ruling of the court. And inasmuch as the debt due to the petitioner was a lawful claim against the trust estate, and the proceedings to enforce the same were in accord with the requirements of the statute, and there were

proper parties defendant to the action, we find no error in the action of the judge in directing a verdict for the petitioner. Judgment affirmed. All the justices concurring.

MATHEWS et al. v. BISHOP.

(Supreme Court of Georgia. March 4, 1899.)

DEFAULT JUDGMENTS—VACATING—GROUNDS.

1. That part of the pleading act of 1895 (Civ. Code, § 5069 et seq.), which deals with the subject of defaults, relates merely to simple defaults, and has no application to final judgments, whether they be rendered by the court or entered up on verdicts in cases "in default."

2. A judgment will not be vacated at the instance of the defendant upon the ground that the plaintiff, prior to the judgment and in consideration of the settlement of his cause of action, verbally agreed to dismiss his suit, and for this reason the defendant failed to appear and plead at the proper time, where the plaintiff denies such settlement and agreement.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by T. L. Bishop against W. A. Mathews & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

W. W. Davies and C. L. Pettigrew, for plaintiffs in error. W. R. Brown, for defendant in error.

FISH, J. Bishop sued W. A. Mathews & Co. on account, in the city court of Atlanta, and Mathews was personally served. Upon the call of the case, in its order, for trial at the first term, there being no appearance for the defendant and no plea or answer filed, verdict and judgment were rendered against the defendant for the amount of the account. Judgment was also entered up against the surety on defendant's bond to dissolve a garnishment based upon the suit. On the next day, and during the term, Mathews & Co., having paid the costs, filed a petition praying the court "to open the default, and to set aside the verdict and judgment, and allow defendant to demur or plead in the case." The allegations of the petition were, in substance, that, prior to the term at which the verdict and judgment were rendered, W. A. Mathews, in company with Davies, attorney for defendants, had a conference with plaintiff, at which an agreement was reached as to the settlement of certain matters of account between the parties, the understanding of Mathews and defendants' attorney being that the settlement included the account sued on; and that it was further agreed, at this conference, that plaintiff's suit should be dismissed. The petition also alleged that defendants had a meritorious defense to plaintiff's suit, viz.: "That the fixtures sued for in the case were sold by Bishop to said Mathews several months prior to the filing of this case, and that the fixtures

thus came into the possession of Mathews, and were paid for in the general payment for the assets, stock, etc., of Snow, Church & Co." A rule nisi was granted, calling upon Bishop to show cause why the prayers of the petition should not be granted. He answered, denying that there ever had been any settlement of his account against Mathews & Co., or any agreement to dismiss his suit, and also denying the truth of the plea which the defendants asked leave to file. Upon the hearing, the court passed the following order: "After hearing evidence and argument in said cause, the petition is denied, and the *fi. fa.* allowed to proceed." To the granting of this order, Mathews & Co. excepted.

1. Counsel for plaintiffs in error contend that they should have been allowed to open the default, upon payment of the cost, under the act of 1895, as codified in section 5069 et seq. of the Civil Code. We do not think so. Even if the provisions of that act as to defaults be applicable to courts like the city court of Atlanta, where the first term is the trial term, such provisions manifestly relate only to simple defaults,—that is, entries of "in default" made upon the call of the appearance docket, in pursuance of the terms of the act,—and have no reference to final judgments rendered by the court, or entered up on verdicts in cases where the defendant has filed no defense.

2. The petition filed by Mathews & Co. sought to vacate the judgment against them because it was obtained in violation of an alleged agreement of plaintiff with defendants to dismiss his suit. In answer to the petition, plaintiff denied that he had ever made such agreement, and averred that "such agreement set up by Mathews & Co. should have been in writing, and for this reason cannot be enforced by the court." It does not appear from the record that there was any such written agreement. Had defendants been in court when the case was called, and, relying on this alleged verbal agreement, moved to dismiss plaintiff's case, and had the plaintiff denied that any such agreement had been made, the motion to dismiss should have been overruled, because no agreement between attorneys or parties will be enforced by the court, when denied by the opposite party, unless it be in writing and signed by the parties. Civ. Code, § 5651. As the trial judge could not have enforced such verbal agreement prior to the judgment, he was not authorized, because of the violation of the agreement, to vacate the judgment. See *Bank v. Elkan*, 72 Ga. 197. It matters not what defense defendants may have had to plaintiff's action, if they had no valid excuse for failing to appear and plead at the proper time. There was no error in refusing to vacate the judgment. Judgment affirmed. All the justices concurring.

GRESS LUMBER CO. v. GEORGIA PINE SHINGLE CO. et al.

(Supreme Court of Georgia. March 4, 1899.)

DEED—PLACE OF EXECUTION—ATTESTATION.

1. A deed is presumably executed at the place named in its caption, but that it was not there executed is shown when the attestation clause recites another place at which it was signed, sealed, and delivered.

2. So far as regards validity of execution, it is immaterial upon what part of a deed the attestation clause is written and signed by a witness, if, from inspection of the instrument, it appears beyond question that it was the purpose of the witness to attest the signature of the maker. It follows that the deeds in question must be held to have been duly executed and attested, and it was error to reject them, when offered in evidence, because of the want of legal execution.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action between the Gress Lumber Company and the Georgia Pine Shingle Company and others. From the judgment the Gress Lumber Company brings error. Reversed.

W. A. Hawkins, C. J. Haden, and E. D. Graham, for plaintiff in error. S. T. Kingsbery, Cutts & Lawson, and J. H. Martin, for defendants in error.

PER CURIAM. Judgment reversed.

KIRKLAND v. DOWNING.

(Supreme Court of Georgia. March 4, 1899.)

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—CONDITIONS.

Specific performance not being a remedy which either party to a contract can demand as a matter of absolute right, it will not, in any given case, be granted, unless strictly equitable and just. Accordingly, specific performance of a contract to convey land upon payment of the purchase price will not be decreed, where it appears that the party seeking the aid of the court entered into a parol agreement with the defendant to the action to become answerable for the debt of another, and to pledge the land as security for the fulfillment of this further obligation, notwithstanding such agreement be not legally binding or enforceable because coming within the operation of the statute of frauds. On the contrary, the plaintiff will be left to pursue his legal remedies, unless he elects to submit to such terms as the court may properly impose upon him as a condition precedent to the granting of the relief sought.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Suit by M. Kirkland against O. Downing, Jr. Judgment for defendant, and plaintiff brings error. Affirmed, with directions.

Hitch & Myers, Atkinson & Dunwoody, and Spencer R. Atkinson, for plaintiff in error. Goodyear & Kay and Brantley & Bennet, for defendant in error.

FISH, J. The forum in which the plaintiff elected to test the righteousness of his com-

plaint was one exercising equitable jurisdiction. His prayer was for the specific performance of a contract,—a purely equitable remedy. He chose to invite the court to pass upon his equitable, rather than upon his strictly legal, rights in the premises. In defense to the action, the defendant was permitted to allege, and to submit evidence to sustain his contention, that the time for such performance had not as yet arrived, for the reason that the plaintiff had expressly agreed to become answerable for certain obligations on the part of his son, which had not been met, and that the title to the land in controversy should be held by the defendant as security until his claims against the son had been fully satisfied. This agreement was not in writing, and the plaintiff therefore sought, but without success, to induce the trial court to ignore it, his position being that such an agreement comes within the operation of the statute of frauds, and is, in consequence, of no binding legal effect. That is to say, the plaintiff apparently recognized that, unless he could avail himself of his purely technical, legal right to repudiate this alleged agreement, his prayer for the equitable relief sought would be painfully lacking in moral support. The question is therefore squarely presented whether or not he is at liberty to insist that the court close its eyes to the unconscionable advantage it is alleged he thus seeks to gain over his adversary, to the end that he may procure its aid, regardless of the hardship which will be entailed upon the defendant.

In the first place, it may be remarked that specific performance is a remedy which "is never to be demanded as a matter of absolute right in either party" to a contract, "and a much stronger case is required to maintain the suit than to defeat it." 22 Am. & Eng. Enc. Law, 911, 912. "Equity will not decree specific performance unless strictly equitable." Id. 931. On the contrary, "in all cases where it is clearly inequitable to grant it the court will refuse to do so. In exercising its discretionary powers it will act with more freedom than when exercising its ordinary powers." Fry, Spec. Perf. (3d Ed.) 23. note, citing numerous cases. As has often been said, the granting or withholding of this peculiar relief is "in the discretion of the court. The meaning of this proposition is, not that the court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor." Accordingly, if the defendant "can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information upon that subject, will not interpose." Id. § 25. And, to the same effect, see

Pom. Cont. § 36 et seq.; Civ. Code, § 4040. It follows that, looking in each instance to the peculiar circumstances surrounding the parties, a court of equity may often impose terms upon the plaintiff as a condition precedent to the granting of the relief sought. Thus, "where a trustee had purchased land in his own name, but really for the benefit of the cestui que trust, and had paid the purchase money with his own funds, and was a creditor of the cestui que trust for other advances made to or for him, it has been held that such beneficiary could not compel a conveyance from the trustee to himself, except upon payment of his entire indebtedness, as well that growing out of this purchase as that arising from the other advances." 1 Pom. Eq. Jur. § 392. "The principle that he who comes into the court seeking equity—that is, seeking to obtain an equitable remedy—must himself do equity, means not only that the complainant must stand in conscientious relations towards his adversary, and that the transaction from which his claim arises must be fair and just in its terms, but also that the relief obtained must not be oppressive or hard upon the defendant, and must be so shaped and modified as to recognize, protect, and enforce all his rights arising from the same subject-matter, as well as those belonging to the plaintiff." Pom. Cont. § 175. This being true, specific performance will be denied, not only where "the plaintiff has obtained the agreement by sharp and unscrupulous practices," or where the "contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other such inequitable feature," but also where it appears "the enforcement itself would be oppressive or hard upon the defendant, or would prevent the enjoyment by him of his own rights, or would in any other manner work injustice." Id. Unquestionably, as is urged by the plaintiff in the present case, the statute of frauds proclaims a definite public policy, as regards the enforcement of a promise not in writing and signed by the party to be charged therewith, "to answer for the debt, default, or miscarriage of another." See Civ. Code, § 2693. But it does not follow that a court of equity, in reaching its determination whether or not a party is entitled to extraordinary relief which he cannot demand as matter of right, is not at liberty to weigh the equitable, as well as the strictly legal, rights of himself and his adversary. The real purpose of the statute is always to be kept consistently in view. "As its primary object is to prevent mistakes, frauds, and perjuries, by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes; designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the

doctrine concerning part performance, but is also enforced whenever it is necessary to secure equitable results." Pom. Cont. § 71. Indeed, it is an established rule in equity "that a man shall not be permitted to use a statute, more than any other assistant, for the purpose of promoting his own fraudulent intents or defending his own fraudulent conduct." Id. § 103. Certainly, in the case now before us, it was eminently proper for the court to hear evidence concerning the agreement on the part of the plaintiff which was set up as matter of defense. Conceding that this evidence established no right, legal or equitable, which could be enforced in behalf of the defendant, it nevertheless was competent as going to show that the plaintiff was not entitled to the remedy he attempted to invoke. "Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong." 2 Pom. Eq. Jur. § 858. In all proceedings where extraordinary equitable relief is sought, the court should open wide the door to pertinent evidence, to the end that the truth concerning the transaction under investigation may fully appear, and that the court may act advisedly and wisely in the premises. "Parol evidence must be admitted in these classes of cases, in order to a due administration of justice. If the general doctrine of the law or the statute of frauds was regarded as closing the door against such evidence, the injured party would be without any certain remedy, and fraud and injustice would be successful." Id. § 859. To extrinsic circumstances must the court necessarily look in determining whether or not a specific performance of a contract may equitably be decreed. Pom. Cont. § 183. The very fact that a plaintiff manifests a disposition to inequitably repudiate an agreement by which he is not, in strict law, bound, may often furnish an all-sufficient reason why he should be remitted to his legal remedies rather than be afforded fuller aid and protection by a court of equity. The conclusion inevitably to be reached in the present case is, we think, that the court properly allowed the defendant to interpose and to submit evidence to establish the defense above indicated. It follows, of course, that the charge complained of, in which the trial judge instructed the jury as to their finding in the event they should believe the testimony introduced in support of this defense, was pertinent, and correctly presented the issue upon which they were to pass. So far, therefore, as the verdict is concerned, it should stand, as there was ample evidence to warrant the jury in their finding.

The decree entered up by the court is, however, in one respect, unauthorized; and, as exception is made thereto, it should in this particular be corrected. We refer to that portion which adjudges that the land in controversy shall be held by the defendant as security for the payment of the debt of the

plaintiff's son, for which, defendant alleged, the plaintiff had by a parol agreement undertaken to become answerable and to pledge the land as security. Doubtless, it was within the power of the court to impose terms upon the plaintiff, and to decree that this debt should be discharged by him as a condition precedent to the granting of the relief sought; but it was not likewise within the power of the court to adjudge that this debt should constitute a special lien on the land, irrespective of the plaintiff's election to accept the terms upon which the court was willing to grant relief. In other words, we wish to be understood as holding that, while the parol contract set up by the defendant afforded a sufficient reason for denying the remedy of specific performance, it could not itself be enforced, in disregard of the statute of frauds, so as to bring about the result reached by the trial judge in framing this portion of the decree. Appropriate direction, which we have given, will, however, cure this infirmity. Judgment affirmed, with direction. All the justices concurring.

MURRAY et al. v. MARSHALL (two cases).
(Supreme Court of Georgia. March 4, 1899.)

APPEALS TO INFERIOR COURTS—AMENDMENT OF PLEADINGS—STATUTES—OPERATION.

1. Inasmuch as an appeal, though entered by one only of two or more joint defendants against whom a judgment had been rendered, brings up the whole record, requires a de novo investigation, and entitles all the parties "to be heard on the whole merits of the case," and as all are bound by the result, it follows that a defendant, though not joining in the appeal, may, in the court appealed to, make any timely and appropriate amendment to a plea or answer already entered.

2. Where an appeal was entered in a pending case in the year 1892, the right to file, in the court appealed to, an amendment to an answer, was not affected by the passage of either the pleading act of 1893 or the practice of 1895; and this is true although the trial in that court was had in the year 1898.

3. The evidence being conflicting, and such as would have warranted a finding either way upon the only issue contested in the case, the court erred in directing a verdict.

(Syllabus by the Court.)

Errors from superior court, Macon county;
Z. A. Littlejohn, Judge.

Separate actions by T. J. Marshall against R. L. Murray and others, administrators. A judgment for plaintiff was entered in each case, and one of the administrators appealed to the superior court. The cases were there consolidated, and a judgment was entered for plaintiff, and defendants bring error. Reversed.

Allen Fort and W. A. Dodson, for plaintiffs in error. R. L. Greer and Guerry & Hall, for defendant in error.

LUMPKIN, P. J. Two actions, each based upon a promissory note, were brought by Marshall, in the county court of Macon coun-

ty, against the administrators of S. T. Murray, deceased, and G. J. and J. W. Harp. Both notes purported to have been executed by the deceased and the two Harps as joint principals. A judgment in the plaintiff's favor against all of the defendants was entered in each case. One of the administrators, in behalf of himself and his co-administrator, entered an appeal to the superior court. Neither of the Harps appealed. In the superior court, the cases were consolidated, and tried together as one case. A plea of usury was, without objection, filed in the superior court in behalf of the administrators. The Harps, during the trial, filed a plea setting up that they were only sureties upon the notes; that the same contained waivers of homestead, which were rendered void because of usury, and consequently they, as sureties, were discharged. This plea the plaintiff met with a demurrer, one ground of which, in substance, was that, as the Harps had not appealed, they could not, in the superior court, set up a new and distinct defense, peculiar to themselves, and which had not been made in the county court. Another ground of the demurrer was that this plea by the Harps was not filed at the proper time, but was offered too late. The demurrer was sustained, and the case proceeded to trial. Upon the question of usury, the evidence was conflicting, and would have warranted a finding either way. The court nevertheless directed a verdict in favor of the plaintiff for the full amount of the notes sued upon. The bill of exceptions alleges error in sustaining the demurrer to the plea filed by the Harps, and in directing a verdict for the plaintiff.

1. The court erred in sustaining the demurrer to the plea. An appeal, though entered by one only of two or more joint defendants, against whom a judgment had been rendered in a county court, brings up the whole record, requires a de novo investigation, and entitles all the parties "to be heard on the whole merits of the case." All the parties to such a case are bound by the final judgment on appeal. Civ. Code, §§ 4402, 4469; *Lewis v. Armstrong*, 60 Ga. 752. In contesting before the court and jury over the issues involved in the trial had on the appeal, every party, whether an appellant or not, has the right to introduce any competent evidence, and is entitled to a full hearing upon all those issues. Since a party, though he did not join in the appeal, is to be concluded by the final judgment rendered in the case, it is but fair that he should be allowed to offer in the superior court any timely and appropriate amendment essential to his defense. The right to defend necessarily carries with it the privilege of filing such pleadings as are proper, and of exercising all rights as to amendment conferred by statute upon litigants generally. The decision of this court in *Patterson v. Barrow*, 90 Ga. 166, 25 S. E. 398, rules nothing contrary to what is here laid down. It was there held that a defendant discharged by a judgment rendered in the lower court could not in any

sense be benefited by an appeal, and therefore could not, on the trial of an appeal entered by a co-defendant, against whom alone a judgment had been rendered in the first instance, be made liable to the plaintiff. It will be noticed, however, that in the case just cited it was said that an appeal by one of several joint defendants, against all of whom a judgment had been rendered, would operate for the benefit of all. We do not see how an appeal could operate for the benefit of a particular party who did not join therein, if he should at the trial, on appeal, be denied any right allowed to the party in fact entering the appeal.

2. We have stated above that an amendment, to be received, should be timely and appropriate. The demurrer to the plea filed by the Harps alleged that it came too late. We do not think so. This case was tried in the county court, and the appeal entered, in the year 1892, and therefore the question of the right to amend in the superior court was unaffected by the passage of either the pleading act of 1893 or the practice act of 1895; and this is true although the trial in the superior court was had in 1898. See, in this connection, *Ford v. Williams*, 98 Ga. 238, 25 S. E. 416. Manifestly, it was not the purpose of either of the above-mentioned acts to cut off amendments in cases to which these acts were evidently never intended to apply. In *Newman v. Scofield*, 102 Ga. 810, 30 S. E. 427, in which the provisions of the act of 1895 were applied, it appeared that the action was brought shortly after the passage of that act.

3. The court ought not to have directed a verdict. The defense relied on by the administrators was usury, and, as already stated, the evidence would have warranted a finding either way on this question. Judgment reversed. All the justices concurring, except *SIMMONS, C. J.*, disqualified.

ESKRIDGE v. BARNWELL.

(Supreme Court of Georgia. March 4, 1899.)

DUEBILL—CONSIDERATION.

A. purchases land from B., and, as part of the consideration therefor, gives a duebill for \$100 to C., a creditor of B. The purchase was made subject to taxes and a certain claim, which was secured by deed to the land. The property was afterwards sold under power of sale embodied in this deed, and did not bring the amount of that claim. *Held*, that a plea of failure of consideration, based upon the fraudulent conduct of B. in not apprising A. of other claims against the property, is not a sufficient defense in an action by C. against A. upon the duebill.

(Syllabus by the Court.)

Error from superior court, Fulton county; *J. H. Lumpkin, Judge.*

Action by Lucinda C. Barnwell against A. P. Eskridge. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Anderson, J. A. Noyes, and Glenn & Rountree, for plaintiff in error. *L. R. Ray* and *S. D. Johnson*, for defendant in error.

LEWIS, J. This case originated in a justice's court, and was a suit by Lucinda C. Barnwell against A. P. Eskridge upon the following duebill: "Atlanta, G., Oct. 19, '93. Due to Mrs. Lucinda Barnwell, on demand, the sum of one hundred dollars. [Signed] A. P. Eskridge." The case was appealed to the superior court, and there a demurrer to the defendant's pleas was sustained, the pleas stricken, and a judgment rendered by the court for the plaintiff. To this the defendant excepted. The defendant, by his plea, and the amendments thereto, alleged that the duebill was wholly without consideration; that Sarah A. F. Backus, in her lifetime, was in possession of a certain lot in the city of Atlanta, and before her death made a will leaving the lot, with other property, to her husband, G. F. Backus; that the lot was incumbered during her life by a mortgage or loan deed in favor of a loan company, and that G. F. Backus, the legatee under the will, contracted to sell the defendant this lot, representing to the defendant that it was subject only to the loan deed or mortgage, and certain small amounts due for taxes, and contracted to sell the lot, subject to the taxes and the loan deed, for \$200, \$100 of which was to be paid to plaintiff, and was the consideration of the duebill sued on; that, in attempting to carry out this contract, the duebill was given, but it turned out that the representations of G. F. Backus were false and fraudulent, in that the city lot in question was subject, not only to the loan deed and taxes, but also to a demand for a large amount, in favor of Dr. T. D. Longino, for medical services rendered Mrs. Backus during her last illness, and in consequence of this fact the said Longino applied for letters of administration upon the estate of Mrs. Backus, and was appointed administrator; that the indebtedness of Mrs. Backus to the plaintiff was for wages or compensation due to the plaintiff from Backus or his wife on account of nursing Mrs. Backus during her last illness, and that, if plaintiff has a right to recover from any one, it is from said Backus, or the estate of his deceased wife; that the property in question was sold, not by the administrator, Longino, but by the party holding the loan deed thereto, under a power in the loan deed, and that it did not bring enough to pay off the loan, so that there was nothing left for the administrator to sell; that no consideration for the duebill sued on passed from plaintiff to defendant; that the plaintiff parted with nothing of value to either defendant or G. F. Backus, who was her real debtor, as consideration for the execution and delivery of the duebill, and that G. F. Backus was wholly insolvent; that the property in question constituted the whole of the estate of Mrs. Backus, except a small amount of personalty, and that the debt due plaintiff from Backus or his wife was worth

less, the title to the real estate having passed as security for a loan during the life of Mrs. Backus; that the plaintiff was not a party to the trade between Backus and the defendant, and that there was no contract between plaintiff and defendant; that defendant was to pay plaintiff before the execution and delivery of the duebill, and that there was no agreement between plaintiff and defendant, or between plaintiff and Backus, or between Backus and defendant, that plaintiff would accept the duebill in satisfaction or payment of her demand against Backus, or the estate of his wife; and that the plaintiff did not so accept it in payment of said claim or demand.

Conceding that the plea in this case would apply to the plaintiff, who was in no wise alleged to have been a party to the fraudulent conduct complained of on the part of Backus, we still think it does not constitute a legal defense. It appears from the plea that the consideration of the duebill sued on was the purchase money of a certain lot of land which defendant admits he bought subject to a debt secured by a deed conveying title to a creditor of Mrs. Backus; that the property was sold under a power of sale contained in this deed, and did not bring enough to pay off the claim. It seems, therefore, from the plea itself, that defendant might have become the purchaser at the sale for a less amount than he actually agreed to pay. It follows that, even if there was fraudulent conduct on the part of the defendant's vendor in concealing the fact that there were other claims against the property, such representations or concealments of facts worked no injury to the defendant. Besides this, it does not appear that when the defendant discovered the fraud he offered to rescind the trade and deliver back to Backus what he had purchased from him, and thus give him an opportunity to redeem or resell the property. On the contrary, he makes no complaint, except by way of a defense to the suit on the duebill instituted after a sale of the property under a claim to which he admits he bought subject. See *Smith v. Organ Co.*, 100 Ga. 628, 28 S. E. 392. Our conclusion, therefore, is that the court did not err in sustaining the demurrer to the plea. Judgment affirmed. All the justices concurring.

WATERS v. DIXIE LUMBER & MANUFACTURING CO.

(Supreme Court of Georgia. March 4, 1899.)

MECHANICS' LIENS—VESTED RIGHTS—REPEAL OF STATUTE.

When the lien of a material man has, under the terms of the statute, become fixed and secured, such lien is then a vested right, and no subsequent repeal or modification of the act under which it became fixed can destroy or modify such right.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Dixie Lumber & Manufacturing Company against Joseph C. Waters and one Cochran. Judgment for plaintiff, and defendant Waters brings error. Affirmed.

Mayson & Hill, for plaintiff in error. J. F. Daniel and Rosser & Carter, for defendant in error.

LITTLE, J. The Dixie Lumber & Manufacturing Company, on August 11, 1896, filed its petition against Cochran and Waters, alleging that it had furnished and delivered to Cochran, who had contracted to build a house for Waters, a bill of lumber and other building material to the amount of \$585.08, which was delivered on the land of Waters, and was used in building the house and improving said land, giving the location of it; that the material was furnished August 12, 1895; that it had duly filed and had recorded a material man's lien on the property; that it had taken no other security for the debt; that within the prescribed times it had served Waters with written notice, as required by the statute, of the claim of lien and filing the same. It alleges that this suit is brought to enforce such lien within 12 months from the completion of the contract. It prays a general judgment against Cochran for \$141.79, with interest; that its lien be set up by judgment against the property improved for the amount allowed by law. To the petition was attached a copy of the notice served upon Waters, on August 26, 1895. There was also attached a copy of the record of the claim of lien filed August 26, 1895, and an itemized bill of the material furnished. By amendment the plaintiff alleged that the contract price for building the house for Waters by Cochran was \$1,800. On the trial, defendant Waters excepted to the charge of the court given in the following language: "Now, the plaintiff contends as against Waters that this material was used in the improvement of the premises described in the declaration, and that the premises were the property of Waters, and that the amount sued for is within the twenty-five per cent. which it alleges the owner, Waters, is liable to pay. If this is true, and the plaintiff has established its lien, it would have a right to assert its lien against Waters for the amount sued for." The basis of the exception to the charge is that the law given in charge had been repealed, and another remedy enacted, and plaintiff could only enforce his claim according to the remedy allowed by the law at the time of the trial. An exception to another part of the charge was made, based on the same ground. The verdict was against Cochran for \$141.79, with interest and costs, and that a special lien to this amount should exist on the real estate of Waters.

The single question made by the record is whether the lien of material men must be enforced against the real estate of the owner under the terms of the statute as it existed

at the time the lumber and material were furnished, or under the provisions of the amending statute which was in force at the time of the trial. According to the petition, the provisions of the act of 1893 were in force at the time the lumber and material were furnished. This act provides that the lien of material men shall attach upon the real estate improved as against the true owner for 25 per cent. of the contract price of the material furnished for the improvement of the real estate. Acts 1893, p. 34. By the provisions of the act approved December 16, 1895, which was amendatory of the act of 1893, the lien should attach upon the real estate as against the owner to the extent of not more than 25 per cent. of the contract price agreed to be paid by the owner to the contractor. By the act approved December 18, 1897, which was in force at the time of the trial, it was provided that the lien should not attach for a sum greater than the balance that the owner might be indebted to the person having the contract at the time of the service of the notice. The provisions of these various acts being different, the plaintiff in error contends that the statute creating a lien in favor of material men is remedial in its nature; that no rights, by such statute, become vested in the person furnishing the materials for the improvement of real estate; that subsequent statutes changing the lien are operative on liens acquired prior to their passage, and the rights of material men are, therefore, to be decided by the provisions of the statute in force at the time of the trial. The material question, therefore, to be considered is whether the provisions which create liens in favor of one who furnishes material for the improvement of real estate are statutes which affect the remedy alone, and may, therefore, be retrospective, or whether they vest rights in the lienor, which cannot be affected by a subsequent change in the statute. The question is one not without difficulty, and we find many adjudicated cases which make a contrary ruling. In general terms, the lien of a material man for furnishing lumber and other articles which enter into the construction of houses or other improvements made upon land is a claim created by statute for the purpose of securing priority of payment for the price of the material furnished in erecting such houses, or in making other improvement on the land. It has been said to be a peculiar, particular, and special remedy given by statute, founded and circumscribed by the terms of its own creation. *Copeland v. Kehoe*, 67 Ala. 594. Jones in his work on Liens (volume 1, § 107), citing the case of *Frost v. Ilsley*, 54 Me. 345, says: "A lien created by statute may be taken away or modified by a subsequent statute. * * * The lien is but a means of enforcing the contract, a remedy given by law; and, like all matters pertaining to the remedy, and not to the essence of the contract, until perfected by proceedings whereby

rights in the property over which the lien is claimed have become vested it is entirely within the control of the lawmaking power in whose edict it originated." The author also cites a number of cases, to be found in a note on page 73, to support the doctrine that the repeal of the statutory lien defeats the lien remedy although at the time of the repeal the proceedings prescribed by the statute for enforcing the lien had been instituted and were pending in court. The same author, in section 109, concedes that other courts have held that liens which have become fixed under the statutes creating them cannot be taken away by repealing the statutes, and that, if the lien arises directly upon the performing of labor, or the doing of any other act, the lien cannot be defeated by subsequent repeal; that, if the lien arises upon the taking of some preliminary step to enforce it, then the lien cannot be defeated after such step has been taken. *Canal Co. v. Beers*, 2 Black, 448; *Streubel v. Railroad Co.*, 12 Wis. 67; *Hallahan v. Herbert*, 11 Abb. Prac. (N. S.) 326; *Chowning v. Barnett*, 30 Ark. 560. In reference to mechanics' liens, a number of courts of last resort have ruled to the effect that, after a lien has once become fixed and secured, it becomes a vested right, and it is not within the power of the legislature to destroy the right by the repeal of the statute under which it accrued. In re *Mining Co.*, 1 Sawy. 710, Fed. Cas. No. 6,681; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Skyrme v. Mining Co.*, 8 Nev. 219; *Weaver v. Sells*, 10 Kan. 600; *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280; *Mining Co. v. Riley*, 1 Or. 183; *Streubel v. Railroad Co.*, 12 Wis. 67; *Christman v. Charleville*, 36 Mo. 610. The Texas court of appeals, in the case of *Handel v. Elliott*, 60 Tex. 145, ruled that the lien of a mechanic becomes a part of the obligation of the contract, which the legislature cannot impair. And *Wade* (*Retro. Laws*, § 173) lays down the rule to be that, from the time the material is furnished or labor performed, the right to the lien is a part of the obligation of the contract, which is protected in the same way that the laws protect corporeal property. Per contra, *Boisot* (*Mech. Liens*, § 33) says that "the better reason and an equal weight of authority sustain the doctrine that the lien pertains merely to the remedy, and may, therefore, be taken away by the legislature that created it." And to support this doctrine he cites *Woodbury v. Grimes*, 1 Colo. 100; *Bangor v. Goding*, 35 Me. 73; *Frost v. Ilsley*, 54 Me. 345; *Hanes v. Wade*, 73 Mich. 178, 41 N. W. 222; *Bailey v. Mason*, 4 Minn. 546 (Gil. 430); *Templeton v. Horne*, 82 Ill. 491; *Donaldson v. O'Connor*, 1 E. D. Smith, 695; *Dunwell v. Bidwell*, 8 Minn. 34 (Gil. 18). Even if it be held that the lien given to mechanics or material men who do the work or furnish the material for the erection of valuable improvements on land is a remedy for the enforcement of the contract, we think the better rule for the con-

struction of such a remedy is that laid down by the supreme court of the United States in the case of *Gunn v. Barry*, 15 Wall. 610, as follows: "The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution or the legislative act of a state fall within the category last mentioned, they are to that extent utterly void." Under our Code, material men have a special lien on the real estate for the material furnished by them which goes into the improvement of such real estate, and the lien attaches upon written notice given to the owner to the amount of the material furnished. Such was the law as it existed at the time the company furnished the material which went into the improvement of the real estate of the plaintiff in error. Can it be said that the consideration of this fact was not within the contemplation of the parties at the time the contract for furnishing the material was made? Can it be inferred that, without such right of security which would attach when the material was furnished and the owner notified, the contract would have been entered into except for this security? We think not. In our view, the material man acquired a substantial right when, under the law in force, he parted with his property, and thus aided in the improvement of the real estate of the owner, who had contracted to have his property substantially improved, and largely increased in value. And, as we agree with the ruling made in a large number of the adjudicated cases which considered this subject, we hold that a material man's lien, as prescribed by the statute, cannot subsequently be repealed or modified, so as to change his right of security, when the contract has been performed, the material delivered, and the notice given under the terms of the statute in force at the time of the contract. The verdict in this case is within the terms both of the act of 1896 and that of 1895, *supra*; and whether the presiding judge, in his charge, referred to the one or the other of these acts as regulating the right of the defendant in error, is immaterial, and the judgment is affirmed. All the justices concurring.

MOSELEY v. RAMBO et al.

(Supreme Court of Georgia. March 4, 1899.)

MORTGAGES—SALE—TITLE—USURY.

1. A power of sale in a mortgage given to secure a debt in part usurious may be exercised, at least, to the extent of collecting the principal, with lawful interest; certainly so when it is exercised with the acquiescence of the mortgagor.

2. When such a mortgage secures a debt maturing by installments, and the parties by a written agreement substitute a new amount for the total indebtedness, which relieves the transaction of usury, and fix the time for its pay-

ment on a given day, if payment be not then made the power of sale may be exercised.

3. Where such power authorizes the mortgagee to convey the premises to the purchaser as attorney in fact for the mortgagor, but the mortgagee conveys in his own name, it does not pass a legal title, but if, in other respects, properly executed, passes an equitable title, which constitutes a good defense, so far as damage to the freehold is concerned, to an action brought by the wife of the mortgagor, whose sole interest in the property is under a voluntary conveyance from her husband, made after the execution of the mortgage.

4. In view of the evidence in the record, there was no abuse of discretion in granting a second new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Mattie Moseley against S. D. Rambo and others. There was a verdict for plaintiff, and a new trial was granted, and plaintiff brings error. Affirmed.

Jas. K. Hines and M. A. Hale, for plaintiff in error. J. D. Rambo, G. K. Looper, and Clyde S. Brooks, for defendants in error.

LEWIS, J. Mattie Moseley alleged in her petition that W. H. Whitley, Lawrence R. Brooks, and S. D. Rambo unlawfully broke and entered her dwelling house, located on a certain lot (describing it), made a great noise and disturbance therein, tore the roof from the house of petitioner, defaced and broke the doors of her dwelling, and left the same uncovered, whereby her household furniture and goods, which were then, and are still, stored in said house, were greatly damaged by the constant rains which have ever since fallen thereon. She alleged that the trespass was accompanied by aggravating circumstances, both in the act and intent, and that she had been put to an expense of \$50 in employing counsel to bring the suit. She alleged her damages, in consequence of the wrongs complained of, to be \$1,000. It appeared on the trial of the case that H. D. Moseley, the original owner of the house and lot in question, created a mortgage on the same to secure a debt he was due to W. M. Jones, evidenced by 48 promissory notes, each for the sum of \$8,—the first due on November 27, 1893, and one on the 1st day of each successive month thereafter, until all were paid. This mortgage was executed on October 27, 1893, and provided that, if the debt was not promptly paid in accordance with the tenor and effect of the notes, then W. M. Jones, the mortgagee, would be authorized to sell at public outcry, to the highest bidder for cash, the property mortgaged, for the purpose of paying the indebtedness and the expense of the proceedings, after first advertising the time and place of sale, etc. The mortgage further constituted Jones the attorney in fact of the mortgagor to make to the purchaser or purchasers of the property at such sale good and sufficient titles in fee simple to said property, thereby divesting out of the mortgagor all right title, or equity that

he may have in and to the property mentioned, and vesting the same in the purchaser or purchasers at the sale. After the execution of this mortgage, H. D. Moseley, the mortgagor, made a voluntary conveyance of the property to his wife, Mattie Moseley, the plaintiff in this suit. There was default in the payment of the notes, and it seems that a difference arose between the mortgagor and mortgagee as to the amount due thereon. This difference was settled through their attorneys, and it was agreed that \$185 should represent the indebtedness due on the notes, and that unless this sum was paid by January 1, 1895, the mortgagee should have a right to bring about a sale in accordance with the power conferred upon him in the mortgage. The property was duly advertised for sale in February, 1894, and was sold the following March, when Rambo, one of the defendants, became the purchaser, at the price of \$125. It seems that at the time of sale the mortgagor and his wife were still living in the house on the premises, and it was afterwards agreed between the mortgagor and the agent of Rambo, the purchaser at the sale, that the mortgagor should pay rent to Rambo for his occupancy of the premises. It does not appear that any amount or term of rental was agreed upon. Rambo lived in Cobb county, and left the property in the care of his agent, C. L. Brooks, the brother of one of the defendants, who is not sued in this case; and C. L. Brooks employed Whitley, in August, 1894, to repair the house, and especially to place thereon a new roof. Whitley accordingly went out to the premises with Lawrence R. Brooks, one of the defendants. The evidence is decidedly conflicting as to what connection Lawrence R. Brooks had with the tortious acts complained of,—whether he took any part in directing the repairs, or whether he simply went there for the purpose of showing the contractor where the house was; having otherwise no connection whatever with the matter. The testimony is uncontradicted, however, that he was not the agent of Rambo, to look after this property. The carpenter tore the roof, or at least one side of it, from the house, and left it in that condition some three weeks, during which time it was constantly raining, and the household furniture of the plaintiff was thereby injured and damaged. It appears that no one was at the house when the carpenter commenced his work of tearing the roof therefrom; but the plaintiff arrived soon after the roof was taken off, and knew of the exposed condition of her furniture, and, it seems, took no steps to prevent the consequent injuries which resulted from rains of several days. There is no testimony in the record directly connecting the defendant Rambo with this alleged trespass. He was residing in Marietta, Ga.; and it does not appear that he was present, or gave any direction to his agent that the house should be repaired, during its occupancy by the plaintiff, in the manner in which

it was done by the carpenter. In fact, the evidence tends to show that he knew nothing about plaintiff claiming title to the premises, nor of the alleged wrongs that had been done her, until after the institution of the suit. The jury returned a verdict for the plaintiff for \$160. The defendants' motion for a new trial was granted. It seems there had been two verdicts for the plaintiff in this case, and this is the second grant of a new trial. To this judgment granting the second new trial, the plaintiff in error excepts, and also, in her bill of exceptions, alleges error in certain rulings of the court made pending the trial.

1. On the trial of the case, plaintiff offered testimony to show that the mortgage which had been introduced in evidence by the defendants was infected with usury, and was made as a part of a contract, and to evade the laws against usury, that the only consideration of the notes was \$175, and that, therefore, \$209 thereof constituted a usurious interest charged on the loan. To the ruling of the court sustaining defendants' objection to the introduction of this testimony, the plaintiff excepted. It is insisted by counsel for plaintiff in error that the effect of usury in the mortgage was to render absolutely void the power of sale therein conferred upon the mortgagee, and that, therefore, no title whatever was conveyed to the purchaser at the sale under this power. We do not think this position is tenable. Usury does not render a mortgage void, in Georgia. Manifestly, had the mortgagee in this case proceeded to foreclose his mortgage by a regular proceeding in the superior court, a plea of usury could not have prevented him from obtaining a judgment for the principal of the debt, and the legal rate of interest thereon. The only effect of such a plea would have been to reduce the amount sued for by the amount of usury which the testimony showed to exist. Usury, therefore, not rendering void the contract, we cannot see how it renders void the power of sale conferred by the contract. This power of sale is nothing more than a remedy given to the creditor by the debtor for enforcing the payment of the debt without resorting to the courts for this purpose. Its evident intention was to save both time and expense in the collection of the debt, should there be default in its payment. It is a remedy, therefore, by contract, intended to substitute the remedy by law, should the creditor see fit to avail himself of the power conferred upon him by his debtor. The adoption of the contract remedy, and a sale thereunder, practically has the same effect as if there had been a sale by a judgment of foreclosure. This court has accordingly held, in *Banking Co. v. Haas*, 100 Ga. 111, 27 S. E. 980, that a power of sale in a mortgage becomes a part of the security for the debt, and, being conferred for the purpose of effectuating the same, was not recoverable, either by the mortgagor, or by the rendition of a judg

ment against him in favor of another creditor, and that, where the power was exercised by selling the land, this was equivalent to a sale under the foreclosure of the mortgage by a court of competent jurisdiction, and a bona fide purchaser at the sale obtained title free from the lien of judgments junior to the mortgage, though rendered before the exercise of the power. Had the statute rendered the mortgage void on account of usury, the case would have been entirely different; for, the whole contract being made void, the infectious evil would necessarily have permeated all its terms and conditions, and destroyed every power therein conferred. It was accordingly held by this court in *Pottle v. Lowe*, 99 Ga. 576, 27 S. E. 145, that where a deed executed by a borrower to secure a debt infected with usury purported, not only to convey title to the seller, but also to confer upon him a power of sale, it was void, and therefore ineffectual either to pass title or to create a valid power of sale. As Justice Lumpkin argues in the opinion delivered by him in that case, "The power of sale was part and parcel of the usurious transaction, and must stand or fall with the deed by which it was created." In the case of *Whitley v. Barker*, 79 Ga. 790, 4 S. E. 387, the mortgagor sought to enjoin the sale of property under a power of sale given in the mortgage, on the ground of usury in the debt. It was there decided that the court would not interfere, without an offer on plaintiff's part to do equity, by tendering to the lender the amount actually due for principal and interest. Clearly, then, this decision recognizes the right of a creditor, when such a power is conferred upon him by the mortgagor, to exercise the same, at least, for the purpose of collecting the principal and legal rate of interest due on his debt, and that the courts will not interfere in the matter on the ground that the debt is infected with usury, unless there is an offer to pay what is legally due. As far as our investigation has extended, the authorities outside of this state on the subject in question uniformly sustain the principle announced in the case last above cited. In 2 Jones, Mortg. (3d Ed.) § 1808, it is declared, "Where usury does not invalidate the mortgage, a sale under the power will not be enjoined by reason of it, unless the debtor brings into court the principal and the legal interest due." This text is sustained by the decisions in *Powell v. Hopkins*, 38 Md. 1; *Eslava v. Crampton*, 61 Ala. 507; *Walker v. Cockey*, 38 Md. 75. In *Powell v. Hopkins*, 38 Md. 1, 2, it is decided that "the exaction of usurious interest does not invalidate the mortgage, or affect the power to sell given in the mortgage." It is true, this court has decided that a waiver of homestead in a note or other instrument tainted with usury is inoperative. We do not think the principle upon which this ruling is based at all in conflict with our views in this case. Justice Bleckley, in *Tribble v. Anderson*, 63 Ga. 54, 55, says that,

"while the waiver of homestead is not a conveyance, it is enough in the nature of a quitclaim title to be subject to the general rule ordained by statute against passing any kind of title to property for a usurious purpose, or as part of a usurious contract. The homestead right is a right in property, and to waive it in favor of a creditor is substantially the same thing as to convey it away,—the same, certainly, in respect to putting the debtor in the power of the creditor." The power of sale in a mortgage is not a conveyance, nor is it anything in the nature of a quitclaim title. It is merely a power given to the creditor to sell the property without resorting to the courts for this purpose, and the deed which the mortgagee makes to the purchaser under such sale is no more infected with usury than would the sheriff's deed be under a foreclosure. We think, therefore, the court did not err in refusing to admit testimony upon the subject of usury.

2. Plaintiff assigns error upon the following charge of the court: "If it is true that the money was not paid by the 1st day of January, 1895, if it is true that this indebtedness of \$185 represented the indebtedness mentioned in the original mortgage, and if it is true that Jones was to hold the mortgage, with all his rights under it as to the power of sale, and its enforcement, changed only by the amount of the debt and its maturity, referred to in the written contract executed November 27, 1894, then Jones would have the right, after the 1st day of January, 1895, if the money was not paid, to proceed to exercise his rights under the power of sale in the mortgage; and the indebtedness would be due, so as to authorize him to proceed under the power of sale." We can see no error in this charge. The effect of the contract was not to waive any right under the mortgage, so far as the power of sale was concerned, but simply to establish the amount that was legally due on the notes. We think that the mortgage itself, together with the power of sale thereunder, would be security for this amount, regardless of any express understanding between the parties that this power in the mortgage should continue to be operative. At the time the mortgagee proceeded to sell, even if he had made no other agreement with the mortgagor than that contained in the notes, we think he would clearly have had the right to proceed to foreclose the mortgage for those of the notes then due, which amounted to \$128 principal, besides interest; and we see no reason why he did not have a like right to enforce the collection of the amount due by exercising the power of sale given him in the mortgage. It was claimed that the charge complained of was error because the contract of November 27, 1894, did not contain any power of sale authorizing Jones to sell this property, if the sum of \$185 was not paid by January 1, 1895, and because such authority cannot be given by parol, as claim-

ed by the defendants, nor can the terms in the power of sale in a mortgage on real estate be changed or modified by parol. Even if there was anything in this contention, the record fails to show that the agreement touching the amount due on this mortgage and the sale of the property was not in writing. The agreement was not made a part of the brief of evidence, but, it seems, was examined by witnesses in open court, and they testified about the same from the stand. The reply, however, to the contention of plaintiff in error, is that the sale was had by virtue of the power granted in the mortgage itself. If the mortgagee had a right, without any agreement, to sell in order to enforce the payment of so much of the debt as was actually due, certainly an agreement as to what was due, and a limitation of time as to its payment, would not affect this power of sale, whether the same was made verbally or in writing.

3. On the trial, plaintiff objected to the deed from Jones to the defendant Rambo being introduced in evidence, on the ground that the deed purports to have been made by Jones under a power of sale contained in a mortgage, and the same was signed by W. M. Jones alone, and not by H. D. Moseley, the mortgagor, by his attorney in fact, W. M. Jones. The introduction of this deed was further objected to on the ground that, at the time the power of sale was exercised, it did not appear that the debt was due, and on the further ground that it was shown that the power of sale was not exercised by Jones personally, but was exercised by his attorneys when said Jones was not present. As to the last ground mentioned, the evidence fails to show that Jones was not present at the time of the sale; and besides, under the ruling of this court in *Palmer v. Young*, 96 Ga. 246, 22 S. E. 928, "the conduct of such a sale is purely a ministerial act, does not in any manner affect the real execution of the power, and may be performed by the mortgagee through the instrumentality of an auctioneer, or any similar agent." The second ground, to the effect that the debt was not due at the time the power of sale was exercised, has already been considered. The mortgage does not confer upon Jones, the mortgagee, the power to sell this property, and make a conveyance thereof in his own name. He is constituted by the terms of the mortgage an attorney in fact for the mortgagor, and as such is empowered to convey the property. We think, therefore, that the criticism by counsel for plaintiff in error as to the manner in which this deed was executed is well taken. It was made by Jones in his individual name. It should have been made in the name of the mortgagor, in whom was the title, by his attorney in fact, Jones. The deed, therefore, from Jones to Rambo, the purchaser, does not convey a perfect legal title, in fee simple, to the premises in dispute. But it does not follow from this, as contended by counsel for plaintiff in error, that no in-

terest in the property has been acquired by the purchaser. In support of this contention, counsel for plaintiff cite the case of *Speer v. Haddock*, 31 Ill. 439. It was there decided that where a mortgage contained a power of sale authorizing the mortgagee to sell the premises, and, as the attorney of the mortgagor, to execute deed to the purchaser, he could only convey title as the attorney of the mortgagor, and by using the name of his principal in the conveyance, and that a deed in the mortgagee's own name as grantor did not pass the legal title. That was an action of ejectment, a plain remedy at law, in which the plaintiff could recover only upon the strength of his own legal title. There is no intimation in that case that the plaintiff did not have an equitable interest in the property, notwithstanding the defective manner in which the deed was executed, and that he would not have had a right in court to enforce that equity against any person who did not have a paramount right to the premises in dispute. In *Mulvey v. Gibbons*, 87 Ill. 368, it was held that, where a mortgage confers such a power of sale and conveyance on the mortgagee, a deed in the mortgagee's name only may be regarded as not conveying a good title in fee simple, at law, but it will pass an equity to the grantee. To the same effect, see *Gibbons v. Hoag*, 95 Ill. 47, Syl., point 6; 2 Jones, *Mortg.* (3d Ed.) § 1891. The plaintiff in this case claims under a voluntary conveyance from her husband, made after the execution by him of the mortgage in question. Obviously, she took subject to this mortgage, and to any rights acquired thereunder by the mortgagee or his assigns. Among these rights was the equitable title obtained by Rambo, one of the defendants in this case, by virtue of his becoming a purchaser of the property at the sale. The plaintiff therefore had no rights whatever to the property, as against the equitable interest of this defendant. It necessarily follows, then, that he could set up such an interest as a defense to an action of trespass brought against him for any alleged damages that may have been committed by him or his agent to the real estate. If any injury was committed to the freehold, the plaintiff was not damaged thereby, for the simple reason it was not her property. It follows, therefore, that there was no error in admitting testimony which showed a complete equitable title in Rambo to the property in dispute. This illustrated his right and good faith in entering upon the premises, and also showed that there could be no recovery against him for any damage done the freehold.

Our conclusion as to the law controlling this case, embodied in the first three headnotes, is strengthened by the fact that it does not appear from the record that the mortgagor, H. D. Moseley, objected to the sale that was had under the power conferred by the mortgage, but, on the contrary, acquiesced in and ratified the same, by agree-

ing to pay rent to the purchaser at this sale.

4. It follows from the above views that the plaintiff in this case had no right to the possession of the premises, or the occupancy of the house. It appears from the record that her husband continued to occupy the same after the sale, but acquiesced in the sale by agreeing to pay to the purchaser rent for the premises; there being no amount of rent stipulated, and no time being fixed for the expiration of the term of rental. The husband was a mere tenant at will, and plaintiff simply occupied the position of being the wife of a tenant at will living with her husband at the time of the alleged trespass. But it does not follow from this that the real owner of the property, or his agents or employes, had the right forcibly to eject her from the house, either directly, by seizing her goods and placing them out of doors, or indirectly, by forcibly, and against her consent, tearing the roof from over her head, and thus forcing her to abandon the structure that had in this way been made uninhabitable. In the case of *Entelman v. Hagood*, 95 Ga. 390, 22 S. E. 545, it was decided that, if a landlord forcibly and violently ejected a tenant and his goods from rented premises, he was liable to the latter in an action of trespass, although the tenant was holding over beyond his term, was in arrears for rent, and had received legal notice to quit. Applying that ruling to this case, it would follow that a forcible seizure of this house without the consent of the occupant, and wantonly or negligently tearing therefrom the roof, and unnecessarily leaving exposed to the weather the personal goods of such occupant,—especially if the purpose of such act was forcibly to evict her from the premises,—would render the perpetrator liable in damages for a trespass. It is as much a wrong to drown one out of house as it is to drive one out. But the evidence in this case tended strongly to show that the plaintiff, by the exercise of ordinary diligence, could have avoided, to some extent, at least, the actual damages she sustained in consequence of the alleged wrongs complained of. We do not mean to say that in such a case the injured party is necessarily restricted to a recovery of only the damage actually sustained. There may be in such cases aggravating circumstances in the act or intention of the trespasser which would authorize a recovery, though no injury to person or property had occurred. This, of course, would be a question for the jury, under all the facts and circumstances of each particular case. It appears, however, that the plaintiff recovered an amount in excess of the highest proven value of the goods that she claims were injured. From the brief report we have made of most of the material facts developed by the evidence in the case, it will be seen that, if there is any testimony at all under which the defendant Rambo could be held liable even for her actual damages, to say nothing of general damages to which she

might be entitled, such testimony is certainly very meager, and furnishes a frail and uncertain basis upon which to support the verdict against him. He would not, on account of being owner of the property, be liable for a willful act of trespass committed by a contractor, though employed by the general agent of the owner, when such act is done in his absence, and without his knowledge or consent. In view of these facts, taken in connection with the entire testimony in the case, we do not think the judge below abused his discretion in granting a new trial, though the second verdict for the plaintiff was thereby set aside.

Besides the general grounds in the motion for a new trial, various errors of law were complained of, relating particularly to the court's failure to give in charge certain principles which were contended to be applicable to the present case. We deem it unnecessary to notice these seriatim, for the decision embodied in the headnotes, and what we have written thereon, cover the controlling questions at issue. Judgment affirmed. All the justices concurring.

FLORENCE v. PATTILLO.

(Supreme Court of Georgia. March 4, 1899.)

ANSWER—DEMURRER—ACTION ON NOTE—EVIDENCE.

1. It is not erroneous to overrule a demurrer attacking collectively two or more paragraphs of a defendant's answer, when it appears that in at least one of these paragraphs a good defense is set up.

2. The verdict in this case was not warranted by the evidence, and ought to have been set aside.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Action by F. L. Florence against W. B. Pattillo. Judgment for defendant, and plaintiff brings error. Reversed.

J. B. Park, Jr., for plaintiff in error. Samuel H. Sibley and Edward Young, for defendant in error.

LUMPKIN, P. J. Three actions upon promissory notes were brought by Florence against Pattillo in the county court. In the superior court, to which they were carried by appeal, they were consolidated, and tried together as one case. It appears from the record that the firm of Florence & Hiles sold to the defendant a newspaper known as the "Greensboro Herald-Journal," together with its outfit, at the price of \$3,200; that he paid \$2,000 in cash, or its equivalent, and gave the notes sued on for the balance. These notes were subsequently assigned by the partnership to Florence. It further appears that, in the negotiations which resulted in the purchase by Pattillo, one Knowles acted as the agent of Florence & Hiles, with full authority to represent them in the transaction. It seems that Pattillo filed

in the county court an answer in each case, the material portions of each of which were as follows: "Par. 3. And, for further plea in this behalf, defendant shows that the notes sued on are three of a series of twelve promissory notes, bearing the same date, given by him to the partnership of Florence & Hiles, of which petitioner was a member, as part of the purchase price of the Herald-Journal, a newspaper property in the town of Greensboro. Said property was purchased at a price of thirty-two hundred dollars, of which amount two thousand dollars cash was paid; said notes of one hundred dollars each being given for the balance. At the time said notes were made and said contract of sale entered into, said property was, as is more fully set out hereinafter, represented to be worth, and appeared to be worth, said amount, but has since proved to be worth not exceeding twelve hundred dollars. Defendant therefore shows that the consideration for the notes sued has wholly failed. Par. 4. For further plea, defendant shows that in August, 1892, at the time of, and previous to, the making of said contract of sale and of said notes, and as an inducement thereto, that one W. A. Knowles, acting as the agent of said Florence & Hiles in the consummation of said sale, conducting all the negotiations, writing the said notes, and receiving the delivery of them for the said Florence & Hiles, and since charged with the collection of the same, represented and warranted to defendant that said newspaper enjoyed an unparalleled patronage, both from advertisers and subscribers; that it had a bona fide subscription list of fifteen hundred paying subscribers, and an advertising patronage amounting to more than five thousand dollars per annum; that said paper was popular everywhere, and earning more than three thousand dollars, net, per annum; that the patrons of said paper were paying one hundred dollars per column per year for regular advertisements, and more than that for transient advertisements,—at least \$150 to \$200 per column per annum,—and ten cents per line, each insertion, for what is known as reading or local notices. Said Knowles further represented and warranted that friends from the country were constantly bringing vegetables, in season, fresh meat, and other supplies, as presents to the paper, on account of their great love for it and desire to support it, and that he (Knowles) had lived almost entirely on these voluntary contributions of liberal and loving subscribers. Defendant shows that said representations and warranties were wholly false; that at said time the bona fide subscription of said paper did not exceed five hundred; that its advertising patronage did not exceed fifteen hundred dollars per annum; that the rates for advertising were only —; that only from 3 to 5 cents per line was paid for local notices, and the majority were inserted for nothing, and the net earnings of the paper at that time, and since, have not exceeded one hundred dollars per annum. Defendant further shows

that said Knowles, before said trade, and as an inducement and warranty, exhibited a copy of said paper to defendant, in which were a great many advertisements, which Knowles represented were live, paying advertisements, when in fact they were dead, or were purely fictitious, no pay being received for them, and they were merely in said paper as decoy ducks and 'bait for suckers.' Defendant shows that said warranties as to the popularity and voluntary support of said paper were wholly false, and that said paper was wholly without local support, and on the verge of ruin. Defendant shows that, through the breach of said warranties, said paper is not worth exceeding one-third of what it was represented to be, and he pleads said breach both in defense of the notes sued, and prays that he recoup against the plaintiff damages to the amount of five hundred dollars already paid said plaintiff, that being the limit of the jurisdiction of this court. Par. 5. Defendant further shows that the above-alleged representations were made by Knowles to induce the purchase of the paper; that they were each and all false; that the said Knowles knew them so to be, and intended to deceive defendant, and lead him to the purchase of said paper at the exorbitant price charged. Defendant, however, was ignorant of their falsity, and, relying upon the integrity and honesty of said Knowles, believed them to be true, and made said purchase upon the faith thereof. So soon as defendant discovered said falsity, he notified said Knowles and Florence, before the notes became due, that he would not pay them. Defendant therefore shows that said notes are the outgrowth of a fraud upon him, and not binding upon him. And he further prays that he recover of said plaintiff five hundred dollars of the money already paid; said paper at said time being worth not exceeding five hundred dollars, and the jurisdiction of this court not allowing the recovery of more." To the defenses thus set up, the plaintiff demurred as follows: "And the plaintiff in said case files the following demurrer to the pleas in said case, and moves to strike the pleas in said case on the following grounds, to wit: (1) Plaintiff moves to strike the entire pleas, for the reasons that they do not set up any defense to the notes sued on, under the facts alleged therein. Defendant does not allege that, upon the discovery of the facts constituting the fraud, that he announced his purpose to rescind, adhered to it, made or offered to make restitution; neither does he allege that he did not examine the property before buying. (2) Plaintiff moves to strike paragraphs 4 and 5 of defendant's pleas, for the reasons that they do not set forth any valid defense to the notes sued on; there being no allegations in such pleas that upon the discovery of the fraud he elected to rescind, and no allegations that he then restored, or offered to restore, the seller to his original status." The court passed an order which reads as follows: "Upon hearing argument on this demurrer, it is ordered by the court that the demurrer on

the first ground be overruled. Ordered, further, that the demurrer on the second ground be overruled, except that the allegations in reference to the voluntary contributions to the Herald-Journal by friends, and the claim for recoupment, be stricken, and the remainder of paragraphs 4 and 5 be allowed to stand." After the order last mentioned had been entered, the defendant filed an amendment to his answer, with a view to amplifying the allegations therein as to the representations made by Knowles, which amendment was allowed without objection. There was a verdict for the defendant, and the plaintiff moved for a new trial, which was denied. He complains here of alleged error in overruling his demurrer to the defendant's answer, and in refusing to grant a new trial. The motion contained numerous grounds. Some of them are sufficiently disposed of by what is now ruled, and none of them, save those alleging that the verdict is contrary to the law and the evidence, are of enough importance to require special notice.

1. As will have been observed, the first ground of the plaintiff's demurrer was directed against the defendant's answer as a whole; alleging generally that the facts therein set up constituted no valid defense, and specially attacking the same for the reason that the defendant failed to allege he had taken the proper steps to rescind the contract upon discovery of the fraud perpetrated upon him. It follows that, if in any of the several paragraphs of the defendant's answer a good defense was set up, this ground of the demurrer was properly overruled; for the entire answer could not properly be stricken, unless as a whole it was fatally defective in the respects indicated. Certainly there was no merit in either of the objections urged,—so far, at least, as the fourth paragraph was concerned. Properly analyzed, this was a plea alleging that the defendant had purchased the newspaper under an express warranty as to particulars materially affecting its value. In other words, it was a warranty as to quality, and the defendant had a right to rely upon it in defense to the action. Under the terms of this warranty, it was his right to receive exactly such a newspaper as he contracted for, and, if the one delivered to him did not come up to the terms of the warranty, he was entitled to recoup the damages sustained by its breach, and thus practically secure a diminution of the price corresponding in amount with the difference between the actual market value of the property and what would have been its value if the circulation of the newspaper, its advertising patronage, etc., had been as warranted. The amount of damages sustained by one who purchases property sold under a warranty as to quality, and which does not come up to the warranty, is "equal, at least, to the difference between the agreed price and actual value as reduced by defective quality." *Atkins v. Cobb*, 56 Ga. 86. The right of a defendant to plead a breach

of a warranty certainly is not dependent upon whether he did or did not promptly offer to rescind the contract upon discovering that he had been overreached in the transaction, when there has been in fact no rescission, and the plaintiff is seeking an enforcement of the contract against the defendant. What is said above applies with equal force to the second ground of the plaintiff's demurrer, which attacked so much of the answer as was contained in paragraphs 4 and 5, and averred that the same was bad because the defendant did not therein allege any effort on his part to rescind the contract, and "restore the seller to his original status." In the argument here, counsel for the plaintiff in error treated this ground of the demurrer as though it was specially directed against the fifth paragraph, and contended that it was not competent, in defense to an action arising *ex contractu*, to plead as a set-off damages sustained by reason of a fraud practiced upon the defendant to induce him to enter into the contract. We cannot, however, undertake to deal with the point thus sought to be raised. In the first place, had the plaintiff desired to invoke a special ruling upon the merits of this particular defense, he should have demurred thereto separately upon the ground just indicated. But, even if the demurrer actually filed be treated as if directed solely to the fifth paragraph of the defendant's answer, the question argued by counsel is not properly presented; for the only reason assigned why this item of set-off could not be pleaded was that the defendant did not allege an offer to rescind as soon as he discovered he had been defrauded. Such an allegation was totally unnecessary in this connection; for the defendant was not attempting to defend on the ground that the notes sued on were void because of fraud, but, treating the contract as binding upon him for the reason that he had not in time elected to rescind, was simply endeavoring to recover the damages he had sustained because of the deceit practiced upon him. The question whether he could or could not lawfully do this is not made by the demurrer. Dealing with the demurrer as it stands, we hold, without difficulty, that for no reason therein stated did the court below err in declining to strike the fourth and fifth paragraphs of the defendant's answer, whether considered together or taken singly, and subjected to the test suggested for determining their sufficiency.

2. We feel constrained, however, to reverse the judgment refusing to grant a new trial, because, in our opinion, the verdict was not supported by the proof submitted in behalf of the defendant. After a most thorough and careful study of the brief of evidence, we are convinced that he entirely failed to establish his plea setting up a warranty. Taking the testimony most favorable to him, it simply appeared that Knowles, as the agent of the sellers, had made to Pattillo a number of representations as to the circulation and adver-

tising patronage of the paper at a time long preceding that at which the sale to Pattillo was effected. Knowles had not been connected with the management of the paper for more than a year prior thereto. What he said to Pattillo necessarily referred to the time when he (Knowles) was conducting the paper, for he did not profess to know definitely the status of the business after that time. In other words, it seems that he undertook merely to present the argument that, as he had made a success of the enterprise when under his management, the paper would prove a paying investment to a competent man desiring to purchase it. Every person of even ordinary observation, whether experienced in the newspaper business or not, must know that such an argument is not to be accepted without question; for great changes in the business of a newspaper may occur in a much less period than 12 months, and what might once have been a profitable investment would not necessarily prove a good one months later. It is true that some of the expressions used by Knowles were indefinite as to time, and under other circumstances might have been understood as referring to the condition of the paper and the extent of the business being done at the time of the sale; but, taking the testimony as a whole, it is evident that Knowles' real knowledge of its situation was confined to a period at least a year prior to August, 1892, and he was not in a position to make any definite statement as to the status of the business at or about that time. As to Knowles' opportunities for knowing the condition of the paper after he severed all connection therewith, Pattillo was fully informed; so even if the former did in fact undertake to make any representations as to the circulation of the paper, its advertising patronage, etc., at the time of the sale, Pattillo could not have failed to understand that what was said was mere speculation or guesswork, not intended as a warranty. Indeed, Knowles told Pattillo that the paper had "run down" considerably since he had ceased to manage it, and undertook merely to assure Pattillo that a man of his ability could bring it up again to a prosperous basis. It follows that the jury were not warranted in finding that the representations made by Knowles amounted to a warranty respecting the condition of the paper, and the profits realized therefrom, in August, 1892, much less a warranty that under Pattillo's management the paper would continue to prove a profitable enterprise. So much, therefore, of the defense as related to the alleged breach of warranty completely fell to the ground. Even if the alleged fraud perpetrated by Knowles can be treated as legitimate matter of defense, the proof also failed in this respect. Exaggerated statements by Knowles of what the paper was doing after he ceased to manage it amounted to nothing more than stating a bare opinion, as he did not profess to have any definite knowledge upon the sub-

ject; and, even if he made these statements recklessly and in bad faith, Pattillo cannot claim to have been thereby misled and deceived, for, under the circumstances, he was not justified in acting thereon. As to representations made by Knowles concerning the success of the enterprise while he was conducting it in person, these related to the past, and were employed in merely "puffing" the advantages of the property, in connection with the expression of a belief on his part that, what he had done, a man of Pattillo's talents and experience could likewise do, if he purchased the paper. Knowles' prediction in this respect did not come to pass, but it does not follow that Pattillo has, in a legal sense, been defrauded. Judgment reversed. All the justices concurring, except LEWIS, J., disqualified.

RYALS v. JOHNSON COUNTY SAV. BANK.

(Supreme Court of Georgia. March 4, 1899.)

NONNEGOTIABLE NOTES—TRANSFER—SALES—VALUE—EVIDENCE.

1. Upon the trial of a suit on a promissory note containing no negotiable words, when the defendant has duly filed a plea of failure of consideration, and has introduced evidence tending to sustain such plea, it is error for the court to direct a verdict for the plaintiff, although it appeared that the plaintiff was a bona fide purchaser of the note, before due, and without notice of any defense thereto.

2. Where the defendant pleads that the goods for which the note was given were worthless, it is not error to admit in evidence before the jury, over objection of his counsel, testimony as to the value defendant placed on the goods when he applied for a policy of insurance on a stock of merchandise which included the articles in question.

3. It is error in such a case to admit testimony of defendant, over his objection, that the insurance company would probably have paid him full value for the goods, had he insured them at the invoice price.

4. If there was any error in ruling out answers to questions seeking to show fraudulent collusion between the payee and the holder of the note sued, based upon knowledge of the holder, at the time he bought the note, of defenses thereto, such error was harmless in this case, as the answers to the questions did not tend to sustain any defense pleaded to the action.

(Syllabus by the Court.)

Error from superior court, Telfair county; C. C. Smith, Judge.

Action by the Johnson County Savings Bank against W. R. Ryals. There was a judgment for plaintiff, and defendant brings error. Reversed.

D. C. McLennan, for plaintiff in error. Eason & McRae, for defendant in error.

LEWIS, J. The Johnson County Savings Bank sued Ryals for \$116.56 principal, besides interest, alleged to be due upon a promissory note signed by the defendant, payable to the New England Jewelry & Silverware Company, and indorsed by that company to the plaintiff, and due as follows: \$38.82, May 10, 1896;

\$38.82, July 10, 1896; \$88.82, September 10, 1896; and \$32.82, November 10, 1896. The defendant pleaded total failure of consideration, alleging that the note was given for jewelry bought of the New England Jewelry & Silverware Company, which jewelry the company represented to defendant was plated with a certain amount of gold, and guaranteed to wear for — years without tarnishing; that the jewelry was nothing but brass, and was only slightly smoked with gold, and would become tarnished with the slightest handling; and that it was absolutely worthless and unsalable. Defendant further pleaded that the plaintiff was not a bona fide holder of the note, but had entered into a conspiracy with the original payee, the W. F. Main Company, and others, for the purpose of defrauding defendant and other merchants; the scheme being for the jewelry company to sell worthless jewelry, guaranteeing it to be heavily plated and to wear three or four years, to obtain the notes of the purchasers, and to transfer the same to plaintiff before due, in order to prevent defendant and others from pleading and proving a failure of consideration. On the trial of the case, the court, at the conclusion of the evidence, directed a verdict in favor of the plaintiff for the amount sued for. To this, and to the admission of certain evidence, and the exclusion of certain interrogatories and the answers thereto, the defendant excepted.

The testimony in behalf of plaintiff tended to establish the fact that it was a bona fide purchaser, for value, and before maturity, of the notes sued upon, without notice of any defense. There is no evidence in the record to contradict this. On the other hand, the testimony introduced in behalf of the defendant tended to show that the jewelry for which the note was given was warranted by the vendor, who was the payee of the note, to be heavily plated with gold, and guaranteed not to tarnish in three or four years. After the goods were received by the defendant, he paid the first installment due upon the note, and sold some of the goods to different customers of his. The goods appeared to be all right, and he was aware of no defect in them until some of the purchasers from him had returned the goods, and had shown him that they were so easily tarnished as to be utterly worthless. On this account he was forced to refund the money to nearly all the parties who had purchased from him, and to receive back the goods. He notified the vendor of the goods of their defects, and proposed to "ship back the entire lot, and to square off even" with it. To this proposition the jewelry company made no reply. The defendant continued to try to sell some of the goods, and realized a small amount of money upon them, but they were utterly worthless and valueless. The bulk of them he had still on hand, and offered to turn over to the plaintiff. What he realized from the small sales made would not amount to as much as the sum he had paid upon the note

before he had noticed that they were made of nothing but brass, and were worthless.

1. One error assigned in the bill of exceptions is that the court erred in directing a verdict for the plaintiff. The case seems to have been tried below upon the theory that if the plaintiff had in good faith purchased the note before due, and without notice or knowledge of any defense, it would be protected against a plea of failure of consideration. The note sued upon contained no negotiable words whatever. Section 3694 of the Civil Code provides that a bona fide holder of negotiable instruments, who receives the same before due, and without notice of any defect or defense, shall be protected against any defense of the character of that set up by the maker in this case. The term "negotiable instrument," as here used, means such instrument as contains upon its face negotiable words, and applies only to paper which the parties render negotiable as a part of their express contract. It is true that there is another section of the Civil Code which provides, in effect, that although a promissory note may not contain any negotiable words, yet it may be negotiated and transferred simply by indorsement by the payee, as was done in this case. Civ. Code, § 3681. This section, however, means that title to such paper may be in this manner transferred. It does not, strictly speaking, render the paper a negotiable instrument. In a similar manner may title to an account be transferred, namely, by a written transfer of the same. This would make the account negotiable, in the sense that title thereto will be passed to the assignee, but it does not follow that such an assignee would be protected against any defense which the debtor might have against the claim. But this is no new question in this court. In the case of *Cohen v. Prater*, 56 Ga. 208, it was decided that "the indorsee of a note containing no negotiable words is chargeable with notice of all defects in the consideration, although he takes it before due, and for value." The opinion Bleckley, J., rendered in that case fully discusses the various sections of the Code bearing upon the question, which sections are embodied in the present Code, and are still of force in this state; and it would be useless work to attempt to add anything to the lucid argument he presents. To the same effect, see *Hamilton v. Insurance Co.*, 65 Ga. 750, and *Adams v. Robinson*, 69 Ga. 627, 630. It follows, therefore, that it was utterly immaterial whether or not the defendant in error in this case had notice of any defense to the note sued upon when it was purchased; and, the evidence in behalf of the maker of the note tending to sustain his plea of a failure of consideration, the court erred in directing a verdict for the plaintiff.

2. It appears from the evidence in the record that the maker of the note in question had obtained a policy of insurance upon his stock of merchandise, including the property in question. He testified upon cross-examina-

tion that he valued this jewelry at some small sum, and that, after he had been burned out, the insurance company paid him about \$20 or \$25 as insurance on the jewelry. This testimony was objected to by counsel for defendant, but we think it clearly admissible, as tending to establish an admission by the purchaser of the goods, as to their value, after he had obtained possession of them.

3. On cross-examination the defendant further testified that, had he valued the goods at their invoice price, the insurance company would probably have paid him such full value. It seems from the evidence that the stock of merchandise of the insured was burned, but that the bulk of the jewelry itself was saved from fire. We think the court erred in admitting this testimony, over objection of defendant's counsel; for it was entirely immaterial what the insurance company would have done, had the insured placed a different and incorrect valuation upon his goods.

4. There were also exceptions taken and error assigned upon the rulings of the court in excluding divers cross questions and answers thereto in the interrogatories taken out for witnesses who swore in behalf of the plaintiff below. By these questions counsel for defendant sought to show a fraudulent collusion between the payee and the holder of the note, and knowledge on the part of the holder, at the time it bought the note, that the maker had a valid defense thereto, and that the object of the transfer of the note by the payee was simply to put the plaintiff in the attitude of an innocent purchaser. The answers to these questions did not tend to sustain any defense pleaded to the action. Besides, they were entirely immaterial, in the view we take of the case, as the validity of the plea of failure of consideration which was relied upon did not depend upon any knowledge or want of knowledge on the part of the holder of the note at the time the same was transferred to it by the payee. The exclusion of this testimony was therefore harmless to the defendant, and was not erroneous. Judgment reversed. All the justices concurring.

PHILLIPS et al. v. WAIT et al.

(Supreme Court of Georgia. March 4, 1899.)

PARTNERSHIP—JUDGMENT—REVIVOR—AMENDMENT—GARNISHMENT—APPEAL—DECISION.

1. Where, upon the trial of an action of tort brought against T. K. F., individually, P. & Co., a firm composed of P. and L. C. F., and against L. C. F., individually, there was a verdict discharging L. C. F. from liability, but finding in favor of the plaintiff against T. K. F. a specified amount, and against P. & Co. another specified amount, this was, in effect, a finding binding P. individually for the latter amount, and it was accordingly proper to enter against him a judgment for the same. Certainly, such a judgment, after having become dormant, was, upon a due revival thereof, conclusive upon P.

2. A judgment purporting to revive the execution issued upon a judgment sought to be

revived is amendable so as to make the same recite that the judgment itself is revived.

3. Inasmuch as the existence of a valid judgment against a debtor is essential to support a judgment rendered upon a garnishment proceeding instituted to reach money due to him by others, this court, in affirming a judgment of the latter kind, which is apparently lawful, but which may be otherwise on account of invalidity in the judgment against the principal debtor (a question as to which is pending here, and about to be sent back to the trial court for adjudication), will direct that the judgment in the garnishment case shall abide the final result of the issue over the judgment in the main case.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Proceeding between W. R. Phillips, Jr., and others and W. T. Wait and others. There was a judgment for the latter, and the former bring error. Affirmed, with directions.

Simmons & Corrigan, for plaintiffs in error. Shepard Bryan, for defendants in error.

PER CURIAM. Judgment affirmed on condition, and with directions.

MOORE et al. v. RIPLEY.

(Supreme Court of Georgia. March 4, 1899.)

BANKS—INSOLVENCY—RECEIVERS—LIABILITY OF STOCKHOLDERS—ENFORCEMENT—PLEADING—PARTIES—LAW AND EQUITY—VESTED RIGHTS.

1. When a petition filed against a number of the stockholders of a bank, alleging that such bank is insolvent and has no funds or assets to pay either creditors or depositors, that about the sum of \$75,000 is due to depositors, that in order to pay the same it would be necessary for each stockholder to be assessed the full amount of his statutory liability, and that under the terms of its charter each stockholder is individually liable for the ultimate payment of the debts of the corporation to an amount equal to the amount of stock held by him, makes the persons named as stockholders defendants to the action, and prays judgment against each of them for the amount of their statutory liability, such petition, in the absence of a special demurrer, not specifically pointing out the want of definite allegations as to the actual indebtedness of the bank, the names of its creditors, and the amounts due them, respectively, and the failure of the petition to pray for a judgment for a specific sum against each of the defendants, will be held to set forth, in substance, a cause of action against the defendants.

2. Where an act incorporating a bank provides that each stockholder shall be individually liable for the ultimate payment of the debts of said corporation to an amount equal to the amount of stock held by him, such liability, since the passage of the act of 1894, may be enforced by the receiver of an insolvent corporation, notwithstanding the act was passed subsequent to the act of incorporation which fixed the liability. The provision of the subsequent act that such liability shall be considered as an asset of the bank, and enforced by the receiver, is remedial in its nature, does not affect any vested right of the creditor, and is applicable in this case.

3. When a banking corporation has been shown to be insolvent, and its assets placed in the hands of a receiver, and in pursuance of an order of court the receiver undertakes to collect by suit the liability of the stockholders for the

payment of the debts of the bank as fixed by the statute, all of the stockholders so liable may be joined as defendants in one action.

4. In such a suit it is not necessary that the bank, as a corporation, shall be made a party defendant.

5. Courts of law have jurisdiction on proper petition, supported by proof, to render a judgment in such a case.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by T. J. Ripley, receiver, against W. W. Moore and others. A demurrer to the petition was overruled, and defendants bring error. Affirmed.

Alexander & Lambdin, Brandon & Arkwright, E. W. Martin, and J. A. Clarke, for plaintiffs in error. Anderson, Felder & Davis, for defendant in error.

LITTLE, J. The questions which arise in this case are made by the exception to the ruling of the court below in overruling a demurrer to the petition.

1. The demurrer alleges that the liability of the defendants is not plainly, fully, and distinctly set forth in the petition; that the receiver has no legal authority to institute suit, because the liability of the defendants is purely statutory directly to the creditors; that there is no community of interests between the defendants which would authorize a joint suit against them; that the receiver has no such common cause of action against the defendants as authorizes a joint action; that the corporation is not made a party defendant; that there is no sufficient statement of the resources and liabilities of the bank, nor of the entire or net amount of debts due by it, nor of the nature and character of such debts; that the action is not cognizable by courts of law, but can only be maintained in a court of equity. The demurrer was amended, but for the purposes of this decision it is not necessary here to set out the amendment. The petition makes an ordinary suit at law, and, while a judgment is prayed against each of the defendants, the amount for which such judgment is sought is not alleged otherwise than by a prayer for judgment against each for the full amount of his statutory liability. A casual reading of the petition shows that it is exceedingly defective, and, even under the liberal rules of pleading in force in this state, it can barely be maintained against the interposition of a general demurrer. Accepting all the allegations of the petition as true, the several liability of the defendants must vary in amount according to the number of shares of stock held by each. By the act of incorporation, each stockholder is made individually liable for the ultimate payment of the debts of the corporation to an amount equal to the amount of stock held by him. It becomes a material question, therefore, to ascertain, in order to fix the liability of the stockholders, what is the indebtedness of the bank. The petition no-

where sets out the amount of such indebtedness. It does allege that the bank is insolvent, and has no funds or assets to pay either creditors or depositors, and that it is necessary for the receiver to collect from the stockholders the amount of their statutory liability to pay off the indebtedness of the bank. It also alleges that the bank is due its depositors about \$75,000, and, in order to pay the same, it is necessary for each stockholder to be assessed the full amount of his statutory liability. The allegations that the bank is insolvent, and has no assets, and that the amount due depositors is about \$75,000, are so general in their nature that, in order to ascertain the liability of any one of the defendants, it is necessary that a calculation should be made; nor could any calculation be certain in its results without assuming the indebtedness to be of a particular amount. The petition states that such indebtedness to the depositors is about \$75,000. It is the requirement of our Code that the petition shall plainly and distinctly set forth the plaintiff's cause of action, and in an ordinary case at common law it is necessary that the plaintiff should name a sum for which he prays judgment. The demurrer filed to the petition, so far as it relates to the matters now in hand, can only be held to be general. It does not specifically set out any defect, or want of necessary allegation. When offered as a special demurrer, it will be found to be very vague and uncertain. So that, in dealing with it, we can only treat it as general, and, so treating it, we find that the petition alleges the insolvency of the bank, that it has no assets to pay its creditors, that it is due to one class of its creditors \$75,000, and, in order to pay this amount, it is necessary that each stockholder shall pay the full amount of his statutory liability. The statutory liability is fixed by the charter. The number of shares at their par value furnishes a basis from which such liability can be ascertained; and when a judgment is prayed against each stockholder it will be held that the prayer is for the entire liability. Evidently the pleader proceeded on the maxim, "Certum est quod certum reddi potest." One difficulty in the application of that maxim, however, is that the necessary fact of the indebtedness of the bank is alleged to be about a given sum. This uncertainty, however, is relieved by the further allegation that the bank is insolvent, and has no funds or assets to pay creditors. Considering all the allegations, we must hold that the petition, in the absence of a demurrer specially directed to and specifying the defects therein, is good in substance.

2. The point is also made by the demurrer that, as the liability set out in the petition is purely statutory, the right of action is directly in the creditors, and the receiver has no right to institute the action. It is argued also, in this connection, that the receiver was not authorized to institute the action. The

act incorporating the State Savings Association, and which fixes the liability of its stockholders, does so in the following language:

"* * * Each stockholder shall be individually liable for the ultimate payment of the debts of said corporation to an amount equal to the amount of stock held by him." Acts 1888, p. 82, § 5. The statute is silent, as to who shall have the right to enforce this liability, in words. It simply fixes the liability. In a number of the states the statute on this subject goes further, and prescribes in terms that the creditors have the right to enforce it for their benefit. It suffices us, however, to observe that our statute prescribes the liability, which is for the ultimate payment of the debts of the corporation in proportion to the number of shares held; and while we are not prepared to say that a single creditor nor a number of creditors of the bank could not, under this, maintain an action against a stockholder who is liable, we at the same time know of no reason why a receiver of the corporation, charged with the duty of collecting whatever assets properly belong to the corporation which are liable for the payment of its debts, might not, in equity, under this statute, seek and have a decree against all such stockholders for the benefit of all the creditors, inasmuch as the court has taken possession of the estate of the corporation on the application and for the benefit of its creditors, and the receiver is but the active officer of the court to collect the assets, and apply their proceeds to the extinguishment of the debts due by the corporation. True, the liability fixed by the act of incorporation is not to the corporation itself, but to its creditors; and while all the property of the corporation, including debts due to it, is a fund which goes into the hands of the receiver for the benefit of the creditors, and if, as is true, the liability of the stockholders can only be applied to the extinguishment of debts, and it exists in favor of the creditors, it would seem to be in consonance with equity practice to gather in all the funds made available by law for payment of the creditors, and then complete the whole matter by distribution. But, however this may be, our Civil Code (section 1890) provides that this individual liability is an asset of the corporation, and shall be enforced by the receiver or other officer having the legal right to collect and distribute the assets of the failed corporation. The provisions of this statute seem to settle the question. They are codified from the act of 1894. Acts 1894, p. 76. It is, however, objected that, inasmuch as this act was passed subsequent to the act incorporating the bank, in which latter act the liability of stockholders is fixed, to apply it in this case would give to the act of 1894 a retroactive application. This contention is not sound. The act of 1888 created a liability on the part of stockholders for the ultimate payment of the debts of the corporation to an amount equal to the

amount of stock held by each, and to apply the act of 1894 would not be in any way to increase or change the liability fixed by the act of incorporation. The vested right given to the creditors of the bank by the latter act was to hold the stockholder liable for his debt in the proportion named. This is not taken away nor affected by the act of 1894, but that act recognizes the same liability, and simply declares a remedy or means of enforcement of the right given. While the act declares the liability to be an asset of the bank, it does so in the sense of providing for the enforcement of the right previously given, and for the purpose of distributing the proceeds arising from the liability among the persons entitled to it by the act of incorporation. It must, therefore, be a remedial act, and as such has direct application in this case. By its provisions no injustice is worked to the creditor, nor are any of the rights of that class lessened. It is provided by our Political Code (section 6) that laws looking to the remedy or mode of trial may apply to contracts entered into prior to their passage. Such a construction does not contravene the provisions of our constitution. See Civ. Code, § 5731. See, also, Sedg. St. Const. p. 160; Pritchard v. Railroad Co., 87 Ga. 294, 13 S. E. 493. It is our conclusion, therefore, that, if authorized by the court, the receiver had the legal right to institute an action against the stockholders to enforce this fixed liability for the benefit of creditors. We conclude, also, from an inspection of the order, that the receiver was authorized to bring such suits. If it were a question of doubt, the receiver having so construed the order, and the court having subsequently ratified his action, the ratification would be the equivalent of an original order allowing suit to be brought.

3. Another objection to the petition, which is raised by demurrer, is that there is not such a community of interest between the named defendants as authorizes a joint action to be brought against them. We think this question has been settled by the decision in the case of Brobston v. Downing, 95 Ga. 505, 22 S. E. 277. It is true that the action filed there was an equitable petition, but the point was made by special demurrer that there was no such community of interests between the defendants as entitled the plaintiff to maintain the joint action. The petition was filed to enforce the statutory liability of stockholders, as here, and the court ruled in that case: "Where the corporation is insolvent, and has no assets applicable to the payment of its unsecured creditors, one or more of these creditors may bring suit * * * against all of the stockholders to enforce their statutory liability," etc. The question has been decided differently in the courts of several of the different states. In some it is regulated by statute. In New York, the action may be maintained against all the stockholders. Weeks v. Love, 50 N. Y. 568. In

Ohio, under a statute founded on prior decisions of the courts of that state, the same ruling has been made. *Umsted v. Buskirk*, 17 Ohio St. 113. In Missouri it has been held that it is not a joint liability. *Perry v. Turner*, 55 Mo. 418. The basis of the ruling that all the stockholders may be joined in the same suit, in the absence of a statute, is clearly stated by the court of appeals of New York in the case of *Corning v. McCullough*, which is reported in 49 Am. Dec. 287, where the court say: "Individual liability of a stockholder under a charter which declares stockholders personally liable for debts contracted by the corporation is not a new liability created by the act, but is a preservation of the common-law liability which members would incur as partners for the engagements of the corporation, were it not incorporated." See, also, *Southmayd v. Ross*, 3 Conn. 52; *Sewall v. Allen*, 6 Wend. 335; *Erickson v. Nesmith*, 46 N. H. 371; *New England Commercial Bank v. Stockholders of the Newport Steam Factory*, 6 R. I. 154.

4. It has been further urged that this action cannot be maintained because the bank is a necessary party defendant, and has not been made such. The allegation is made by the petition that the bank is entirely insolvent, and has no assets, and the suit is brought for the one purpose of enforcing the personal liability of the stockholders named as defendants. Why, then, should the insolvent corporation, whose assets have been placed in the hands of the receiver, the plaintiff in the case, be a necessary party to the proceedings? No judgment is sought against the corporation. The original liability was for the immediate benefit of creditors, and by the recovery the corporation would be benefited. If it be said that the bank should be a party because it is the debts of the corporation which are to be paid, the reply is that such corporation exists only in name. In fact, its assets have all been taken in charge by the court for the benefit of its creditors, and the court is proceeding to gather up its assets for the benefit of the creditors, and, incidentally, of course, for the benefit of the corporation. The creditors would be required to establish their claims before they participated in the proceeds arising from the assets of the bank. In the case of *Mickles v. Bank*, 11 Paige, 126, it was ruled that in such a case the corporation need not be made a party. Further, by the act of 1894 (Civ. Code, § 1890), which is above cited, this liability of stockholders is placed among the assets of the insolvent corporation, and it is declared that the receiver is the proper person to sue and enforce the liability, thus making that officer the statutory plaintiff. We know of no reason why there should be any other defendants than those liable under the provisions of the statute. The receiver represents all the parties at interest. He represents the bank as well as all the creditors; and while it might not constitute a misjoinder for the bank to be

made a party in an equitable proceeding where all the parties are brought into court, and an account had, and decrees for contribution and distribution made, there is no necessity. In an action at law brought by the receiver to recover the amount due under the statutory liability of the defendants, to make the corporation a party defendant.

5. Another of the grounds urged by the demurrer is that a suit of this character is not cognizable by courts of law. We cannot sustain this position. Courts of law, in this state, administer equitable relief when it is so prayed, and the facts warrant such action. It may, under the pleadings in the present case, be difficult for the plaintiff to make such exact and specific allegations as to the indebtedness of the bank and the value of its assets, so as to show the liability of the stockholders under the act of incorporation, without a resort to an equitable petition and prayers for equitable relief, so as to apply the principles of equity and equity practice in the settlement of the liability of the defendants. But because he has not done so we are not compelled to say that the suit has not been properly brought on the common-law side of the court. The difficulties which attend the allegation and proof of such facts as show the liability of each of the stockholders against whom judgment is prayed does not afford a bar to the rendition of such judgment when a proper petition is supported by proper proof. Judgment affirmed. All the justices concurring.

PAYNE v. ATLANTA CONSOL. ST. RY. CO.
(Supreme Court of Georgia. March 4, 1899.)

NONSUIT—INSUFFICIENT EVIDENCE.

When, on the trial of a suit for damages for a malicious prosecution, there is no evidence connecting the defendant with the prosecution, it is not error to order a nonsuit.

(Syllabus by the Court.)

Error from city court of Atlanta; J. D. Berry, Judge.

Action by Bess Payne against the Atlanta Consolidated Street-Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Lumpkin & Colquitt and Brandon & Arkwright, for plaintiff in error. Goodwin, Westmoreland & Hallman, for defendant in error.

PER CURIAM. Judgment affirmed.

CORPORATION OF LONDON ASSURANCE
v. PATERSON et al.

(Supreme Court of Georgia. March 4, 1899.)

INSURANCE—CONTRACT—SCOPE—CONCURRENT INSURANCE—ADJUSTMENT OF LIABILITY—APPEAL—RIGHT TO COMPLAIN—HARMLESS ERROR.

1. Apparently, the auditor to whom this case was referred for the purpose of determining how a loss by fire should be adjusted, as be-

tween the insured and each of several insurers, correctly found that an application for insurance presented by the insured to one of the insurers was not specific as to the precise property sought to be insured. But, whether this be true or not, it affirmatively appears that no substantial right of the party complaining of this ruling was prejudiced thereby.

2. When a memorandum of a contract for additional insurance is indorsed upon a policy previously issued, the stipulations therein contained, in so far as the same may be applicable, are to be treated as constituting the basis of the new contract. (a) In the present case the indorsement contemplated additional insurance which should cover the entire interest of the insured in the property specified,—not merely a three-fifths interest therein, which was the extent of the risk originally assumed. (b) Even if error was committed in admitting parol evidence offered to show the intention of the contracting parties, no injury thereby resulted to the insurer.

3. One of the insurance companies being, in any event, liable to pay in full the amount expressed in its contract, the mere fact that the auditor estimated the value of the property destroyed upon an erroneous basis affords to this company no just cause of complaint.

4. Under the express provisions of what is commonly known as the "American Clause," though it be contained in an "open" policy, not immediately attaching to any specific risk, the date to be looked to in determining whether concurrent insurance is prior or subsequent "in day of date to this policy" is, not that upon which the policy attached to a specific risk, but that upon which the policy was issued.

5. An insurer in no way interested in an adjustment made between the insured and a subsequent insurer is not in a position to question the correctness thereof.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Paterson, Downing & Co. against the Corporation of the London Assurance and others. Exceptions of said corporation to the report of an auditor were overruled, and it brings error. Affirmed.

Brantley & Bennet and W. W. MacFarland, for plaintiff in error. Goodyear & Kay, King & Spalding, Mercer & Mercer, and Atkinson & Dunwoody, for defendants in error.

LUMPKIN, P. J. Before undertaking to deal with the several assignments of error presented by the bill of exceptions in this case, it is proper to set forth a statement of some of the leading facts disclosed by the record, which will serve both to explain the nature of the controversy, and to indicate the relevancy and materiality of the questions upon which rulings are invoked: Paterson, Downing & Co., of New York City, were engaged in buying and exporting naval stores. They had agents or business connections at nearly all of the South Atlantic and Gulf ports, including Brunswick, Ga., through whom rosin and turpentine were purchased at inland points, transported by rail to these ports, and then loaded on vessels for export. Desiring protection against possible losses by fire, Paterson, Downing & Co. during the fall of 1895 applied to the Thames & Mersey Marine Insurance Company and the Corporation of the London Assurance

for insurance to the amount of \$50,000, which should cover all naval stores subsequently purchased, not only while stored in warehouses at these several ports awaiting export, but also while in transit from inland points to the coast. The company first named undertook to carry two-fifths, and the latter company three-fifths, of the insurance applied for; and accordingly each issued what is commonly known as an "open policy," dated October 12, 1895, the purpose of which was to enable the insured, by simply reporting a shipment from a given point, and agreeing upon the rate of premium, to immediately bring within the protection of the policy any particular consignment they might wish to be covered thereby. Later, the insured applied to the Corporation of the London Assurance for additional insurance, to cover all naval stores while located at certain designated ports, the value of which should be in excess of the \$50,000 for which they were, as above stated, already insured. Thereupon, under the date of December 18, 1895, this company entered upon the policy previously issued by it the following indorsement: "It is hereby understood and agreed that upon notice from the assured, and from the time such notice is given, provided it be before known loss, this policy shall cover not exceeding \$50,000.00 on the excess of \$50,000.00 on goods as herein described, at the ports enumerated herein, for a period of not exceeding fifteen days; such period, however, to be renewable one or more times for other periods of fifteen days, each upon notice from the assured prior to the beginning of such other period,—a premium to be arranged to be paid for each period." On January 11, 1896, the insured gave notice that they desired additional insurance on naval stores located at Brunswick, to the extent of \$50,000, agreeably to this indorsement, for a period of 15 days from that date; and the company accepted the notice, and fixed the premium. Further notices were from time to time subsequently given and accepted, by which this insurance was extended for successive periods of 15 days; the last notice stipulating that the period to be covered was from March 26 to April 10, 1896. A loss by fire occurred on April 2d, the greater part of the goods on storage in Brunswick being consumed. Besides the insurance above referred to, the insured held a number of policies, covering the same property, which had been issued by various fire insurance companies at different periods during the latter part of the year 1895 and the early part of 1896. An attempt was made to adjust the loss, but the several companies failed to agree among themselves as to the respective proportion thereof each should bear. This gave rise to the present litigation, the purpose of which was to fix the liability of each, and to compel payment to the insured accordingly. The case involved many complicated questions, both of law and of fact, and was referred to an auditor, who duly made a report covering all the points at issue.

Being dissatisfied with the auditor's findings concerning the adjustment to be made of the loss, the Corporation of the London Assurance filed numerous exceptions to his report; and, the same being overruled and disallowed by the court below, that company now brings the case here for review. Such other facts as are necessary to an understanding of the questions presented for adjudication will be stated in immediate connection with the points to which the same relate, and will be developed as occasion requires in the discussion which follows.

1. It appeared on the hearing before the auditor that a portion of the goods destroyed by fire arrived in Brunswick prior to October 12, 1895; and it was insisted by the London Assurance Company that it was not liable, either under the policy issued by it on that date, or under the indorsement of December 18th entered thereon, to pay any part of the loss thus sustained. Exception is taken to the finding of the auditor "that the several notices given under and by virtue of the indorsement of December 18, 1895, on the defendant's policy, for the purpose of procuring excess insurance as thereby provided, were 'silent as to the receipt of the stuff designed to be covered by them.'" The record, however, shows, manifestly, that this complaint is without merit. In the first place, it would seem, the auditor's finding was in accord with the only possible construction which could be placed upon the language in which these notices were couched. Besides, notwithstanding the same did not specifically limit the operation of the insurance thereby effected to goods received subsequently to October 12, the auditor expressly announced his conclusion to be that, in view of the parol evidence submitted, "it was the intention of the plaintiffs and the said London Assurance, as evidenced by their dealings, * * * that this indorsement was not designed to cover goods received prior to October 12, 1895." Accordingly, in fixing the liability of this company, the auditor found that it was answerable only for its just proportion of the loss on goods which arrived in Brunswick after that date, which ruling gave to this company the full benefit of its contention, and relieved it of all liability as to other goods destroyed in the same fire.

2. Another question presented for determination is, what was the legal effect of the indorsement of December 18th, above quoted, which was entered on the policy previously issued by the London Assurance? Obviously, it was the intention of the parties to provide for additional insurance, to become operative whenever the insured gave the required notice, and the premium to be charged was fixed, upon the same terms and conditions, so far as applicable, as had been previously agreed on when the company wrote its policy covering the \$30,000 risk originally accepted. In other words, the company

agreed, if called upon by the insured, to increase the amount of insurance it had in the first instance undertaken to carry; and, instead of issuing another policy containing the stipulations upon which such additional insurance was proposed, the plan was adopted of indorsing its proposal upon a policy already held by the assured, in which the terms and conditions upon which it was willing to insure the property in question were fully and distinctly set forth. The method pursued of evidencing this agreement on the part of the company was very similar to that commonly employed of extending the period for which a policy is originally issued; the only difference being that the indorsement now under consideration was intended to expressly fix the amount, as well as the periods, of the insurance thus provided for. It is well settled that, in the event a new contract is entered into between the insurer and the insured, it is not essential that the same should be evidenced by the issuance of another and distinct policy. On the contrary, "a policy of insurance may be renewed by the underwriters for an additional term beyond that mentioned in it, by the mere issuance of a renewal receipt or certificate, and this is the custom and practice in the insurance business." 7 Am. & Eng. Enc. Law, 1011. In such case "the renewal has the effect of a new contract, but upon the same terms and conditions as the old." Id. 1012. It follows, of course, that where the plan is adopted of evidencing a new contract of insurance by merely indorsing upon a policy previously issued a memorandum of the date, amount, and subject-matter of the additional insurance effected, the policy upon which such entry is made is to be looked to, in ascertaining the terms and conditions governing the new contract. Accordingly, we hold in the present case that the indorsement of December 18th is to be regarded as equivalent to the issuance of an entirely new and distinct policy bearing that date, and containing all the stipulations set forth in the policy issued by the London Assurance on October 12th, save those the adoption of which this indorsement negatives, either expressly or by necessary implication.

(a) Recognizing the soundness of this conclusion, counsel for the insurance company, in effect, contend that, as the policy issued on October 12th provided that the insurance thereby effected was "to cover three-fifths interest in all goods" therein designated, in an amount not exceeding \$30,000, a proper construction of the indorsement of December 18th would limit the company's liability thereunder to "three-fifths of the \$50,000 excess insurance" provided for. We cannot assent to this proposition. The amount and extent of the new insurance contemplated was specifically fixed by the indorsement in question, as was also the precise subject-matter thereof. In these respects the addi-

tional insurance was not to be identical with the contract previously entered into. That is to say, the company in the first instance undertook to carry only three-fifths of the \$50,000 risk offered to it and the Thames & Mersey Company, but, when applied to thereafter, agreed to accept and carry the whole risk, incident to the additional insurance of \$50,000 which the insured desired to place on the property, because its value was far in excess of the amount for which insurance had previously been procured. But even were this indorsement less definite in its terms, and susceptible of a different construction, the dealings between the parties pursuant thereto show beyond any question what they understood its meaning to be. Each of the several notices thereafter given by the insured, and accepted by the company, called upon it "to enter on open policy of Paterson, Downing & Co., No. 610, \$50,000 on naval stores on excess of \$50,000," located at Brunswick; "so, regardless of what the company by the proposal evidenced by the indorsement of December 18th intended to offer to do, it subsequently, as matter of fact, actually granted the insured additional insurance to the full extent asked, viz. \$50,000, and in each instance fixed the premium on that amount at $\frac{1}{10}$ net."

(b) In this connection, complaint is also made that the auditor improperly, over the company's objection, admitted "parol evidence offered to show that it was the purpose and intention of the parties at the time of the writing of the indorsement of December 18, 1895, on the policy of the London Assurance, that the said indorsement should cover [the property] insured, to the extent of the whole of \$50,000, and not merely three-fifths of that amount; the objection being that the said evidence was immaterial and irrelevant, and, further, that the policy and the indorsement make the contract the highest evidence of what was covered," etc. The evidence objected to is not, as it should have been, set forth. So, whether it established that which it was "offered to show" cannot, of course, be determined. But, however this may be, suffice it to say that, as the construction to be given the contract as evidenced by the writings before us is as above stated, the admission of this parol evidence could not have operated prejudicially to the company.

3. The policy of October 12th issued by the London Assurance Company contained a written stipulation that the basis upon which the value of the goods insured was to be estimated, in the event of loss, was "invoice cost, and ten per cent. added, unless otherwise agreed upon at time of indorsement." In almost every instance, prior to December 18th, when a particular risk was reported and indorsed upon this policy, the quantity and value of the goods were specifically stated, but none of the notices given in pursuance of the indorsement of that date evidencing the new contract undertook to state the value of the goods thereby

insured. Exception was taken by the company to a finding by the auditor that, both as to the insurance effected under the contract of October 12th and as to that effected under the indorsement of December 18th, premiums were fixed upon the basis of invoice cost and 10 per cent. added, and accordingly the value of the goods destroyed was to be estimated upon a like basis. Complaint is made that the company was thus held liable, under its policy of October 12th, for the value of the goods at invoice cost, and 10 per cent. added, despite the fact that a given amount had been agreed on as the value of each shipment of goods, insurance upon which it had from time to time indorsed upon the policy. Doubtless, the finding complained of was erroneous, so far as the risks insured against by the original policy are concerned, but the error thus committed resulted in no hardship upon the company. It appears from an agreed statement of facts presented in behalf of the contending parties, and to the correctness of which each expressly assented, that the market value of the goods destroyed was over \$80,000, whereas the invoice cost thereof was over \$96,500. It further appears from the testimony of the company's agent that the insured, in reporting in each instance the value of goods to be covered by the policy, gave in only the invoice cost of the same; and this amount was, "in round numbers," indorsed upon the policy as the agreed value of the particular risk reported. So it will be readily seen that whether estimated upon the basis of reported value, invoice cost, or market value, the goods destroyed were worth much more than double the amount of the face of this policy, which, as originally issued was limited to \$30,000, and the company was bound to pay this amount in full in any event. As to the insurance of \$50,000 additional on the same goods, effected under the indorsement of December 18th, the only proper basis for estimating the loss was that provided for in the stipulation above alluded to; for this stipulation became a part of the new contract, and, as the value of the goods was not "otherwise agreed upon" in any of the notices given by the insured and accepted by the company, it became bound to indemnify them, in the event the goods were destroyed, upon the basis of "invoice cost and ten per cent. added," as the agreed value thereof. So far as this additional \$50,000 of insurance is concerned, we understand the company to make no complaint of the auditor's finding, for none is presented by the exceptions filed in its behalf. We have deemed it proper, however, to call attention to the fact that, in view of the company's liability under the contract last above referred to, the only question of real importance to be determined was the value of the goods, estimated at invoice cost and 10 per cent. added; for a further specific finding as to exactly how much they were worth, taking into consideration only the agreed values indorsed on the policy under the contract of October 12th, could have served no practical purpose in determining whether

or not the company was liable to pay in full its policy of \$30,000.

4. The most important question in the case is whether or not, in view of the stipulation as to concurrent insurance contained in the policy issued by the London Assurance, the auditor correctly fixed the order in which the several companies issuing policies covering the property destroyed were to be held legally liable to make good the loss. The stipulation referred to was as follows: "Provided, always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said assurers shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said assurers shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And, in case of any insurance upon the said premises subsequent in day of date to this policy, the said assurers shall nevertheless be answerable, subject as hereinafter provided, for the full extent of the sum insured by this policy, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance." There were of force at the time of the fire four policies which had been taken out by the insured in different fire companies prior to October 12, 1895, the date upon which the London Assurance and the other marine company, the Thames & Mersey, issued their respective policies. These four were floating policies, and in general terms undertook to cover, during their continuance, all naval stores, the property of the assured, while stored in their warehouses in the city of Brunswick, irrespective of the time such goods might be received at that point. Each contained an express stipulation, however, that the insurance thereby effected should not apply to any naval stores which at time of loss might "be covered in whole or in part by, or be under the protection of, any marine insurance or policy of any marine company." Another fire policy, issued after October 12th, contained a similar stipulation. Accordingly the auditor held that the five policies just referred to were limited to such goods only as were received in Brunswick prior to the date last mentioned, all goods thereafter arriving being covered by the policies of the two marine companies referred to. His finding, therefore, was that, as there was no prior insurance to be first applied to the loss on goods covered by the \$30,000 policy issued by the London Assurance, this company

should pay that amount in full, and that the Thames & Mersey Company should, for a like reason, pay the full amount of its policy, \$20,000. Up to this point, the plaintiff in error concedes that the adjustment made by the auditor was eminently just and proper.

Besides the policies already mentioned, there were a number of others, some of which were taken out by the assured on January 7, and the rest on January 27, 1896. All were floating policies, covering goods received both before and after October 12, 1895. In all, this additional insurance amounted to \$20,000; and it was earnestly insisted by counsel for the London Assurance that a ratable proportion of the fund arising from these policies should next be applied to the loss on goods received after the date last mentioned, and fully exhausted, before that company could legally be called upon to pay anything further. The idea upon which this contention was based was that this \$20,000 of insurance was "prior in day of date" to that, of force at the time of the fire, issued under and by virtue of the indorsement of December 18, 1895, entered upon the policy of the London Assurance, which latter insurance, the company asserted, did not go into effect until March 26, 1896, and accordingly was to be treated as "subsequent in day of date," agreeably to the express terms of its policy. The auditor, however, held to the contrary, and the main controversy here presented grows out of this ruling.

To fully understand the company's position, it is necessary to follow closely, step by step, the argument submitted by counsel in its behalf. In the first place, attention is called to the fact that the company, by the indorsement in question, proposed to insure the goods, "upon notice from the assured, and from the time such notice" might be given, provided it was before known loss, "for a period of not exceeding fifteen days; such period, however, to be renewable one or more times for other periods of fifteen days, each upon notice from the assured prior to the beginning of such other period,—a premium to be arranged to be paid for each period." In this connection the cases of *Insurance Co. v. Wright*, 23 How. 401, and *Douville v. Insurance Co.*, 12 La. Ann. 259, are cited in support of the proposition relied on, that the indorsement of December 18th constituted merely an executory contract, and no present and immediate risk was thereby assumed by the company. Thus far we concur. See 1 *Para. Mar. Ina.* 326, 327. The next step taken is to point out the fact that each of the notices subsequently given by the assured and accepted by the company called for and effected an entirely distinct and independent contract of insurance, the duration of which was expressly limited to a fixed period of 15 days, which was to expire by mere lapse of time, and thus become forever inoperative, and essentially a thing of the past. Accordingly it was argued that the risk accepted by the company under

the last notice given by the assured, on March 25, 1896, went into effect on the following day, and was to continue until April 10th, that all previous contracts had duly expired, and that the only insurance granted in pursuance of the indorsement of December 18th which was of force at the time of the fire was that effected by this last notice. To each of these propositions we unhesitatingly assent. See authorities last above cited. But, as to the deductions to be drawn from the premises stated, we think the argument presented by the able and learned counsel for the plaintiff in error departs from sound reason, and utterly fails to establish the conclusion for which they contended. They concede that the legal effect of the indorsement of December 18th is the same as would have been the case had the company's proposal thereby made been submitted to the assured by issuing to them another and distinct policy, bearing that date, and containing the above-quoted stipulation as to concurrent insurance, which, as was explained on the hearing before us, is, in insurance parlance, designated the "American Clause." We were further informed that such a proposal, thus evidenced, would constitute what is known as an "open" or "running" policy. By reference to Bouvier's Law Dictionary (volume 2, p. 430), we find this definition is usually applied to a policy "on which the value is to be proved by the assured." However, "By an 'open policy' is also sometimes meant, in the United States, one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time." See cases cited. We therefore accept as correct the terms suggested for designating the instrument now under consideration. Our attention was further directed to the exigencies policies of this description were designed to meet. They often necessarily differ from ordinary contracts of insurance, because it is not within the power of the assured to accurately describe, or even point out, at the time he applies for a policy, the property he desires covered, or give information as to its value. For instance, in the case before us, it appears the assured desired the policy of October 12th to cover future consignments of goods to them or their agents, not at that date even purchased; and therefore the policy issued was necessarily left "open" and "running," so that subsequently such consignments might be brought within its protection. On the other hand, a policy left open may immediately attach to a specified risk, and nothing else ever subsequently come within its operation.

In view of these considerations, it was contended by counsel for the company that, in determining whether or not an open policy evidences a contract simultaneous with, or prior or subsequent "in day of date to," other concurrent insurance covering the same property, the date upon which such policy actu-

ally attaches to the risk and covers the property therein described, not the date upon which the policy was issued, should be accepted as the test to be, in any given instance, applied. "In other words," as counsel undertake confidently to assert in a brief filed in behalf of the company, "the time when a policy attaches to a particular risk is the efficient date of the policy. No other date is intended than that at which the policy takes effect by accepting a risk. All other dates are nominal, inoperative, and mere surplusage." In support of this position, authorities are cited to the effect that the date which a policy bears is only *prima facie* evidence as to the time of its execution; and, where two or more policies cover the same property, "in determining which is the prior insurance, it may be proved that a [particular] policy was subscribed on a different day from that of its date." See 2 Phil. Ins. § 1253, referring to the case of *Lee v. Insurance Co.*, 6 Mass. 208; also, *Potter v. Insurance Co.*, 2 Mason, 475, Fed. Cas. No. 11,332. It is to be observed, however, that neither of these cases sustains the proposition for which they are cited. On the contrary, they are merely authority for the time-honored principle that a person not a party to a contract, and neither subscribing nor accepting the instrument evidencing the same, is not bound by any recital therein contained, while, on the other hand, a party to the contract is not, as against a third person, thereby precluded from showing by parol evidence that the instrument does not, as matter of fact, speak the truth. In both of those cases the defense set up by the insurer, when sued upon its policy, was that the plaintiff held prior insurance upon the same property, as shown by another and distinct policy issued by a different and independent company, not a party to the action; and the court simply held that, while the date of this other policy was *prima facie* evidence of the time of its execution, either of the contesting parties was at liberty to show by parol what was the real truth in this regard. We may add that we have not been cited to any case which sustains the contention upon which the plaintiff in error so earnestly insists. Indeed, all the authorities with which we have met during the course of our investigation of the question presented look unmistakably the other way. Alluding to the case of *Seamans v. Loring*, 1 Mason, 128, Fed. Cas. No. 12,583, Mr. Phillips, in the second volume of his work on Insurance (section 1252), announces that "it has been held that the clause as to a prior policy relates to priority in date, and not in the commencement of the risk." In the case cited it appeared that the property insured was fully covered by a number of policies prior in date, and subsisting at the time the policy in question was written, but, before the risk could commence under any of these prior policies, they were canceled; yet, notwithstanding this, it was held that their

effect was to exonerate the subsequent insurer from all liability under the policy written by him, and the assured was entitled to demand a return of the premium.

The following pertinent quotations will show the trend of opinion among text writers: "When there are several policies on the same property and risks, by the general law on the continent of Europe and in the United States, by virtue of special clauses in the policy, they attach on the subject insured, in the order of their execution; and, where the sums insured exceed in the aggregate the value of the subject, the policies subsequent in date are discharged, wholly or partially, in the inverse order of their execution, until the whole amount insured is reduced to a correspondence with the value of the interest meant to be covered." 1 Duer, Ins. § 37. "The priority respecting which this provision is made is not a priority as to the beginning of the risk, but a priority in effecting the insurance, and is determined by ascertaining the actual time of making the contract. For this purpose the date is *prima facie* evidence, but not conclusive, for it may be contradicted by proof that the contract was made on another day. It is a general principle of law that the fractions of a day are not regarded; but if two or more policies are made on the same day, insuring the same property against the same risks, and the question of priority is material, this priority will be determined by ascertaining when on that day the first was made." 1 Pars. Ins. 285-287. "If, in such a case, it be shown that one of the policies was in fact executed prior to the other, then, if the prior policy covers the whole interest, the underwriters under that policy must alone bear the whole loss, where the subsequent policy provides that the underwriters of that policy shall be liable only for as much interest as is uncovered by the prior policy.

* * * The question as to whether other policies are prior in date should not be determined by the date of the attaching of the policies. The clause refers to priority in date of effecting the insurance." 3 Joyce, Ins. § 2481, citing *Deming v. Storage Co.*, 90 Tenn. 306, 17 S. W. 89, which case is precisely in point. It was therein distinctly ruled that "there can be no contribution among the co-insurers where two or more open policies of different dates have been issued by different insurers for the same risk, subsequently attaching at same instant under all the policies; there being a provision on the face of each policy against contribution with insurers of prior or subsequent date. Each insurer's liability attaches, in such case, as of date of his policy, not as of date of risk incurred." The stipulation as to concurrent insurance, known as the "American Clause," was in identically the same terms as in the policy now before us. It appears that, construing this clause, the chancellor before whom the case was tried held that "the question as to whether the fire insurance preceded, was contemporaneous with, or was subsequent to, the marine insurance, was to be determined, not by the dates of the respective policies, but by the date of the attaching of the risk under each." In announcing his decision, he assigned for this ruling the following reasons, which the full report of that case enables us to state in the precise language he employed: "I am of the opinion that, under the American clauses of the marine open policies, there was no insurance until the cotton was brought within their terms, and became the subject of insurance. An open policy does not, *ex vi termini*, insure property until the property is brought within its terms. Hence, there is no insurance until then. The rule making the date of the policy the date of the insurance applies to valued policies, but not to open policies." But this reasoning was not accepted as sound by the higher court. On the contrary, Snodgrass, J., who pronounced its judgment, after reviewing in a very able opinion nearly, if not quite, all the authorities directly bearing upon the question, said: "We hold that the date of the policy, and not of the attaching of the risk, must govern. It is so agreed in express terms, and no reason is perceived why such an agreement might not be made in contemplation of open policies. It is true that ordinarily the date of a contract is not material; but this is not true where it is specially made so in terms,—where it is, among other things, an object contracted about." The effective simplicity of this argument appeals to us irresistibly, and the conclusion reached is, in our opinion, entirely satisfactory. It would, of course, be perfectly proper for an insurance company to stipulate that the test for determining what was or was not insurance "prior in day of date" should be the actual date upon which an open policy issued by it really became effective by the acceptance thereunder of a definite risk. However, the stipulation known as the "American Clause" obviously does not even remotely suggest such a test, but distinctly provides that the company shall be exonerated from liability only as regards "other assurance upon the premises aforesaid, prior in day of date to this policy"; evidently referring to the instrument setting forth its proposal, not to the various contracts of insurance to be made in the future, from time to time, and evidenced by separate indorsements thereon. "Policy," or, more fully, "policy of assurance" or "insurance," is the name by which the formal written instrument in which the contract of insurance is usually embodied is known." 2 Abb. Law Dict. 286. We accept as true the statement made in the brief of counsel for the company, that: "An open policy may effect no insurance, and embrace no risk, at the date of its issue. It looks to the future and successive dates. Unlike the standard form, which, in all its terms, relates to effecting present insurance of a defined subject-matter, open policies are merely promises to in-

ter, open policies are merely promises to in-

sure." Still, this presents no reason why the date of the instrument, or any other purely arbitrary date, cannot be agreed upon between the insurer and insured as the time from which other policies are to be treated as subsequent. For instance, the date agreed upon might be Washington's birthday, or some other legal holiday, occurring in either a past, the current, or a future year; and this express stipulation would be binding upon the parties themselves, though not, of course, upon third persons not assenting to such an arbitrary arrangement. Indeed, a company might agree that no insurance should be deemed prior in day of date to its policy, unless issued more than five years previously, or stipulate that it should be primarily liable under its policy, regardless of prior insurance. That each indorsement upon an open policy constitutes a new and independent contract of insurance can have not the slightest bearing upon the question in hand. The policy may, indeed, when issued, amount to no more than a bare promise to insure,—purely unilateral, and too vague and indefinite to be capable of enforcement in a court of justice. But these considerations in no way affect the character of the proposal of the company thereby made, which, in substance, is that each and every contract thereafter entered into, and duly indorsed upon the policy, shall be governed by the stipulations therein contained,—including, of course, the American clause. It matters not at what time any particular indorsement be entered,—whether the day after the policy is issued, or a week or a year thence,—the pregnant fact remains that when such indorsement is made the stipulations set forth in the policy immediately become part and parcel of the contract thus effected; and this is true, be it entered into agreeably to the first, the last, or any intermediate acceptance by the assured of the company's open proposal that, if given a risk at any time during the continuance of its policy, the date upon which that instrument was issued shall control in determining what is or is not to be regarded as prior insurance.

To hold otherwise than we do in the present case would surely lead to absurd results. For illustration, suppose two open policies, each containing the American clause, were simultaneously issued on a given date by different companies, with a view to insuring the same property. In the event a particular risk was reported and indorsed upon one the following day, but a week or more elapsed before this risk became covered by the other, could not the company issuing the policy last referred to fairly claim that the insurance effected under the other policy was "prior in day of date to" its policy? If so, occasion would soon arise, in the course of numerous like transactions, which would warrant a similar claim on the part of the other company, and so on indefinitely; one company having an undeserved advantage

over the other one day, and being heavily involved in liability the next. The spectacle thus presented would be suggestive of a game of leapfrog, a counterpart of which we would hesitate to introduce into the law relating to fire insurance contracts. The case now before us furnishes an example of the mischief which would follow such a step. The fire companies writing the insurance which the plaintiff in error claims is "prior in day of date to" its proposal of December 18th issued their respective policies long after that date, for a term of one year, presumably relying upon the assurance given by the American clause, contained in its policy, that they should be regarded as subsequent insurers. Thereafter they remained passive, silently awaiting the issue. The London Assurance, on the other hand, in accepting from time to time separate risks for successive periods of 15 days, displayed an ever-continuing activity. At first these acceptances antedated the time when the fire companies ventured to assume the risk undertaken by them. Soon, however, by mere lapse of time, some of these antecedent acceptances became inoperative, and were replaced by others, so that those shortly anterior to the fire bore a subsequent date. The fire companies were rooted to the spot they originally occupied, unable to effect a change in their situation, whereas the London Assurance was constantly moving and advancing its attitude, until it eventually outstripped them in point of time. We cannot give countenance to such an unequal and one-sided race. After, in a sense, practically inviting the fire companies to assume liability as subsequent insurers, with the distinct assurance that they should to the end of their term occupy that situation, the plaintiff in error cannot consistently claim an advantage over them simply because of the totally irrelevant circumstance that the last risk it assumed under its proposal of December 18th was not actually accepted until the following March. In view of the confusion and serious embarrassments which would inevitably arise if, in passing upon disputes as to priority, the date of the attaching of each separate risk, rather than the date of the policy itself, was accepted as the proper criterion, we cannot doubt that the insurance companies which write open policies containing the American clause do so understandingly and advisedly. But, be this as it may, we are not now called upon to decide what will, independently of this clause, constitute prior or subsequent insurance, but simply to determine the character of the fire insurance above mentioned, tested by the somewhat arbitrary rule which this clause expressly and plainly provides. Our conclusion upon this question is reached without serious misgivings.

5. The remaining point to be considered is controlled by what has been announced in the preceding division of this opinion. Complaint was made that the auditor, in effect-

ing an adjustment of the loss on goods received in Brunswick prior to the date the London Assurance wrote its policy of October 12th, held that certain companies whose policies covered these goods alone were, under the express terms and conditions thereof, entitled to demand contribution from the several fire companies whose policies covered indifferently goods arriving both before and after that date. In so far as the respective rights of the insured and of these two classes of insurers are concerned, the adjustment made would seem to be eminently proper and just. See 4 Joyce, Ins. § 3457. and cases cited. At any rate, no one of these parties is before this court in the attitude of a plaintiff in error. As to the London Assurance, having failed to establish its contention that the floating policies just referred to constituted prior insurance relatively to that written under its proposal of December 18th, obviously it has no interest whatever in this particular matter, and is not, therefore, in a position to urge any objection to the action taken by the auditor in regard thereto. Judgment affirmed. All the justices concurring.

SOUTHERN RY. CO. v. NEWTON.

(Supreme Court of Georgia. March 4, 1899.)

GARNISHMENT—PAYMENT INTO COURT.

Where summons of garnishment is based upon a suit in which the court acquires no jurisdiction to render a judgment against the principal defendant, the garnishee cannot relieve himself of liability to the defendant by paying the amount of a debt which he owes him into such court.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Charles O. Newton against the Southern Railway Company. Judgment for plaintiff in a justice court. Certiorari by defendant was dismissed, and it brings error. Affirmed.

H. M. Dorsey, for plaintiff in error. Maddox & Terrell, for defendant in error.

FISH, J. This was a suit brought by Newton in a justice's court against the Southern Railway Company. It was tried upon an agreed statement of facts. The justice rendered a judgment for the plaintiff, and, on appeal to a jury in the justice's court, there was a verdict for the plaintiff. The defendant carried the case to the superior court by certiorari, and, the certiorari being overruled, it excepted. The only point insisted on here by plaintiff in error is that it was relieved from liability to Newton by reason of the payment into court of the amount which it owed him under a garnishment issued in the case of Freeman against Newton, as set out in the agreed statement of facts. We are clearly of opinion that this contention of the plaintiff in error is not sound. Freeman

commenced, in the justice's court, an action against Newton, by having a summons issued for the latter, and upon this had summons of garnishment issued against the Southern Railway Company. No service was ever effected upon Newton in that case, and it is not claimed that he ever did anything which amounted to a waiver of service. In fact, it appears that the plaintiff, presumably on account of the want of service upon the defendant, subsequently instituted another action against Newton, upon the same claim, in which the defendant was duly served, and in which the plaintiff obtained a judgment against him. After the summons was issued for the defendant in the case from which the garnishment proceedings issued, the jurisdiction of the court was dependent upon service being effected upon him or a waiver by him of service. As there was no service upon the defendant, or waiver thereof, the court never acquired any jurisdiction in that case. *Ballard v. Bancroft*, 31 Ga. 503; *Branch v. Bank*, 50 Ga. 413; *Ferguson v. Manufacturing Co.*, 51 Ga. 609; *McClendon v. Phosphate Co.*, 100 Ga. 219, 28 S. E. 152. The garnishment proceedings being ancillary to the main case, the jurisdiction of the court as to them was necessarily dependent upon its jurisdiction in that case. When the action against the principal defendant fell, for the want of service, the ancillary suit against the garnishee went down with it. It is very apparent, therefore, that the garnishee did not relieve itself of liability to Newton, the defendant in the principal case, by paying the amount which it owed him into a court which never acquired jurisdiction over him, and consequently had none over the garnishee. The fact that the garnishee, after it had answered, paid into court the amount which it owed Newton, upon the demand of the justice who issued the summons of garnishment, can make no difference. The justice had no authority whatever to make such a demand, and a compliance therewith by the garnishee was, in legal contemplation, merely voluntary. Section 4726 of the Civil Code provides that "the plaintiff shall not have judgment against the garnishee until he has obtained judgment against the defendant." As we understand, from the agreed statement of facts, no judgment was ever rendered against the defendant in the case upon which the garnishment was based, and if one had been rendered it would have been void, as, in the absence of service upon the defendant, the court had no jurisdiction to give judgment against him. Until a valid judgment has been obtained against the principal defendant, a garnishee is under no legal obligation whatever to pay the amount which he owes the defendant into court. The payment by the railway company of the amount which it owed Newton into the justice's court being without authority of law, it was not relieved of its liability to him, and consequently the verdict of the jury in the justice's court in the present case was right, and

there was no error in overruling and dismissing the certiorari. Judgment affirmed. All the justices concurring.

EVANS v. STATE.

(Supreme Court of Georgia. March 4, 1899.)

CRIMINAL LAW—CRIMINATING EVIDENCE.

Following the decision of this court in the case of *Day v. State*, 63 Ga. 667, the evidence which was offered by the state, and admitted, showing that the accused, while not under legal arrest, had been compelled to put his hand in his pocket and surrender a pistol, thus disclosing that he was violating the law, was not admissible on the trial of such person for the offense of carrying a concealed weapon, alleged to have been committed on that occasion.

(Syllabus by the Court.)

Error from city court of Hall county; G. H. Prior, Judge.

Will Evans was convicted of carrying a concealed weapon, and brings error. Reversed.

H. H. Dean, for plaintiff in error. Howard Thompson, Sol. Gen., for the State.

COBB, J. Evans was convicted of the offense of carrying a concealed weapon. His motion for a new trial was overruled, and he excepted.

The only witness introduced on the trial of the case was Brown, a policeman, who testified that he was called up at night in Gainesville, Hall county, on account of some disturbance. When he got to the place where the disturbance was alleged to have occurred, he saw nobody, but was told that the accused had been shooting around there. After a while he saw the accused coming down the road. At this point the witness was allowed to testify as follows: "I told him to give up his pistol, and he said, 'What pistol?' and I said, 'The one you have been shooting with.' He refused to give it up, but I called Mr. Lyles, another policeman, and we forced him to give it up. He had it in his hand, under his coat, and it was concealed so I could not see it until after I compelled him to give it up." After this, witness arrested the accused. He had no warrant for the accused; and neither had Lyles, the other policeman. That part of the testimony of the witness which is quoted above was objected to by the accused on the ground that "no party can be compelled to give evidence against himself by act or words." The refusal of the court to exclude this evidence is assigned as error in the motion for a new trial.

The constitution of this state provides that "no person shall be compelled to give testimony tending in any manner to criminate himself." Civ. Code, § 5703. In the case of *Day v. State*, 63 Ga. 667, it was held that: "Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible. A defendant

cannot be compelled to criminate himself by acts or words." In that case, Allen, a witness for the state, testified that: "Witness took hold of [the accused], and pulled him along, and then he put his foot in the track. The first time witness told him to put his foot in the track, defendant refused. Witness then took hold of his foot and put it in the track. He did not consent to it. The shoe fitted the track." This evidence was admitted over the objection of the accused that it was compelling him to furnish evidence against himself, contrary to the constitution of the state. Chief Justice Warner, after quoting the constitutional provision above set out, added: "Nor can one, by force, compel another, against his consent, to put his foot in a shoe track, for the purpose of using it as evidence against him on the criminal side of the court,—the more especially when the person using such force has no lawful warrant or authority for doing so." It will thus be seen that in the case cited the constitutional provision was construed to apply to cases other than those in which the accused was forced to give evidence against himself, either in court, or pursuant to an order of court. In the present case, neither the officer who testified nor the officer who assisted in the arrest had any warrant for the accused, nor was any arrest made until after the accused was forced to give up his pistol. The only fair interpretation that can be given to the evidence objected to is that the accused was compelled, against his consent, to put his hand in his pocket, and surrender his pistol to the officers, and thus disclose that he was guilty of a violation of law. Viewing the case in this light, we think it is controlled by the decision in the *Day Case*, and that the court erred in admitting the evidence objected to. We have made a careful examination of the decisions of this court bearing upon this question, and find none which, properly construed, conflicts with the ruling here made. The case of *Franklin v. State*, 69 Ga. 36, differs from the present case in three important respects: (1) The accused was under legal arrest; (2) he did not object to furnishing the incriminating evidence; and (3) he remained passive while shoes, which were afterwards used as evidence of his guilt, were pulled from his feet by others. Chief Justice Jackson, in his opinion in that case, in distinguishing it from the *Day Case*, makes use of this language: "It was that which he wore which witnessed against him, and not any act he did under coercion, such as being forced to put his feet in tracks somebody had made." While the headnote in the case of *Drake v. State*, 75 Ga. 413, restricts the application of the constitutional provision above quoted to persons sworn as witnesses in a case, an examination of the facts appearing of record in that case will show that it is really not in conflict with the *Day Case*, or the ruling made in the present case. While it appears that part of the clothing introduced

in evidence was taken off of the person of the accused, he was at the time in legal custody; and no objection, so far as the record discloses, was made by him. Woolfolk's Case, 81 Ga. 551, 8 S. E. 724, is to be distinguished from the Day Case for the same reasons as the case last cited. In the Myers Case, 97 Ga. 76, 25 S. E. 252, the accused was not forced against his will to furnish evidence against himself. In discussing this question, Atkinson, J., recognizes the distinction laid down by Chief Justice Jackson in the Franklin Case, supra, in the quotation above set out. Besides, Myers was under arrest, and it does not appear whether the shoes introduced in evidence were taken from his feet, or whether, if this was done, he raised any objection thereto. In the case of Williams v. State, 100 Ga. 511, 28 S. E. 624, no such question as the one now under discussion was raised or decided. In that case an officer took from the person of the accused marked coins, which were afterwards used in evidence against her. She was not compelled to furnish any evidence whatever against herself. The decision in that case simply holds that the constitutional provision as to unreasonable searches and seizures did not render the evidence inadmissible. It was there said that the purpose of the constitutional provision was to deter the lawmaking power from authorizing or declaring lawful any unreasonable search or seizure, and to prevent courts and executives from enforcing any law which was violative of this provision, but that it was not intended to operate so as to prevent the courts from receiving evidences of crime, although they might have been obtained by an illegal and unreasonable search and seizure. It would seem from these cases that the law in this state is that evidence of guilt found upon a person under legal arrest may be used in evidence against him, but that, where a person not in legal custody is compelled to furnish incriminating evidence against himself, the evidence is not admissible. The ruling made in the Day Case constrains us to reverse the judgment of the court below in refusing a new trial, on the ground that the evidence complained of was improperly admitted. Judgment reversed. All the justices concurring.

WILLIAMS v. STATE.

(Supreme Court of Georgia. March 14, 1899.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—RES GESTÆ—INSTRUCTIONS.

1. Where a defendant has been found guilty of stabbing, on an indictment charging him with the offense of assault with intent to murder, an omission of the judge to give in charge to the jury the law of voluntary manslaughter, even if applicable to the case, is not sufficient ground for a new trial.

2. Sayings of the defendant, after the commission of the alleged crime, and constituting no part of the *res gestæ*, are not admissible in evidence in his behalf.

3. The charge of the court fairly and fully

covered the issues involved, and the verdict is amply supported by the testimony.

(Syllabus by the Court.)

Error from superior court, Jefferson county; R. L. Gamble, Judge.

Coley Williams was convicted of stabbing, and brings error. Affirmed.

Hudson & Wright, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

DILL v. STATE.

(Supreme Court of Georgia. March 14, 1899.)

HOMICIDE—EVIDENCE—ARGUMENT OF COUNSEL—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—APPEAL—RIGHT TO COMPLAIN—HARMLESS ERROR.

1. A new trial will not be granted because the judge, on objection made by defendant's counsel, did not stop the solicitor general in his concluding argument to the jury, when that officer had read to, and commented on, before the jury, a section of the Criminal Code, the provisions of which had no direct bearing on the case, when, on the interposition of the objection, the court considered the same, and ruled, in the hearing of the jury, that the law insisted on did not apply in the case.

2. If there was any error in the admission of the statement of the deceased subsequent to the difficulty that the accused hit him with a rock, as not being properly a part of the *res gestæ*, such error was rendered harmless by the statement made to the jury by the accused that he did strike the deceased with a rock.

3. There was no error in allowing the state to put in evidence a certain rock which was claimed to be the same that the defendant used in striking the deceased. While the evidence identifying this instrument as the one used was not conclusive, it was entirely legal, after preliminary evidence showing that the deceased was stricken with a rock, that the one offered was found at the place where the altercation occurred, that it had on it hair, presumptively attached by contact with the head of the deceased, to permit the same to go to the jury with such evidence, in order that the jury might determine whether it was in fact the rock with which the wound was inflicted.

4. Where, on a trial for murder, the jury is instructed in relation to the law of justifiable homicide more favorably to the accused than is warranted by the law, such charge, though error, is not one of which the accused can justly complain, and for the commission of such an error a new trial will not be awarded.

5. Where a new trial is sought on the ground of newly-discovered evidence, and it is apparent from the testimony adduced on the trial, as well as from that offered in support of the motion, that the witnesses who are relied on to furnish the new evidence were, within the knowledge of the accused, at the scene of the difficulty immediately prior to the altercation which resulted in the homicide, and some of them during and subsequent to the altercation, there was no error in overruling the motion. Especially is this true where a considerable portion of such newly-discovered evidence is merely cumulative, some of it tending to impeach a witness sworn at the trial, and other parts immaterial, and when it further appears that all the witnesses relied on to furnish such evidence were subpoenaed by the state, present at the trial, and some of them actually sworn as witnesses, but not called to testify.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. J. Kimsey, Judge.

Pink Dill was convicted of homicide, and he brings error. Affirmed.

J. J. Bowden and J. B. Jones, for plaintiff in error. Howard Thompson, Sol. Gen., W. A. Charters, Sol. Gen., and W. F. Findley, for the State.

LITTLE, J. 1. One of the grounds for the motion for new trial is that during the progress of the trial the solicitor general, in conclusion, read to the jury section 72 of the Penal Code, and insisted it was the law of the case. This was objected to by defendant's counsel. The court ruled, in the presence and hearing of the jury, that the provisions of the section were not applicable, but did not prevent the solicitor general from continuing his argument on the same lines. We fail to see what application this section of the Code had in the solution of the question as to the guilt of the plaintiff in error. As we understand the evidence in the record, the issue being tried was to be determined on other principles of law than those insisted on by the solicitor general in this part of his argument. However, we do not think that the judgment overruling the motion for new trial should be reversed because the court did not stop this part of the argument. When defendant's counsel made objection, the court ruled that the law insisted upon did not apply, and the jury should, and doubtless did, have regard, in determining the question of the guilt of the accused, for the rulings of the court, and the law given to them in charge. A careful review of the entire record fails to induce the belief that a presentation of the provisions of law contained in this section had any effect on the finding of the jury.

2. Another ground of the motion is predicated on the admission of the evidence of Mrs. Manus that the deceased (her husband) told her about the difficulty with the accused, that he ought to have fought him fair, and ought not to have hit him with a rock. This evidence was objected to, because it was not shown that the statement of the deceased was made as a dying declaration. It appears that the deceased and the accused had been engaged in a fight, in which the deceased had received a wound on the left side of the head, which fractured his skull; that no one was present at the time the wound was inflicted except the combatants. After the cessation of the fight, which occurred in the immediate vicinity of the dwelling house of the deceased, the latter, in company with his wife, went into his house; and the conversation in which the statement objected to was made occurred within a very short time after the fight. The judge, in admitting the evidence, ruled that it might go to the jury as a part of the res gestæ, the statement having been made but a few minutes after or during the fight. This evidence, we think, was properly admit-

ted as a declaration accompanying the altercation in which the wound was received. It was subsequently shown by the evidence that the wound which deceased received in the altercation was the cause of his death, and the explanation of how it was received was, in point of time, a part of the same transaction. Pen. Code, § 998; *Hall v. State*, 48 Ga. 607. What the law distrusts in the admission of such evidence is not after-speech, but after-thought. Here there was no fair opportunity for the will of the deceased to mold or color his statement. *Futch v. State*, 90 Ga. 478, 18 S. E. 102. But, even if the evidence was improperly admitted, such admission affords no ground for the reversal of the judgment overruling the motion for new trial. The defendant, in his statement, told the jury, in giving his account of the fight, that "I reached down, and got me a rock, and knocked him loose from me." So that the testimony that the defendant was stricken with a rock comes as well from the lips of the accused as from the deceased.

3. Another ground of the motion assigned error to the ruling of the court admitting in evidence a rock, claimed to be the instrument with which the accused inflicted the wound on the deceased. The wound was apparently small in size, and was not at first deemed to be a serious one. It could readily have been inflicted with a stone or rock. The evidence identifying this rock to be the instrument with which it was inflicted was circumstantial. The wife of the deceased, acting on information, in company with others, went, after his death, to the place where the difficulty occurred, and found the rock offered in evidence; and while it is true the testimony showed that there were many other rocks of similar character there, one witness testified that the particular rock in question had hair on it, which it was claimed attached to it from contact with the head of the deceased. Under this testimony it was proper to have permitted this rock to have gone in evidence; not as having been absolutely proven to be the instrument with which the wound was inflicted, but that the jury might consider the evidence relating to that question, and then determine the fact as to whether it was or was not the weapon used by the accused. The size, weight, and character of this stone, if it should be the instrument which was used, would have had a very important bearing on the verdict to be rendered by the jury. The evidence of identification was by no means complete, but it was sufficient to permit the stone to go to the jury, together with the evidence which sought to identify it as the weapon used.

4. Exception is taken to the refusal to grant a new trial because of the following charge of the court: "If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, or prevent a felony from being committed on his

person, the killing of the other was absolutely necessary," etc. This charge was clearly error, and mingled two entirely different principles of law without giving proper effect to either. Our Penal Code (section 70) declares that it is justifiable homicide where one kills another who manifestly intends or endeavors by violence or surprise to commit a felony on the person of the slayer. It is not essential, in order for such killing to be justifiable, that it was absolutely necessary to prevent the commission of the felony. It is sufficient, in order to make this defense available, if it appear that the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be committed, and that the party killing acted under the influence of these fears. Pen. Code, § 71. Nor is it true, as a matter of law, that in cases of mutual combat it is justifiable homicide for one who voluntarily entered into a fight with another to kill his antagonist to prevent any other felony than the taking of the life of the slayer. But, to be justified for a homicide following a mutual combat, it must appear that the danger to the slayer was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary. The principles of law which justify a killing in each of these two instances stand upon an entirely different footing. In the one case,—that following mutual combat,—the slayer, having been at fault, in that he voluntarily entered the fight which brought on the necessity, can only take the life of his antagonist when it is absolutely necessary to save his own life, and only then when the person killed was the assailant, or when the slayer had in good faith endeavored to decline any further struggle before he struck the mortal blow. A homicide to prevent the commission of a felony on the person of the slayer is a pure defense, unmixed with fault, so that it be done under circumstances sufficient to excite the fears of a reasonable man that the deceased was intending or endeavoring by violence or surprise to commit a felony of any grade on his person, habitation, or property. It does not, however, follow that, because it was erroneous, the charge complained of should work a new trial for the plaintiff in error. Certainly, if it were more favorable to him than a correct interpretation of the law would be, he cannot complain of its error. It was very proper for the court to have charged the jury the principles of law under which the accused would have been justifiable. The evidence tended to show that the accused and the deceased were engaged in a mutual combat at the time the mortal wound was inflicted. The rule of law, as we have before stated, is that, before he would be justified, the danger to him must have been so urgent and pressing at the time he killed the deceased that, in order to save his own life, the killing was absolutely necessary. This is the principle which the accused was entitled to have given in charge to the jury. What did

he get? The jury was told that the danger must have been so urgent and pressing at the time of the killing that, in order to save his own life, or prevent a felony from being committed on his person, the killing of the other was absolutely necessary, etc. A felony is any offense punished by law with death, or confinement in the penitentiary. Therefore, under this charge of the court, if the accused—notwithstanding he had voluntarily engaged in the combat—killed the deceased to prevent any injury to his person which would only amount to a felony, and less than the taking of his life, he would be justified. While the charge given was error, it qualified the rule of law in favor of the accused, and he neither can nor ought to be heard to complain. It is declared by section 1060 of the Penal Code that a new trial may be granted in all cases when the presiding judge may deliver an erroneous charge to the jury against the applicant (for new trial) on a material point. It will be observed that for an erroneous charge a new trial may only be awarded when such charge is against the applicant on a material point.

5. A further exception is made to the ruling of the judge in refusing to grant a new trial on the ground of newly-discovered evidence. To support this ground of the motion, three affidavits are presented: One from Jane Busha, to the effect that on Monday following the altercation in which the deceased received the mortal wound she was at the house of the deceased, and heard him say that he had his knife in his hand at the time of the fight with Dill, and aimed to kill Dill, but did not do it. Another, from G. W. Fisher, that on the night when the difficulty occurred he was at a house near that of the deceased, and, hearing the wife of the deceased scream, in company with the inmates of the house he went to where she was, and went home with her; that on the way Mrs. Manus said that she had had a great deal of trouble since she left her mother; that her husband was so overbearing; that during the fight with the accused she held onto her husband until he told her he would beat her brains out if she did not turn him loose; that she did so, and then went after help; that when he reached the house of the deceased the accused was standing in the yard, very quiet, while the deceased was in the house, cursing; that deponent induced the accused to leave; that afterwards he went into the house, saw the deceased, who was very drunk, and cursing; that the deceased several times said he had whipped the accused, and could do it again, and would whip him before the next night. He also declared in this affidavit that deceased was reputed to be a very violent man when drunk, and he had the reputation of invariably using his knife. The third affidavit was from John Watkins, who, after setting out certain bad language and threats used by the deceased to and of the accused on the Sunday afternoon immediately preceding the altercation between the parties, stated that he was about to leave,

and had gotten a few steps away, when deceased attacked the accused, and they had a fight; that it was dark; deponent could not see the fight, could only hear; that the deceased was the aggressor; accused seemed quiet and peaceable, while deceased was wild and uncontrollable; that the wife of the deceased tried to keep her husband away, but he tore loose from his wife, and followed the accused as he was trying to leave; from the voice of the deceased he could tell that he was the aggressor, and following the accused; that the deceased was a violent and dangerous man when drunk, and would use his knife on his most intimate friends, without provocation. The rule which authorizes a new trial to be granted for newly-discovered evidence is stated in section 1061 of the Penal Code in the following language: "A new trial may be granted in all cases, when any material evidence, not merely cumulative in its character but relating to new and material facts, shall be discovered by the applicant after the rendition of a verdict against him," etc. Interpreting the rule thus stated, this court has frequently declared that such applications are not favored, and are received with caution. *Berry v. State*, 10 Ga. 527; *Clark v. Carter*, 12 Ga. 500; *McAfee v. State*, 31 Ga. 411; *Polite v. State*, 78 Ga. 347. It must further appear that the evidence has come to the defendant's knowledge since the trial, and that it was not owing to the want of due diligence that he did not acquire it sooner. The affidavits containing the alleged newly-discovered testimony are accompanied with an affidavit of the plaintiff in error to the effect that he did not know of the evidence set out in the affidavits, and that the same could not have been discovered by the exercise of ordinary diligence; while the affidavit of his counsel simply states that they did not know of the evidence set out in such affidavits. The latter is defective in that it is not declared that they did not know of the evidence at the time of the trial. We, of course, give due credit to these affidavits, but it seems to us that with any sort of diligence the information contained in the affidavits could have been readily discovered. Each and every one of these witnesses was subpoenaed by the state, was in attendance on the court at the time of the trial, and two of them—*Busha* and *Watkins*—were sworn as witnesses, but not examined; and *Fisher* was subpoenaed, but not sworn as a witness. Further than this, it is shown by the testimony of *Mrs. William Manus*, who was the first witness introduced on the part of the state, that *Jane Busha* was at the house of the deceased, in company with his wife, the evening of the difficulty, and immediately preceding the same. The accused was obliged to know this fact, because, according to the testimony of this witness, she was there after the accused came to the house. The witness *Ayers* also testified that the witness *Jane Busha* was at the house of the deceased immediately preceding the diffi-

culty. As to the evidence of the affiant *Fisher*, there cannot be the slightest excuse why, if this testimony was wanted by the accused, he was not put on the stand to testify, because, when this affiant went to the house of the deceased, he found the accused there, and talked with him, and the affiant then said to the accused to leave there, that the deceased was drunk, and that under his importunities the accused left the place, knowing that the witness remained there, and further knowing that this witness was aware of the drunken condition of the deceased. It appears, also, from the affidavit of the witness *Watkins*, that the accused did know that this affiant was at the place at the time of the difficulty, because he says, "*Manus* and *Ayers* went to cursing, and in a little while *Pink Dill* came down to where we were, and also squatted down on the ground"; and this was the time at which the difficulty commenced between the deceased and the accused. So that the accused had absolute personal knowledge that these witnesses were at the place at the time the difficulty occurred, or just immediately preceding it, and with diligence of any character could have easily and readily ascertained about what they would swear. Besides, there is very little of the evidence contained in these affidavits which is original. That portion of the evidence relating to the violent character of the deceased is cumulative, as counsel for the accused at the trial cross-examined witnesses on this subject, and brought out the fact that the deceased had the character of being a violent man when drinking. It would be a waste of the time consumed in the trial of criminal cases if, after verdicts were rendered, they were set aside on such a showing. In the case of *Monroe v. State*, 5 Ga. 139, Judge Lumpkin, speaking for this court, said: "We fully subscribe to the doctrine that motions for new trial [on this ground] are to be received with caution, and for the reason assigned, because there are few cases tried, especially those involving life, in which something new may not be hunted up, and because it leads very much to perjury to admit new evidence after the party who has lost the verdict has had an opportunity of discovering his adversary's strength and his own weakness." The court did not err in overruling the motion for new trial on the ground of newly-discovered evidence. Judgment affirmed. All the justices concurring.

AUSTIN v. STATE.

(Supreme Court of Georgia. March 15, 1899.)

CRIMINAL LAW—APPEAL.

The evidence authorized the verdict. The charges complained of, when taken in connection with other parts of the general charge, were not erroneous, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

George Austin was convicted of crime, and brings error. Affirmed.

L. F. McDonald, Oscar Brown, and John R. Cooper, for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

PHILLIPS v. ROSENHEIM et al.
(Supreme Court of Georgia. March 15, 1899.)

APPEAL—REVIEW.

There being evidence sufficient to authorize the verdict, and the trial judge being satisfied therewith, his judgment refusing a new trial will not be reversed.

(Syllabus by the Court.)

Error from superior court, Emanuel county; R. L. Gamble, Judge.

Action between W. M. Phillips and Joseph Rosenheim and others. From the judgment, Phillips brings error. Affirmed.

Saffold & Mitchell, for plaintiff in error. Williams & Williams and F. R. Durden, for defendants in error.

PER CURIAM. Judgment affirmed.

EVANS et al. v. BEDDINGFIELD et al.
(Supreme Court of Georgia. March 15, 1899.)

MECHANIC'S LIEN—AFFIDAVIT—DEMURRER.

Where an affidavit for the foreclosure of a special mechanic's lien showed upon its face that the parties asserting such lien were not mechanics, but proprietors of a sawmill, and that the work they did was simply sawing timber into lumber, upon which they were seeking to enforce a lien as mechanics, it was not error to sustain a special demurrer to such affidavit on the ground that the plaintiffs had no lien as mechanics, but, if they had any lien at all, it was as proprietors of a sawmill.

(Syllabus by the Court.)

Error from superior court, Jefferson county; R. L. Gamble, Judge.

Action by Evans & Pennington against J. S. Beddingfield and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Hudson & Wright, for plaintiffs in error. Phillips & Phillips, for defendants in error.

LEWIS, J. It appears that Evans & Pennington, through their attorneys, made affidavit for the purpose of foreclosing a special mechanic's lien, asserting that they were mechanics, and as such made a contract with the defendants to saw and manufacture for them a certain quantity of lumber at a stated price; that they had fully complied with their contract by cutting from the land of the defendants the timber, and converting the same into lumber at their sawmill, and that they had re-

tained possession of the lumber, and thereby set up their lien thereon; and that the affidavit was made for the purpose of foreclosing their special mechanic's lien upon this property. A *fi. fa.* was issued by the judge of the county court accordingly, and levied upon the property mentioned in the affidavit. Thereupon the defendants filed a counter affidavit, and the case was appealed to the superior court. On the hearing there, the judge sustained a demurrer filed by the defendants to the affidavit of foreclosure. One ground of the demurrer was as follows: "The lien foreclosed is foreclosed as a mechanic's lien, when the facts stated in the affidavit show that, if plaintiffs have any lien at all, it must be as sawmill men, since the facts stated in their affidavit of foreclosure show they are not in any sense mechanics, but sawmill men."

Under the view we take of this case, it is unnecessary to consider the questions raised by the other grounds of the demurrer. We think the special ground just quoted clearly required the judgment of the court below, sustaining the demurrer and dismissing the affidavit of foreclosure. In the case of *Murphey v. McGough* (decided at the present term) 31 S. E. 757, this court held that, by virtue of section 2807 of the Civil Code, the proprietors of a sawmill can assert a lien on the product of their mill for work done on material furnished by others. This decision was put upon the ground that a sawmill is a similar establishment to a planingmill, and therefore comes within the terms of that section. It follows that the plaintiffs in the present case, under the facts alleged in their affidavit, might properly have asserted a lien upon the property in question as proprietors of a sawmill, but they could not set up any valid lien as mechanics. They were in no sense of the term "mechanics." Their lien existed by virtue of the fact that they were conducting a sawmill, and grew out of the contract they made, as the proprietors thereof, with the owners of the timber. Under the uniform rulings of this court, the summary remedies allowed by law for the enforcement of special liens of this character should be strictly construed, and an affidavit for the foreclosure of such a lien should clearly and unequivocally set forth its character. There is a provision of the Code giving mechanics a lien upon personal property for work done thereon in manufacturing or repairing the same, while there is another section of the Code giving a similar lien to the proprietors of planingmills and "other similar establishments," yet nowhere are they placed by the statute in the same class. The one has his lien by virtue of his occupation and work as a mechanic. The other has a lien growing out of an occupation and business relation entirely different. In the case of a mechanic, it is necessary that he should be an operative engaged in a business requiring some particular skill in doing the work by virtue of which the law creates in his favor a lien. On the other hand, the sawmill man has a lien by

virtue of his ownership of the machinery which converts timber into lumber, and not by virtue of any labor he may perform as a mechanic in operating the machinery. We do not say that the defect in the affidavit filed in the present case might not have been cured by amendment; but no amendment having been offered, and the affidavit being specially demurred to because of the fatal defect above pointed out, there certainly was no error in the judgment complained of. Judgment affirmed. All the justices concurring.

SHEPPARD v. ROBERSON et al.

(Supreme Court of Georgia. March 15, 1899.)

EXECUTION—AFFIDAVIT OF ILLEGALITY.

While the issuing of an execution within four days after the rendition of a judgment in a justice's court is a mere irregularity, which does not subject the execution to collateral attack, the defendant in *fi. fa.* may, under section 4736 of the Civil Code, take advantage of the same by an affidavit of illegality.

(Syllabus by the Court.)

Error from superior court, Washington county; R. L. Gamble, Judge.

Action by Charles H. Sheppard against Lumpkin Roberson and others. On levy of execution, defendants introduced affidavit of illegality. Judgment for defendants, and plaintiff brings error. Affirmed.

Evans & Evans, for plaintiff in error. Rawlings & Hardwick, for defendants in error.

LUMPKIN, P. J. This case presents for adjudication the single question dealt with in the headnote. Under the section of the Code there cited, it is the right of a defendant against whose property an execution "shall issue illegally" to arrest a levy of the same by filing an affidavit of illegality. It appears in the present case that an execution was issued from a justice's court against the defendants in error within four days after the rendition of the judgment upon which it was founded. It was subsequently levied on their property, and they interposed an affidavit of illegality, which the trial judge held was good. We agree to the correctness of this ruling. In *Mills Co. v. Lovinger*, 83 Ga. 563, 10 S. E. 230, this court held that such an execution issued by a justice's court was irregular, but not void, and, while for that reason the same could not be attacked collaterally by a claimant, it was open to a direct attack by the defendant in execution. In 8 Enc. Pl. & Prac. 344, it is said, "An execution issued prematurely, even if it be issued at a time when its issuance is prohibited by statute, while it may be remedied in a direct proceeding seasonably instituted, is not abso-

lutely void, but irregular, merely." Our statute plainly points out the way in which the defendant in execution may take advantage of such an irregularity, viz. by filing his affidavit of illegality, which was the course pursued in the present case. Judgment affirmed. All the justices concurring.

HANDY v. STATE.

(Supreme Court of Georgia. March 15, 1899.)

HOMICIDE—DYING DECLARATIONS.

There was sufficient evidence in this case tending to show that the deceased was conscious of his condition at the time he made the dying declarations offered in evidence to authorize the judge to admit them. The charge of the court fully and fairly covered the issues involved, and there was evidence to support the verdict.

(Syllabus by the Court.)

Error from superior court, Ware county; J. L. Sweat, Judge.

Will Handy was convicted of murder, and brings error. Affirmed.

L. A. Wilson, for plaintiff in error. John W. Bennett, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

HICKS v. STATE.

(Supreme Court of Georgia. March 15, 1899.)

INTOXICATING LIQUORS—ILLEGAL SALE—COMPLAINT.

1. Section 434 of the Penal Code, which provides that "if any person shall sell, or offer to sell, any spirituous, alcoholic or malt liquors, in any quantities, within a radius of three miles of any church or public or private school-house, he shall be guilty of a misdemeanor," defines a complete affirmative offense; and an accusation which charges one with the commission of such offense, and describes it in the language of that section, is sufficient, without negating an exception contained in a different section, viz. 435, to the effect that the provisions of the former section do not apply to an incorporated town or city. *Elkins v. State*, 13 Ga. 435; *Hester v. State*, 17 Ga. 133 (Syl. point 3); *Jordan v. State*, 22 Ga. 555; *Cook v. State*, 26 Ga. 605; *Williams v. State*, 15 S. E. 552, 89 Ga. 483.

2. It not being necessary to aver the negative of such exception, it follows that the state will not be required to prove it.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Manse Hicks was convicted of an illegal sale of liquors, and brings error. Affirmed.

T. E. Patterson, for plaintiff in error. J. D. Boyd and O. H. B. Bloodworth, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

BOWENS v. STATE.

(Supreme Court of Georgia. March 16, 1899.)

HOMICIDE—INDICTMENT—EVIDENCE—NEW TRIAL—IMPROPER REMARKS OF COUNSEL.

1. It is not essential to the validity of an indictment for murder that it should allege upon what portion of the body of the deceased the mortal wound was inflicted; nor, when the indictment charges that the homicide was committed by beating the deceased with a piece of iron, is it necessary to specifically set forth the size or weight of the same.

2. It follows that the location and character of a wound by which a death was caused, and the nature of the weapon by which such wound was inflicted, may be proved on the trial of an indictment for murder lacking in allegations of the kind above indicated.

3. It is not competent for a witness who had acted as the amanuensis of an illiterate person, in writing letters to the latter's wife, to testify that they were affectionate in character, and thereupon state his belief, derived from a knowledge of the contents of such letters, that the husband was passionately fond of the wife.

4. A trial judge, in passing upon grounds of a motion for a new trial, with a view to correcting and then verifying the same, may, without impropriety, act upon a written statement of facts prepared by the solicitor general, if satisfied that the same is true, and that it fully and fairly sets forth what occurred at the trial with reference to the matter in question.

5. A new trial will not be granted in a criminal case because of alleged error "in not cautioning and instructing the jury, and thereby counterbalancing the evil effect of" improper remarks made by the solicitor general in his argument before the jury; it not appearing that any request to charge on this subject was presented, or any ruling of the court invoked with reference thereto, and the remarks themselves having little or no bearing upon the merits of the case, but really amounting to no more than a refutation by the solicitor general of an attack upon his official integrity made by counsel for the accused.

6. That the court, in a trial for murder, allowed a witness for the state to testify: "I met [the accused] about a week before he killed his wife. He said he had been in jail thirty days, and had got out again,"—and then ruled out this testimony, did not have the effect of putting the general character of the accused in issue.

7. The evidence fully warranted the verdict. (Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Toby Bowens was convicted of murder, and brings error. Affirmed.

Fred T. Saussy, R. M. Lester, and Gordon Saussy, for plaintiff in error. W. W. Osborne, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. 1. The indictment in this case charged that the accused, Toby Bowens, murdered his wife, Rosa Bowens, by beating her with "a certain piece of iron." It did not allege upon what part of her person the mortal wound was inflicted, nor did it state the size or weight of the instrument used. There was a demurrer to the indictment, presenting several objections thereto. None of these, however, need be noticed, except those complaining that the indictment

was defective in failing to state the location of the wound, and to minutely describe the piece of iron with which it was inflicted. The court overruled the demurrer, and, in our opinion, rightly did so. The indictment certainly complied with the requirements of section 929 of the Penal Code. We are at a loss to perceive how the defendant was deprived of any substantial right in making his defense merely because the indictment was silent as to the location of the wound on the person of the deceased, and failed to allege the precise dimensions or weight of the weapon by which death was caused.

2. During the progress of the trial, objection was made to the testimony of a medical witness as to the location and character of the wound, and also to the testimony of another witness as to the description of the piece of iron. The grounds of objection were that the indictment did not "describe the location of the wound inflicted by the defendant upon deceased," and that "the piece of iron called a 'fish plate' was not sufficiently described in the indictment." The ruling above announced with reference to the demurrer covers the point now under consideration, and it follows, of course, that the court properly admitted the testimony of these witnesses.

3. The accused introduced as a witness H. S. Moore, and offered to prove by him the following: "I employed Toby Bowens to work for me at Tybee. He could not write, and I used to write his letters to his wife at his dictation. I remember their general contents. They were affectionate, and I believe he was passionately fond of her. I frequently inclosed money in those letters, at his request." The court rejected this testimony on the ground that it was not the best evidence of the contents of the letters. Obviously, the purpose of counsel for the accused was to show by the witness that, in his opinion derived from a knowledge of the contents of these letters, the accused was passionately fond of his wife. It requires no argument to show that the fact sought to be established could not be proven in this way. It would be very dangerous indeed to allow a witness to characterize a series of letters as being of a particular nature, and then proceed upon this to testify to his belief that they showed this, that, or the other state of feeling on the part of the author or person at whose dictation the letters were written. This would be allowing him to give his bare opinion, based on the contents of written instruments not disclosed, and of which, therefore, the jury could not intelligently judge.

4. One of the grounds of the motion for a new trial in this case complains that the court gave no instructions to the jury concerning alleged improper remarks made by the solicitor general in his argument before them. The judge declined to approve this ground without qualification, but certified that the truth of the matter therein referred to was embodied in a written statement pre-

pared by the solicitor general, which statement appears in the record. Counsel for the plaintiff in error made the point that the judge had no authority to base his action in the premises upon this statement. In our opinion, counsel's contention is trivial, and without a shadow of merit. It is the duty of a trial judge to pass upon the correctness of the recitals of fact contained in a motion for a new trial, and, in so doing, we see not the slightest impropriety in his adopting a statement prepared by the solicitor general, if the same is true, and fully and fairly sets forth what really occurred at the trial with reference to the matter in question. Dealing with the ground of the motion last referred to, as it comes to us, we are satisfied that it presents no sufficient cause for ordering a new trial. Counsel for the accused, in his argument before the jury, insisted that a man was in the room of Rosa Bowens at the time she was killed by her husband, and asserted that the failure of the solicitor general to produce this man as a witness manifested a disposition on the part of the state to conceal testimony. The state's officer, in his argument, replied to this imputation by disclaiming any knowledge of the existence of such a witness, and added that, if he had known there was such a witness, it would not only have been his duty, but his pleasure, to have the witness at the trial. Thus it will be seen that counsel for the accused attacked the official conduct of the solicitor general, and, in effect, charged him with concealing testimony. It was but natural for the latter to resent an assault upon him of this kind. In so doing, however, he undertook to state facts not proved by any witness,—a thing which is never permissible. Still, we do not feel called upon to reverse the judgment. The only assignment of error relating to this occurrence is that the court failed to caution the jury not to be influenced by the improper statements made by the solicitor general. It does not appear that any request to charge on this subject was presented to the judge, or any ruling of any kind invoked with reference to this matter. This court has frequently held that, where counsel make unauthorized and improper statements in their arguments before juries, opposing counsel should call attention to the same, and either move for a mistrial, or request the court to instruct the jury to disregard such statements. As instances in point, see *Young v. State*, 65 Ga. 528; *Ozburn v. State*, 37 Ga. 182, 13 S. E. 247; *Edwards v. State*, 90 Ga. 143, 15 S. E. 744; *Croom v. State*, 90 Ga. 430, 17 S. E. 1003; *Railroad Co. v. Johnson*, 90 Ga. 501, 16 S. E. 49; *Farmer v. State*, 91 Ga. 728, 18 S. E. 987; *Von Pollnitz v. State*, 92 Ga. 16, 18 S. E. 301; *Railway Co. v. Glover*, 92 Ga. 133, 18 S. E. 406; *Robinson v. Stevens*, 93 Ga. 539, 21 S. E. 96; *Morris v. Maddox*, 97 Ga. 581, 25 S. E. 487; *Lumber Co. v. Coody*, 99 Ga. 779, 27 S. E. 169; *Kearney v. State*, 101

Ga. 804, 805, 29 S. E. 127; *Smalls v. State*, 102 Ga. 35, 29 S. E. 153. In this case nothing of the sort was done, but, after taking the chances of an acquittal, counsel for the accused now complain that the court neglected to give, on its own motion, suitable instructions calculated to undo whatever of wrong may have been occasioned to the accused by the objectionable remarks of the state's officer. In this connection we may add that these remarks had little or no bearing upon the real merits of the case. It seems to have been a matter of dispute whether or not a man was in the room of Rosa Bowens when she was killed. The evidence indicates more strongly than otherwise that no such person was then and there present. Counsel for the accused, upon the assumption that there was, reflected seriously upon the official integrity of the solicitor general, who earnestly denied the imputation thus made. So at last what occurred amounted to but little more than a personal altercation between opposing counsel, and left the jury practically free to draw their own inferences from the facts actually proved in the case.

6. Another ground of the motion complains that the court, in effect, permitted the state to put in issue the general character of the accused. It is urged that this was done by allowing a witness to testify that he met the accused about a week before he "killed his wife," and that "he said he had been in jail thirty days, and had got out again." As it appears that this testimony was ruled out, we are at a loss to perceive how what occurred with reference thereto put the general character of the accused in issue.

7. The evidence against the accused, if credible, made out a case of wanton and cruel murder. From this evidence it appears that, without a shadow of provocation, he brutally beat his wife to death with a heavy piece of iron. The jury believed this evidence, and returned a verdict of guilty. We feel constrained to allow it to stand, for the record discloses no reason which would even remotely justify this court in ordering a new trial. Judgment affirmed. All the justices concurring.

COLLINS et al. v. MOBILE FRUIT & TRADING CO.

(Supreme Court of Georgia. March 17, 1899.)

APPEAL—REVIEW—DAMAGES.

This case presents no question of law, and no error is alleged, except the refusal of the court below to grant a new trial. The evidence, though conflicting, fully warranted the verdict, and the trial judge was satisfied with the same. In view of the long-established and unvarying rule applicable in such cases, there was no good reason for anticipating a reversal of the judgment below, and consequently the case must have been brought to this court for the purpose of delay only. Accordingly, on motion of counsel for defendant in error, 10 per cent. damages are awarded in its favor against

the plaintiffs in error. In future, this court will, in similar cases, award damages for delay, whether asked for or not.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by the Mobile Fruit & Trading Company against Collins, Grayson & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Charlton, Mackall & Anderson, for plaintiffs in error. W. W. Gordon, Jr., for defendant in error.

PER CURIAM. Judgment affirmed, with damages.

FREYERMUTH v. SOUTH-BOUND R. CO.
(Supreme Court of Georgia. March 17, 1899.)

ACCIDENTAL INJURY TO EMPLOYE—EVIDENCE—
TRIAL.

1. The evidence introduced in behalf of the plaintiff showing that his injuries were occasioned either by his own negligence or as the result of a pure accident, there was no error in granting a nonsuit.

2. Where a plaintiff had testified fully and at length as to the manner in which he was injured on a particular occasion, there was no abuse of discretion by the court, after announcing that a nonsuit would be granted, in refusing to allow the plaintiff to be reintroduced as a witness, "for the purpose of making clear his testimony in regard to the way" in which the injury was caused; it not appearing to what additional facts, if any, the plaintiff would have testified, had he been permitted to again take the stand.

(Syllabus by the Court.)

Error from superior court, Effingham county; R. Falligant, Judge.

Action by M. K. Freyermuth against the South-Bound Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. B. Strange and P. W. Meldrim, for plaintiff in error. Denmark, Adams & Freeman, for defendant in error.

LUMPKIN, P. J. 1. In the present case the granting of a nonsuit is under review. The plaintiff below, who here complains that the trial judge erred in not submitting his case to the jury upon the evidence introduced in his behalf, was an employé of the South-Bound Railroad Company. He was injured while riding upon a hand car, the immediate cause of the injury being the falling from the car of a large crowbar, which, as it descended, caught the plaintiff's foot, and precipitated him upon the rails in front of the car, which ran over him and crushed him. It appears that the plaintiff was one of a number of hands whose business it was to keep the railway track in order. He testified that it was his duty to look after the tools of the company, including a number of crowbars, and see that they were properly placed upon the hand car, when moved from one place to

another. He did, it is true, by making other statements in this connection, undertake to avoid the consequences to his case of what has just been recited, but it was certainly not unfair to him for the court to base its action upon what he himself asserted was true in giving his account of the manner in which he was hurt. Railroad Co. v. Evans, 96 Ga. 481, 485, 486, 23 S. E. 494. On the occasion under consideration, it seems that he did not himself place the crowbars upon the car, but that this was done by another employé. Some of the testimony tended to show that the crowbar which fell was put upon the car in the usual manner; that it had many times been carried in this identical way without falling from the car; and that there was no reason to apprehend that it would fall on this particular occasion. Other testimony tended to show that the crowbar was not properly placed upon the car, but that one of its ends projected too far towards the front, so that, after some jolting resulting from the movement of the car, it toppled over and fell. In either view of the matter, however, we agree with the trial judge that the plaintiff was not entitled to recover. If the crowbar was improperly placed upon the hand car, it was the plaintiff's fault; for it was his duty to look after this very matter. If properly loaded upon the car, then it seems that the catastrophe was the result of a pure accident,—a thing entirely unexpected, and not to be anticipated in the usual course of events.

2. After the plaintiff had closed his case, the motion for a nonsuit had been argued, and the judge had announced that a nonsuit would be granted, plaintiff's counsel moved to reintroduce him as a witness, but the court denied this motion. As to this point, the bill of exceptions recites that the court was asked to allow the plaintiff to again take the stand, "for the purpose of making clear his testimony in regard to the way in which the bars were placed upon the car." We cannot gather from the language quoted how it was proposed to make clear, in this manner, the plaintiff's right to recover. The bill of exceptions does not inform us what additional facts were sought to be elicited and would have been brought out if the plaintiff had been permitted to add to his testimony. If counsel's purpose was to reintroduce the plaintiff, in order to make clear that the crowbars were negligently and improperly loaded upon the car, the ruling complained of did not operate to his prejudice; for the effect of such evidence would be merely to emphasize and render more conclusive an inference that the accident was due to the fault of the plaintiff in not discharging the duty he owed to the company of seeing that these tools were placed upon the car in the proper manner. Moreover, it appears that the plaintiff was fully, tediously, and at great length examined and cross-examined as to the entire transaction and every material fact and circumstance connected with it. It is therefore

difficult to conceive how he could have made more lucid details which he had already several times recounted. Certainly there was no abuse of discretion in refusing to allow him to testify further in the case. Judgment affirmed. All the justices concurring.

WELLS et al. v. MAYOR, ETC., OF CITY OF SAVANNAH et al.

(Supreme Court of Georgia. March 17, 1890.)

MUNICIPAL CORPORATIONS—TAXATION—EXEMPTION—CONTRACTS.

1. Even if the municipal authorities of any city in this state had, prior to the constitution of 1877, the power, by contract with any of its citizens, to perpetually exempt property from taxation, before a claim to such an exemption could be seriously entertained the existence of such a contract would have to be clearly and specifically shown. (a) The record in this case fails to disclose any contract between the city of Savannah and the plaintiffs, or any of their predecessors in title to the land claimed to be exempt from municipal taxation. Such a contract will not be implied merely from the fact that the marshal of the city customarily announced, when lands of like character were exposed for public sale, that the same were not subject to city taxes, nor from the fact that it was generally understood by the public that such property would be so exempt, nor from the further fact that for many years the city never undertook to exercise over this class of property its powers of taxation.

2. All other questions presented by the record in this case were specifically adjudicated by this court in its decision therein, as reported in 13 S. E. 442, 87 Ga. 397.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. F. Alligant, Judge.

Action by David Wells and others against the mayor and aldermen of the city of Savannah and others. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

Saussy & Saussy, for plaintiffs in error. Saml. B. Adams, for defendants in error.

LEWIS, J. Over a hundred years ago, the municipal authorities of the city of Savannah, by ordinances duly passed, resolved to expose to the public sale certain lands, known as "Commons," then owned by the city. One scheme provided for in these ordinances was to offer the lands for sale on what was known as the "ground-rent" plan. The purchaser who elected to buy upon this plan was to pay quarterly a stipulated amount as rent for the land sold to him, and as long as such payments were continued he was to have the right of peaceful occupation and use of the premises forever. It is this class of property, now held by the successors in title to the original purchasers from the city, that the plaintiffs claim to be exempt from municipal taxation. There are two controlling questions presented by the record: First, have the plaintiffs such an interest in the title to the property as will subject them to the payment of taxes thereon? Second, has

this property ever been perpetually exempted from the assessment of municipal taxes by virtue of any contract between the city and the original purchasers therefrom?

The first of these questions was specifically adjudicated adversely to the plaintiffs in error when this case was before this court at its March term, 1891. See 87 Ga. 397, 13 S. E. 442. We think the decision then rendered also disposed of the second question above mentioned, it being necessarily involved in the case; but, inasmuch as this court did not enter upon a specific discussion as to the contract relations which the plaintiffs claim exist between themselves and the city of Savannah, and as their learned counsel, in his argument before us, insisted that at the last hearing of the case in the court below much additional evidence was introduced which strengthened his position that the city had, by express contract, exempted this property from taxation, we will briefly present the views which we entertain concerning this issue.

We are aware of no act passed by the state legislature that has ever conferred upon the city of Savannah the power to exempt from taxation any property owned by its citizens. There is respectable and weighty authority to the effect that a legislative body, in the exercise of the sovereign powers of a state, has no inherent right, upon any consideration, to enact a law perpetually exempting any particular species of property from the burden of taxation. Some of the decisions to which we refer are based upon the reasoning that, from the very nature of legislative bodies, one legislature cannot fix a limit to the power of another and subsequent one. Other authorities have treated such exemptions by legislative enactment as privileges or bounties only, revocable at the will of the legislature. It is unimportant, however, to go into a consideration of the many judicial expressions of opinion to be found upon this subject, among which may be cited the remarks of McCay, J., in *State v. Georgia Railroad & Banking Co.*, 54 Ga. 424, and the discussion of the question by Judge Bleckley in *Atlantic & G. R. Co. v. State*, 55 Ga. 312. The federal supreme court seems thoroughly committed to the proposition that a state is bound by an act of its legislature which, for a good or valuable consideration, perpetually exempts any particular class of property from taxation. In the case of *Murray v. Charleston*, 96 U. S. 432, it was held that the clause in the constitution of the United States providing that "no state shall pass a law impairing the obligation of contracts" is a limitation upon the taxing power of a state, as well as upon all its legislation, whatever form it may assume." See, also, *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665; *State v. East Saginaw*, 13 Wall. 376; *State v. Wilson*, 7 Cranch, 164; *Cooley, Tax'n*, p. 60. In the view we take of this case, we find it unnecessary to pass

upon the power of a state government or of its subordinate branches to enact such legislation or make such contracts with its citizens. We think there can be no sort of question that, when such an exemption is claimed by any citizen of the government, it is incumbent upon him to clearly show the existence of an express contract, unambiguous and definite, in creating by its terms the exemption claimed. Such a contract cannot be implied, and if there is any doubt concerning its existence, or the exact and true meaning of its stipulations, the doubt ought always to be resolved in favor of the government upon which has been conferred the right to exercise this sovereign power. In this connection, we quote the following pertinent extract from the opinion of Mr. Justice Swayne in the case of *Tucker v. Ferguson*, 22 Wall. 575, as laying down the correct rule upon this subject: "The taxing power is vital to the functions of government. It helps to sustain the social compact, and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden; but the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all." Was such a contract shown in the present case? With the view of determining whether or not there was, we have naturally looked to the official action taken by the governing body of the city, either in its ordinances or resolutions providing for the plan upon which the sales were to be made, and the consequences and effect thereof, or in its deed of conveyance to the purchaser. Upon examining the various ordinances set out in the record, we fail to find any reference whatever to the matter of exempting this property from taxation; and, instead of finding any stipulation to that effect in the form of deed invariably made by the city to the various purchasers, there appears a clause directly negating the idea that the city ever intended to grant a perpetual exemption of this property from the burden of taxation. In each instance, it was recited in the deed given to the purchaser that the conveyance of the city was made, and the rights of the purchaser thereunder were conferred, "subject only to such assessments and burthens as shall be in common with other lot holders in the said city." The term "assessment" is often used as a synonym of "taxes." Indeed, one of the definitions of this term given by Webster is, "a tax." But, even if this word, as used in the deed, does not necessarily refer to taxation, the word "burthen," which is also therein

employed, is certainly sufficiently comprehensive to include municipal taxes. Taken all together, the language adopted is clearly broad enough to embrace every burden then existing or which might thereafter be lawfully imposed upon other landowners in the city. The deed was signed by both parties. Here, then, is a specific written agreement, made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and, of course, by his assigns) subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.

Plaintiffs in error contend, however, that the contract they insist upon is evidenced sufficiently by the conduct of the municipal officers at the time that the sales by the city took place. It was shown that, when lots were put up for sale, the city marshal publicly announced that they would not be subject to city taxes; that this was generally understood by the city at large; and that, for nearly a hundred years after these sales first began, the municipal authorities failed to tax the lands, and in various ordinances afterwards passed these ground-rent lands were exempted. The effect of these ordinances was merely to grant an exemption from taxes for the particular years to which they related. Mere nonuser by a government of its power to levy a tax, it matters not for how long it continued, can never be construed into a forfeiture of the power. This question was directly passed upon by this court when the case was here before. As to this point, Chief Justice Bleckley said: "Whatever the expectation of purchasers, or the unbroken practice of the city hitherto may have been, the mandate of the constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now." There is an absolute want of any testimony in the record showing that the mayor and aldermen of the city of Savannah, by ordinance, resolution, or official action of any sort, ever authorized the marshal to make the public announcement above referred to in offering for sale the city's property. The effect to create a contract by such proof is simply an attempt to ingraft upon a written instrument by parol a stipulation contrary to the terms of the writing itself. After the oral announcement made by the marshal, the city made its deed to the purchaser, the terms of which expressly negated the assurance given by that officer to the public. Under no rule of law could such parol evidence be allowed to vary the terms of a written contract. Besides all this, we fail to find in the record any testimony showing that these particular plaintiffs, or any of their predecessors in title, bought any of the

lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the marshal made such an announcement as that above referred to. The evidence simply goes to the extent of showing what was his custom in this particular, and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city's conveyance of the lots purchased by them. Our conclusion, therefore, is that, even if the city of Savannah had the power claimed for it, the record utterly fails to make it appear that its authorities ever attempted to exercise such power. Judgment affirmed. All the justices concurring.

MITCHELL v. CAROLINA CENT. R. CO.
(Supreme Court of North Carolina, March 21, 1899.)

TRIAL — INSTRUCTIONS — RAILROADS — CARRYING
LIVE STOCK—EXCEPTIONS FROM RISK—
BURDEN OF PROOF.

1. A question of fact that is not admitted should be submitted to the jury, though there is uncontradicted testimony as to its existence.

2. A shipper of live stock by rail signing a bill of lading excepting damages not resulting from the railroad company's negligence from the risk, does not have the burden of proving that a loss in progress of transportation occurred by the company's negligence, where he had no means of ascertaining how the loss occurred.

3. In an action for a loss of live stock shipped, a failure to charge that the company has the burden of showing that the loss occurred under circumstances bringing it within an exception of the bill of lading is error, though the shipper made no request for such an instruction.

Faircloth, C. J., dissenting.

Appeal from superior court, Craven county; Norwood, Judge.

Action by T. J. Mitchell against the Carolina Central Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

Simmons, Pou & Ward, for appellee.

DOUGLAS, J. We cannot assent to the proposition that in cases of limited liability the burden of proof rests upon the plaintiff to show primarily the negligence of the defendant. In the case before us the plaintiff brought suit for the value of a mule which was shipped to him from Nashville, Tenn., in a car with other horses and mules. When the car reached Newbern the mule was missing. The plaintiff has no means of knowing what became of it, except information furnished by the defendant, who says that it died en route. This may be true, and we presume it is, from the testimony for the defendant; but it has neither been admitted by the plaintiff nor found as a fact by the jury. Uncontradicted testimony is never equivalent to an admitted fact, as the

jury may not believe it; and this is especially so where the alleged facts are peculiarly within the knowledge of the witness. Here, the plaintiff simply knew that the defendant received his mule under a contract to deliver it to him at Newbern, which it has failed to do. He simply asks for his mule or its value, neither of which does he obtain. The defendant says that the shippers, implied agents of the plaintiff, signed a bill of lading releasing the defendant from all risk of loss or damage from any cause whatever not resulting from the negligence of its agents, and that the burden rests upon the plaintiff of proving affirmatively, not only the shipment and the loss, but that the loss occurred through the negligence of the defendant, when in fact he neither has, nor could have, any knowledge as to how it occurred. It is true the defendant introduced testimony tending to show the death of the mule from natural causes, but it did so purely as a matter of supererogation, with the burden of proving nothing. If its contentions are correct, it need not have said a word. It made no difference how the loss occurred, provided the plaintiff could not prove that it occurred through its negligence. The entire car load of stock might have been safely stolen through the gross negligence or actual connivance of its agents, if done without the knowledge of the plaintiff, or of any one by whom he might prove it. If this is the law, what protection is there for the shipper? If a resident of Raleigh ships freight to New York under a so-called "released" bill of lading, he cannot be expected to go with it and watch it day and night. And yet, if he did not, how could he know the facts connected with its possible loss? The carrier could stand upon the word "released," and, without one word of explanation as to the nondelivery of the freight, simply say to the plaintiff, "Prove your case." It is too well settled to need any citation of authority that common carriers cannot exempt themselves by contract from the results of their own negligence. This principle is recognized in the bill of lading before us, and yet we are asked to establish a rule of evidence that will destroy its vital principle and subvert its beneficial purposes. It makes no difference to the plaintiff whether you deny his right or simply deprive him of the only remedy by which it can be obtained, and it is equally beneficial to the defendant whether you relieve it from all liability or only place it beyond the possibility of proof. It seems to us that the error lies in a misapprehension of the true nature of the bill of lading. It is not an agreement primarily intended to release the common-law liability of the carrier, but, as said in *Pollard v. Vinton*, 105 U. S. 7: "It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter, it is a contract to carry safely and deliver." The safe carriage and delivery are the essential objects of the contract, and it is the duty of every party to a contract to comply with his agreement, or to show such facts

as will excuse his nonperformance. This is especially so where the contract is made in the performance of a public duty. It is the duty of a common carrier, irrespective of contract, but subject to reasonable regulations, to accept, safely carry, and deliver all goods intrusted to it. If the goods are lost, it must show what became of them; and if they are damaged, it must prove affirmatively that they were damaged in some way that would relieve it from responsibility. The plaintiff has a *prima facie* case when he shows the receipt of goods by the carrier, and their nondelivery, or delivery in a damaged condition. Any further defense is in the nature of confession and avoidance. If the defendant pleads exemption by virtue of a special contract, it must prove the contract, and show that the loss or damage comes within some one of the exceptions. It must appear to the court, as matter of law, that the contract is reasonable in all of its essential features, and that the exemptions are not contrary to public policy. All such exemptions, being in derogation of common law, should be strictly construed. So far, I think the principles herein laid down are properly deducible from all the authorities; but we now come to an irreconcilable conflict of decisions as to the subsequent burden of proof. The courts of Alabama, Georgia, Iowa, Minnesota, Mississippi, Ohio, South Carolina, Texas, Tennessee, and West Virginia, and perhaps one or two others, hold that the burden still rests upon the carrier of showing that the loss was not due to its own negligence. This view is clearly laid down in an able opinion by Judge Cooper in *Railroad Co. v. Moss*, 60 Miss. 1003, where he says: "To us it also seems that public policy forbids the further relaxation of the principles of the common law governing common carriers. It is no uncommon thing in this age to see under one management a line of railroads extending from the lakes of the North to the Gulf of Mexico, or from the Atlantic to the Pacific Ocean. To hold that a shipper in New York or Chicago shall be required to establish the negligence of the carrier by proof of the circumstances of a fire in California or New Orleans would, in a great number of cases, result in a verdict for the carrier, even though there was in fact negligence. In a large majority of cases the facts rest exclusively in the knowledge of the employes, whose names and places of residence are unknown to the shipper. In many cases the witnesses are the employes whose negligence has caused the loss, and, if known to the shipper, it may be dangerous for him to rest his case upon their testimony, since the natural impulses of mankind would sway them, in narrating the circumstances, to palliate their fault by stating the occurrence in the most favorable light to themselves. All the authorities hold that it devolves upon the carrier to show the loss to have occurred by the excepted cause. In doing this it will add but little to his burden to show all the attending circumstances; and that the burden rests upon him to do so, and disprove his own negligence, we think arises from the

terms of the contract, from the character of his occupation, and from the rule governing the production of evidence, which requires the facts to be proved by that party in whose knowledge they peculiarly lie."

This opinion is especially interesting because it tersely reviews the authorities on both sides of the question, which is the single point in the case. Bishop in his *Law of Evidence* (14th Ed. § 219) adopts the same view, in the following words: "And if the acceptance was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care." It would seem from the recent work of Elliott on Railroads that this has now become the settled rule of a majority of the states, as the author says in section 1548, on page 2403: "There is some conflict among the authorities as to the burden of proof in such cases; but the prevailing rule, where the owner or his agent does not go with the stock, is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence." This rule strongly commends itself to our better judgment, and receives our approval, especially in view of the universal acceptance of the principle that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof. 5 Am. & Eng. Enc. Law (2d Ed.) p. 41; Best, Ev. § 274; 1 Greenl. Ev. § 79; Starkie, Ev. 589; Rice, Ev. § 77; Selma, R. & D. R. Co. v. U. S., 139 U. S. 560, 567, 11 Sup. Ct. 638; State v. McDuffie, 107 N. C. 885, 888, 12 S. E. 83; Govan v. Cushing, 111 N. C. 458, 461, 16 S. E. 619. On the other hand, the federal courts, with those of a large number of the states, hold that, under a bill of lading containing a contract of limited liability, the burden rests upon the plaintiff of proving that the loss or damage was caused by the negligence of the defendant carrier; but we think that an examination of the cases will show that the true principle of the rule in those jurisdictions is that the burden of proving the negligence of the carrier does not primarily rest upon the plaintiff, but is shifted to him upon the carrier proving that the loss fell within one of the excepted causes. That the carrier must prove that the injury complained of came within one of the special exemptions created by law or contract is admitted by all the authorities. By the act of 1851, congress relieved the owners of sea-going vessels from all responsibility from loss by fire unless caused by their own design or neglect, and from responsibility for loss of money and other valuables named unless notified of their character and value, with certain other limitations of liability not arising from their own negligence. These limitations are substantially brought forward in chapter 6 of title 48 of

the Revised Statutes, subsequently amended by the act of February 13, 1893. Several of the states enacted similar legislation; and the same general principles are held to apply to common carriers on land. In addition to this, it became the custom of shipowners to protect themselves by contract from risks arising from the perils of navigation. Within reasonable restrictions, these contractual limitations have been held to be valid; and it is upon these two classes of exemptions that the decisions generally rest. Those referring to the proper or inherent vice of animals do not appear to have any bearing upon the case at bar in its present status. It must be admitted that among the different states adhering to the same general rule there is much diversity of application, as well as uncertainty of definition. This may come in some degree from the unfortunate tendency of some otherwise able judges to formulate general principles upon special cases, unmindful of the limitations or modifications that may necessarily arise from the varying facts of other cases. Some of these definitions, like our old state grants, where each grantee furnished his own survey, cover much more than was originally intended, and lap over upon other essential principles. Those unlucky rights which lie within the lappage are necessarily of uncertain tenure. Of course, perfection of definition is impossible to human foresight; and, as human motives and resulting action do not run in parallel lines, there is frequently an ultimate point of conflict between essential principles themselves. There the superior principles must prevail; such, for instance, as depend upon public policy or natural right. The great principle of legal construction was never better stated than by Lord Mansfield in *Rex v. Bembridge*, 3 Doug. 332, where he says: "The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases." It is impracticable to review any considerable number of cases bearing upon that at bar, but a few citations from the supreme court of the United States, which sustains the rule most favorable to the carrier, will sufficiently illustrate this view.

In *The Mohler*, 21 Wall. 230, 233, the court says: "It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that, therefore, the carrier was excused from a delivery of the wheat. The burden of proof lies upon the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which he law has annexed to his employment." In *Clark v. Barnwell*, 12 How. 272, the court held (quoting from the syllabus) that: "Where goods are shipped, and the usual bill of lading given, 'promising to deliver them in good order, the dangers of the sea excepted,' and they are found to be damaged, the onus probandi is upon the owners of the vessel to show that the injury was occasioned by one of

the excepted causes. But, though the injury may have been occasioned by one of the excepted causes, yet the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; but the onus probandi then becomes shifted upon the shipper to show the negligence." The same rule is sustained in *Rich v. Lambert*, 12 How. 347; *The Niagara v. Cordes*, Id. 7; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597. In *Transportation Co. v. Downer*, 11 Wall. 129, the court says: "On the trial the plaintiff made out a prima facie case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee * * * in a ruined condition, and the consequent damages sustained. The company met this prima facie case by showing that the loss was occasioned by one of the dangers of lake navigation." In *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, the court says, on page 212, 153 U. S., and page 828, 14 Sup. Ct.: "In any aspect, the real point in controversy is, did the respondents so far sustain the burden of proof which was upon them?" etc. It further held that, even where the loss was caused by the dangers of the sea, the burden was still upon the owners of the vessel to show that it was seaworthy. In all these cases of limited liability the rule is invariably recognized that proof of shipment and injury makes a prima facie case for the plaintiff, and that then the burden is always upon the carrier to show that the circumstances of the loss bring it within the excepted causes. When the carrier has shown this by a preponderance of testimony, then, and then only, does the burden shift to the shipper of showing that the loss, even if within the excepted classes, might have been avoided by diligence and care upon the part of the carrier. Therefore, under the most stringent rule, the plaintiff in the case at bar is entitled to a new trial, as the defendant did not prove to the satisfaction of the jury, by whom alone the fact could be found, that the circumstances of the loss brought it within the exception. The mere proof or admission of the terms of the bill of lading containing the stipulated exceptions is no proof that the loss comes within those exceptions. The necessary issues do not appear to have been submitted. Ordinarily parties cannot complain of the issues, in the absence of a special tender and exception; but this court has held in *Tucker v. Satterthwaite*, 120 N. C. 118, 21 S. E. 45, that the court below must, of its own motion, with or without suggestion, submit such issues as are necessary to settle the material controversies arising on the pleadings. If the issue as to the negligence of the defendant was intended to raise the question whether the loss came within the exception, then the burden of that issue rested upon the defendant in order to rebut the prima facie case already made

out by the plaintiff. The defendant cannot be permitted, by the mere form of an issue, or a "broadside" stipulation of exemption, to change the rules of evidence, and practically destroy essential principles firmly resting upon public policy. At that stage of the proceedings the burden was admittedly upon the defendant. Has it been ever lifted or shifted? If so, we cannot see when or where.

It is contended for the defendant that it is exempted by this contract from all loss or damage not arising from its own negligence, and that therefore it cannot be required to prove the loss within the excepted classes without requiring it in effect to prove its own want of negligence. Even so. If, standing with the burden of proof upon it, it claims a total exemption, it must show every fact necessary to prove that exemption. It is not placed in any better condition than the ordinary defendant, merely by the unreasonable extent of its stipulations. The bill of lading, covering five printed pages, is full of the most stringent stipulations, all in favor of the carrier, among which is the broadside exemption from all risk "of loss or damage from any cause or thing not resulting from the negligence of the agents of said party of the first part." It then provides that, "In case the said party of the first part (the carrier) shall furnish laborers to assist in loading and unloading said stock, they shall be subject to the orders, and deemed employes, of the said party of the second part while so assisting." It gravely winds up by requiring the shipper, who has shipped nothing but horses and mules, to sign a written agreement that turkeys are reasonably worth only 12½ cents apiece in Nashville. The "reasonableness" of such a bill of lading may well be questioned. These extraordinary stipulations strongly recall the pertinency of Mr. Justice Bradley's language in delivering the opinion of the court in *Railroad Co. v. Lockwood*, 17 Wall. 357, where he says, on page 378: "It is a favorite argument, in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. * * * Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation. The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents,—often, indeed, without knowing what the one or the other contains.

In most cases he has no alternative but to do this or abandon his business. In the present case, for example, the freight agent of the company, testified that, though they made 40 or 50 contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay the tariff rates. * * * Of course, no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected. If the customer had any real freedom of choice, if he had a reasonable and practical alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness."

The action of the court below seems to have been based on the opinion of this court in *Smith v. Railroad Co.*, 64 N. C. 235, which, on careful examination, does not seem to decide the question before us. The general principles were not elaborated, and the opinion was evidently based entirely on the particular facts of the case. There, the exemption claimed was not general, but special, being as to fire only. The contract was proved, and it was shown that the cotton was destroyed by fire. This brought the loss within the exception. What the court evidently intended to say was that then the burden of proving negligence rested on the plaintiff. The opinion cites but two authorities, namely, 1 Pars. Cont. 1, 704 (perhaps meaning volume 1, p. 704) and *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. In *New Jersey Steam Nav. Co. v. Merchants' Bank*, the question of the burden of the proof of negligence arose only incidentally, but the court

clearly recognized the prior burden of the carrier, on page 383, where it says: "The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties." For the same reasons, the case of *Selby v. Railroad Co.*, 113 N. C. 588, 18 S. E. 88, does not conflict with the principles now discussed. The only case that we can find in our reports that seems to settle the point now in question, and to settle it apparently in favor of the plaintiff, is *Manufacturing Co. v. Ohio R. & C. Ry. Co.*, 121 N. C. 514, 28 S. E. 474, where this court has laid down the rule, without dissent, that "among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption." We think that our view of the common law is expressly recognized in chapter 46 of the Laws of 1897, entitled "An act for the better protection of the traveling public," which reads as follows: "Section 1. That all railroad and steamboat companies doing business in this state shall be required to handle with care all baggage and freight placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight. While the same is under their control, and upon proof of injury to baggage or freight in the possession or under the control of any such company, it shall be presumed that the injury was caused by the negligent acts of said company's agents or servants." While its caption does not fully indicate the scope of the act, we think the words italicized by us are plain and unequivocal in their meaning and effect. For the reasons given above, a new trial should be ordered.

FAIRCLOTH, C. J. (dissenting). The plaintiff shipped live stock from Tennessee to Newbern, N. C., over several railroad lines, including the defendant's line. One mule was found dead in the car. The plaintiff sues for its value, and alleges negligence as the cause of loss of the mule. The plaintiff had a right to ship his stock over the railroads, as common carriers, by paying the usual charge for transportation or to ship by special contract, and he elected to take the latter course. He, by special contract, for a consideration in reduced rates for transportation, agreed to relieve the carriers from their liability of common carriers in the transportation, and agreed that their liability should be only that of a private carrier for hire, and he assumed all risk of injury by the animals to each other, or of heat or suffocation or other ill effects of being crowded in the cars, etc. We, then, have the case of a carrier liable for want of ordinary care; in other words, for negligence. The liability of common carriers is harsh, but upon the ground of public policy it is not unjust. After the parties closed the examination, his honor explained the

rights and liabilities of carriers, and instructed the jury that there was no evidence in this case that the defendant was negligent in transporting the stock, to which the plaintiff excepted. I have carefully read the evidence, and I see no error in the charge of the court. The mule seems to have died of colic or from some natural cause, which may have been induced and accelerated by the crowded condition of the car. I think the burden of showing negligence on the part of the defendant rested on the plaintiff, and that the special agreement was a valid contract. *Smith v. Railroad Co.*, 64 N. C. 235; *Selby v. Railroad Co.*, 113 N. C. 588, 18 S. E. 88.

JONES v. CITY OF GREENSBORO.

(Supreme Court of North Carolina. March 28, 1899.)

MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—PERSONAL INJURIES—NOTICE—BURDEN OF PROOF—EVIDENCE—INSTRUCTIONS.

1. In an action to recover for injuries resulting from a defect in a city street, the burden is on plaintiff to show that the city had actual or implied notice of the defect.

2. In an action to recover for injuries resulting from a defect in a city street, the refusal of an instruction to find for defendant, if it had no actual or implied notice of the defect, is error.

3. The limb which fell from a tree and struck a pedestrian was not shown to have been materially decayed, and there was no evidence that any one had ever discovered its condition, or that the city officials could, or with reasonable diligence should, have noticed the defect. *Held*, that the city was not liable.

Appeal from superior court, Guilford county; Robinson, Judge.

Action by Asa S. Jones against the city of Greensboro. Judgment for plaintiff, and defendant appeals. Reversed.

A. M. Scales, for appellant. J. A. Barringer, for appellee.

FAIRCLOTH, C. J. The defendant is a duly-organized municipal corporation, and derives its powers and duties from its charter and the general statutes. Code, c. 62. By Code, § 3803, it is required to keep the streets and the bridges in the town in proper repair, in the manner and to the extent it may deem best; by section 3802, as well as by the common law, it may abate or prevent nuisances of any kind; and by section 60 of its charter the board of aldermen shall macadamize and pave the streets and sidewalks, and protect the shade trees of the city; and an ordinance provides that the trees shall be trimmed only with the permission of, and under the direction of, the street committee. The plaintiff was walking on one of the sidewalks, when a limb fell from a tree standing on the edge of the sidewalk, and injured him. The limb fell from 15 to 25 feet, out of the top of the tree. It is not alleged that the limb was dead, but it seems to have been treated as a dead limb during the trial. There was no evidence to show whether the limb was decayed, or whether it fell of its own weight, or fell in a storm. There was no evidence that any citizen, or any one else, had ever noticed the limb before it fell. One of the plaintiff's

witnesses testified that he never saw the dead limbs in this tree prior to the time plaintiff was injured, although he had frequently passed it.

The general duties, powers, and liabilities of municipal corporations, as to keeping their streets and sidewalks in good repair, have been recently fully stated by this court in *Bunch v. Town of Edenton*, 90 N. C. 431, in *Russell v. Town of Monroe*, 116 N. C. 720, 21 S. E. 550, and in *Dillon v. City of Raleigh* (at this term), 32 S. E. 548; and it seems unnecessary to repeat them again so soon. Quite a diversity of opinion on these questions has been written by different courts. They agree that the corporation is not an insurer against all defects; that the corporation, however, will be held to a strict performance of its duties, within limits that are reasonable and just. The health, safety, comfort, and convenience of the public require this much, and the corporation is vested with the power and means necessary to perform its duties. The liability grows out of the power conferred on the city over its streets, including sidewalks, and its duty to keep them in reasonable repair, having the power to raise means for that purpose. Each case must depend upon its exact facts, and upon the circumstances of the particular case, in view of the statutory provisions of the state. Upon notice of defects and dangers in the streets, the city must remove them in a reasonable time, and failure to do so is negligence, and such negligence is the basis of an action by any one injured by reason thereof. The corporation, however, is not liable without notice of the defect which caused the injury. This notice may be actual or implied. Implied notice may be from facts from which it may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known and remedied. Not only patent defects must be remedied, but reasonable care must be exercised to discover defects; for it has been well said that "negligent ignorance is not less a breach of duty than willful neglect." So, whether constructive notice will be attributed to the city must depend upon the circumstances of each case. Nothing more than reasonable care to discover the defects will be required of the corporation. Notice will be inferred from the notoriety of the defect, open to reasonable observation; but, if it be concealed or obscured in any way, so as to escape the attentive observation on the part of the defendant, notice will not be attributed to it. The burden of showing a defect and notice rests upon the plaintiff.

The defendant asked for this instruction to the jury: "If the jury shall find that the defendant had no notice, actual or implied, of the alleged defect, they should answer the first issue 'No.'" This should have been given, but was refused. We have read the whole charge in the record to see if this instruction was substantially given, and we

think it was not; and it is not improbable that the jury were misled, and they probably considered that the prayer was improper, as it was directly refused. If we assume that the limb was a defect, there is no evidence in the case that it was decayed materially, or how long it had existed. No witness saw it before the accident, and there was no evidence that any one had seen it, or that any city officer knew of it, or could by reasonable diligence have seen it, before the accident. *Stanton v. Salem*, 145 Mass. 476, 14 N. E. 519. "A city is not charged with notice of a defect in a sidewalk which is not apparent to the ordinary observer, and whose existence is not known to the inhabitants of the city generally," and especially those in the immediate vicinity. *Cook v. City of Anamosa*, 66 Iowa, 427, 23 N. W. 907. "It is certainly true, as a general proposition, that before the corporate authorities can be held liable in this class of cases, it must be shown that they knew of the existence of the cause of injury, or had been notified of it, or such a state of circumstances must be shown that notice would be implied." *Mayor v. Sheffield*, 4 Wall. 195, 196. "Where a decayed tree, being struck by a heavy truck, fell upon and injured the plaintiff, it was held that if the tree was dangerous, but appeared safe, to outward observation, the defendant was not liable, and that the defendant was not bound to examine a hole which had existed on one side of the tree, although by so doing it would have discovered the decay." *Gubasko v. Mayor*, etc. (Com. Pl.) 1 N. Y. Supp. 215.

We think the plaintiff failed to meet the burden of proving his case, and a new trial is necessary, for the error already pointed out. New trial.

BLACKWELL v. BLACKWELL.

(Supreme Court of North Carolina. March 28, 1899.)

DEEDS—REPUGNANT CLAUSES—CONSTRUCTION.

1. If two clauses in a deed are so repugnant to each other that they cannot stand, the first will be sustained, and the latter rejected.

2. Where a clause in a deed conveys a fee to a wife, and a subsequent clause gives a life estate to her husband, the latter clause will be rejected for repugnancy, in construing the deed.

Appeal from superior court, Caswell county; Timberlake, Judge.

Action by Lella Blackwell against John B. Blackwell. Judgment for defendant, and plaintiff appeals. Reversed.

John W. Graham, for appellant. J. A. Long and Shepherd & Busbee, for appellee.

FAIRCLOTH, C. J. The plaintiff instituted this action against the defendant, her husband, for possession of certain tracts of land, subject to his marital right of ingress and egress, and for the exclusive control of the rents and profits of these lands. She claims

to be the owner in fee, and he claims to have a life estate in them. The whole matter turns upon the construction of a deed from plaintiff's father and his wife to her, dated December 22, 1887. The deed, in the premises, says: "We give, grant, convey, and confirm unto the said Lella E. Blackwell [plaintiff], her heirs and assigns," two tracts of land. " * * * To have and to hold the said lands and premises, together with all the appurtenances thereto belonging. And we * * * do warrant and will forever defend the said title to the above-described land and premises to the said Lella E. Blackwell, her heirs and assigns, against the claim or claims of all persons whatsoever." The deed then concludes: "I give, grant, and convey unto the said John B. Blackwell [defendant], under any and all circumstances, the above-described lands and premises, during the term of his natural life, together with all the rents and profits arising therefrom." After the deed was put in evidence, his honor expressed the opinion that the defendant was entitled to a life estate, and that the plaintiff could not recover. Nonsuit, and appeal by plaintiff.

In earlier times the rule of construction was that the first conveying clause in a deed, and the last clause in a will, would control the estate. In modern times the courts, looking through a deed, will transpose words or sentences, if thereby they can effectuate the intention of the grantor, if it can be done without defeating the intent in any other part. But if, in a deed, there be two clauses so repugnant to each other that they cannot stand together, the first shall be received, and the latter rejected; differing in this respect from a will. 2 Bl. Comm. 381. Where exceptions or reservations appear in a deed, they retain in the grantor certain interests, which do not pass. When, however, the fee is conveyed to A. in one part, and the fee, or a part thereof is conveyed to B. in another part, these provisions are irreconcilable and repugnant, and one must yield to the other. In *Hafner v. Irwin*, 20 N. C. 433, the whole interest was conveyed in the premises to one person, but in the habendum it was limited to another. Held, that the latter was repugnant to the former, and void. The same conclusion is arrived at in 2 Bl. Comm. 381; 4 Kent, Comm. 468 (5); and in 9 Am. & Eng. Enc. Law (2d Ed.) 139. Applying these principles to the deed before us, the concluding clause is in conflict with the first part. The intention is clear in each case. In the premises, the fee is conveyed to the plaintiff, and afterwards a life estate to the defendant in the same lands. If the first intent in the premises, expressed in apt language, and repeated in the warranty clause, is to be observed, then there is nothing left to satisfy the intent in the last clause. Putting either in force, that necessarily defeats the intent in the other; and, as above shown, the first expression is the controlling part of the deed.

We hold, therefore, that the last clause of the deed is void, and that the plaintiff is entitled to judgment in her favor. Reversed.

McDONALD et al. v. INGRAM.

(Supreme Court of North Carolina. March 28, 1890.)

EJECTMENT — SUMMARY PROCEEDINGS — EVIDENCE OF TITLE — JUSTICES OF THE PEACE — JURISDICTION.

1. In a summary proceeding in ejectment in justice court, it is no evidence of defendant's equitable title to the land on which to dismiss the proceeding on the ground that a question of title was involved, that defendant had accepted the owner's verbal offer to sell it, or that the owner had made him an unaccepted written offer.

2. Where, on a trial in summary proceedings before a justice, there is evidence to establish equitable title in defendant, and the court finds from such evidence in favor of defendant, and dismisses the action, his judgment cannot be reviewed; but, where there is no evidence, his decision becomes a question of law, and reviewable.

Appeal from superior court, Cumberland county; Allen, Judge.

Summary proceeding in ejectment by W. J. McDonald and others against Mrs. G. H. Ingram in justice court. The proceeding was dismissed for want of jurisdiction, and plaintiffs appeal. Reversed.

N. A. Sinclair and N. W. Ray, for appellants. R. P. Buxton, for appellee.

FURCHES, J. This is a summary proceeding in ejectment, commenced in the court of a justice of the peace. Plaintiff claims that defendant was his tenant, having rented the property from him, for which she paid him rent for about 14 months; that such tenancy had expired, but that defendant continued to hold possession, and refused to vacate the property. Defendant admitted possession, denied the tenancy, and alleged that she was the equitable owner of the house and lot in controversy. From the evidence it seems that the defendant had once been the owner of the property, but that she had sold and conveyed it to the plaintiff. Plaintiff testified that after he became the owner of the property he rented it to defendant at eight dollars per month, which was afterwards reduced to seven dollars per month; that defendant continued to occupy the property, and to pay rent therefor at the agreed rate, for about 14 months, when she ceased to pay rent, and refused to surrender the possession. The defendant admitted the payment of the money, but denied that it was paid as rent, and alleged that plaintiff had agreed to let her have the property back, and that the payments were made under that contract, and not as rent. The defendant offered evidence which she claims tended to show the truth of her contentions; and his honor, being of the opinion that the title to the lot was involved, dismissed the action for want of jurisdiction.

The jurisdiction of a justice of the peace in actions for possession is entirely statutory, and is limited to landlords and tenants. If title is involved, he cannot proceed with the trial, for want of jurisdiction. But the plea of ownership by the defendant will not oust the jurisdiction of the court, but it will proceed with the trial until it is made to appear from the evidence that the question of title is involved. The only question the court can try, under the statute, in this proceeding is, "Was the defendant the tenant of plaintiff, and does she hold over after the expiration of the tenancy?" It seems that justices of the peace, as between landlords and tenants, have concurrent jurisdiction with the superior courts; and, as justices of the peace have no jurisdiction to declare or to enforce an equity, that in such cases as they have justice's jurisdiction they stand very much as they would have stood in actions of ejectment at law, before the joinder of jurisdictions of law and equity in the same court. And if we were to give the statute and the proceedings thereunder this interpretation, it would seem that, to oust the jurisdiction, the title so pleaded by the defendant should arise after the tenancy alleged by plaintiff had commenced. This view seems to be sustained as to legal titles, but not as to equitable titles, in *Davis v. Davis*, 83 N. C. 71, and *Parker v. Allen*, 84 N. C. 466. Why there should be a difference between legal and equitable titles (if there is) does not plainly appear. But it is held in *Parker v. Allen*, *supra*, that, if there is evidence tending to establish an equitable title in the defendant, and the court finds from such evidence this contention in favor of the defendant, and dismisses the action for want of jurisdiction, his action is final, as this court has no right to review the court below upon findings of fact. But, if there is no evidence to support the findings of the court below, it then becomes a question of law, and this court has the right to review and reverse the judgment appealed from. This is the case we now have under consideration. There is no claim that defendant has a legal title to the property. There is nothing to show a parol trust, as plaintiff holds title under a deed from defendant, without any claim that it has any conditions, limitations, or defeasance. The only claim the defendant makes, or offers evidence to support, is that the plaintiff promised to sell the property back to her, which if true, would be insufficient to give the defendant any equitable estate or title to the lot, unless it was reduced to writing, and signed by the plaintiff, or some one authorized to sign it for him. But the evidence introduced utterly fails to show that there was ever any contract on the part of plaintiff to sell her back this property. It plainly appears that he offered to sell it back to the defendant for what it had cost him; one-third cash, and the balance on time. But she did not accept this offer. And while it does

not affect the matter before us, we must say that there is nothing in the case that has any tendency to show but what the plaintiff has acted fairly and honorably with the defendant in this whole transaction. As there is no evidence tending to establish an equitable title in defendant, there was error in dismissing the action. And there must be a new trial, when the matter will be submitted to a jury upon proper issues as to whether the defendant is, or was when this action commenced, the tenant of the plaintiff, and whether that tenancy had terminated. New trial.

LINDSAY v. DARDEN.

(Supreme Court of North Carolina. March 28, 1899.)

ATTORNEY'S CLAIM—ASSISTING ADMINISTRATOR—ENFORCEMENT AGAINST ESTATE.

An attorney's claim against the administrator on his personal contract for assisting him in his duties cannot be enforced against the estate.

Appeal from superior court, Greene county; Robinson, Judge.

Action by George M. Lindsay against W. M. Darden, administrator. From a judgment for plaintiff, entered on the findings of a referee, defendant appeals. Reversed.

Battle & Mordecai, for appellant. George M. Lindsay, pro se.

FAIRCLOTH, C. J. This action was referred, and upon the findings of the referee and the court, judgment was entered for the plaintiff. The facts are that R. C. D. Beaman died in 1884, and R. J. W. Beaman qualified as his administrator, and before the estate was fully administered the administrator died, and in 1897 the defendant qualified as administrator d. b. n. on said estate. Said administrator contracted with plaintiff as his attorney to aid him in administering and settling the estate of his intestate. The plaintiff now sues the administrator d. b. n. for services rendered the first administrator, and defendant declines to pay the account on the ground that it is not a charge on the estate in his hands. It is very well settled that if an administrator employs counsel to assist him in his administration, the contract is personal, and is not a debt against the intestate's estate. The administrator must pay it, and, if the disbursement is proper, it will be allowed him in the settlement of his account with the estate. The court will allow such commissions, charges, and expenses as it may deem reasonable and just, whether it is equal to or less than the contract price. *McKay v. Royal*, 52 N. C. 426; *Kessler v. Hall*, 64 N. C. 60. Plaintiff does not seriously dispute the above rule, but falls back on the equity of his case. He contends that, inasmuch as the courts will allow the administrator's voucher, the court ought to coerce the pay-

ment out of the assets of the estate. The fallacy is that it is not a debt of the estate, as no debt of the estate can be created after the death of the intestate or testator. He relies on *Edwards v. Love*, 94 N. C. 365. That case was upon a state of facts unlike the present. The testator directed his executors to employ the plaintiff as agent to sell lands, and the executors contracted with him in obedience to such directions, and it was held that the executors were personally liable on the contract, but, as it was entered into under the directions of the will, and the services were for the benefit of the estate, payment might be coerced out of the assets of the estate. It was as if the testator had made the contract and the services were rendered after his death, in the course of administering the estate. The law must fit the facts. The plaintiff emphasized the fact that legal and equitable remedies are now allowed in the same action. That is true, but the distinction between legal and equitable principles is the same as it was before the constitution of 1868. This fact seems frequently to be overlooked or misapprehended. We think plaintiff's remedy is against the representative of the administrator with whom he contracted, and not against the estate of the defendant. There was error. Reversed.

HANCOCK v. NORFOLK & W. RY. CO.

(Supreme Court of North Carolina. March 21, 1899.)

STATUTES—PLEADING—MASTER AND SERVANT—NEGLIGENCE—CONSTITUTIONAL LAW—PRIVILEGES—APPEAL—RECORD—COSTS.

1. Priv. Laws 1897, c. 56, making railroad companies liable to employes for injuries caused by negligence of fellow servants, is a public statute, and, though published among the private acts, need not be pleaded.

2. Priv. Laws 1897, c. 56, making railroad companies liable to employes for injuries caused by negligence of fellow servants, does not deprive the company of the defense of contributory negligence of the servant injured.

3. Priv. Laws 1897, c. 56, making railroad companies operating in the state liable for injuries to servants caused by negligence of fellow servants, is not contrary to Const. art. 1, § 7, prohibiting the legislature from conferring exclusive privileges on any set of men.

4. Where there was no exception to the evidence and no dispute as to it presented by the exceptions to the court's charge, which was sent up, and which contained a hypothetical presentation thereof, the evidence was unnecessary; and, being sent up by appellee over appellant's objection, the former will be taxed for the cost of the transcript and printing thereof, under rule 22 (22 S. E. vii.), though he was successful.

5. Where appellant requested certain instructions, which were given, and excepted to portions of the court's charge, such instructions and the full charge were properly sent up on appeal, and a successful appellee, who sent them up, is not liable for the cost thereof, under rule 22 (22 S. E. vii.).

Appeal from superior court, Durham county; Timberlake, Judge.

Action by Whit Hancock against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Guthrie & Guthrie, for appellant. Boone & Bryant, for appellee.

CLARK, J. The decision of this case depends upon chapter 56, Priv. Laws 1897,—“An act to prescribe the liabilities of railroads in certain cases.” This statute, commonly known as the “Fellow Servant Act,” was ratified on the 23d day of February, 1897, and provides:

“Section 1. That any servant or employé of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such servant or employé, who shall have suffered death in the course of his services or employment with said company by the negligence, carelessness or incompetency of any other servant, employé or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.

“Sec. 2. That any contract or agreement, expressed or implied, made by any employé of said company to waive the benefit of the aforesaid section shall be null and void.”

The plaintiff was injured in the service of the defendant since the ratification of this act. The defendant contends that the injury was caused by the negligence of a fellow servant of the plaintiff, to wit, a brakeman on the passenger train, in leaving the switch open, whereby the hand car was derailed. Its counsel cites, *inter alia*, *Ponton v. Railroad Co.*, 51 N. C. 245, *Pleasants v. Railroad Co.*, 121 N. C. 492, 28 S. E. 267, and *Wright v. Railroad Co.*, 122 N. C. 852, 29 S. E. 100, which sustain the contention that, if the injury was thus caused, the action could not have been maintained at common law. The defendant excepts as to above statute, which the judge held confers a right of action in such case, because: “(1) It is a private act, and, as such, under section 284 of the Code of North Carolina, it should have been pleaded. (2) Whether this act is public or private, it is unconstitutional and void when applied, in a case like this, to fellow servants of a ‘railroad company operating in this state,’ upon the ground that it ‘undertakes to confer upon servants and employes of such companies separate and exclusive privileges from the rest of the community engaged in similar private employment, which are denied even to servants and employes of railroad construction companies and of street railroad and railroad bridge companies, and partnerships operating lumber and mining railroads, since its provisions are confined strictly to railroad companies,’ and therefore violates article 1, § 7, of the constitution of the state.”

As to the first ground of exception, the act

is so plainly and clearly a public statute that it is a mystery why it was placed among the private acts. *Kinney v. Railroad Co.*, 122 N. C. 961, 30 S. E. 313; *Wright v. Railroad Co.*, 123 N. C. 280, 31 S. E. 652. But by whom and for what purpose this was done is immaterial. Whether a statute is private or public depends upon its contents, and not upon the conduct or judgment of the person who directs the compilation in which it shall be published. *Durham v. Railroad Co.*, 108 N. C. 399, 12 S. E. 1040, and 13 S. E. 1. Indeed, part of an act may be public and part thereof a private act. Being a public statute, the fact that it was printed among the private acts did not make it incumbent upon the plaintiff to plead it.

As to the second ground of exception, nothing in this case requires us to pass upon the questions, which cannot arise upon the facts herein, whether the fellow servant act applies to street railroads, partnerships operating lumber and mining railroads, railroad construction companies, and railroad bridge companies, and whether the defendant can set up the defense of a knowledge of defective machinery by the plaintiff and assumption of risk. Beyond controversy, the plaintiff was in the employment of "a railroad company operating in this state" when injured. These matters may possibly come up for adjudication when the facts of some case present the question, but in the meantime "sufficient unto the day is the evil thereof."

As to the other question learnedly argued in the brief, whether, under the fellow servant statute, the defendant can plead contributory negligence on the part of the servant injured, there can be no doubt. The statute goes no further than to remove the defense that the injury was sustained by the negligence of a fellow servant. The defendant does not take his own argument on this point seriously; for, in fact, he sets up the plea of contributory negligence, and an issue thereon was submitted to the jury, and found in favor of the plaintiff.

We see no ground for the defendant's contention that the act in question violates article 1, § 7, of the North Carolina constitution, by "conferring exclusive privileges upon any set of men." The law exempting a master from liability to a servant for the negligence of a fellow servant is by judicial construction and of comparatively recent origin. Its history is traced in *Hobbs v. Railroad Co.*, 107 N. C. 1, 12 S. E. 124. Its extent has been differently outlined in different states by judicial construction, and in several states it has been restricted by legislative enactment so as not to extend to employes of railroad companies, as has now been done in this state. As the original ground of the decision was that a servant knew the character for care of his fellow servant, and entered service with a view to that risk, the courts themselves might logically have long since modified the ruling not to extend to an

employment like that of railroads, embracing many thousands of employes, and exposing its servants to peculiar risks. The fellow servant act now in question applies to a well-defined class, and operates equally as to all within that class. Indeed, any act incorporating a company confers special privileges upon the stockholders, but not exclusive privileges, within the meaning of the constitution. We fail to see in this act any conferring of "exclusive privileges," within the language or intent of the constitutional provision in question (*Broadfoot v. Town of Fayetteville*, 121 N. C. 418, 28 S. E. 515); and similar fellow servant acts, almost in totidem verbis, in other states, have been held by the federal supreme court to be not in conflict with the "equal protection" clause of the fourteenth amendment. Our statute specifies "servants or employes of any railroad company operating in this state," etc. The Kansas statute (1 Gen. St. 1888, p. 415), which uses the words, "every railroad company organized and doing business in this state shall be liable," etc., was held valid in *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161; and the Iowa statute (Code 1873, § 1307), which uses the words, "every corporation operating a railroad shall be liable," etc., was sustained in *Railway Co. v. Herrick*, 127 U. S. 211, 8 Sup. Ct. 1176; and both cases have been very recently reviewed and reaffirmed in *Railroad Co. v. Mathews*, 165 U. S. 1, 25, 17 Sup. Ct. 243,—all of which have been lately cited as authority by this court in *Broadfoot v. Town of Fayetteville*, at page 422, 121 N. C., and page 516, 28 S. E. In another recent case (*Railroad Co. v. Pontius*, 157 U. S. 209, 210, 15 Sup. Ct. 586), the federal supreme court, through Chief Justice Fuller, approving *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, has thus stated the ruling with approval: "As to the objection that the law (the Kansas statute above cited) deprived railroad companies of the equal protection of the laws, and so infringed the fourteenth amendment, this court held that legislation which was special in its character was not necessarily within the constitutional inhibition, if the same rule was applied under the same circumstances and conditions; that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their employes; and that such legislation could not be objected to on the ground of making an unjust discrimination, since it met a particular necessity, and all railroad corporations were, without distinction, made subject to the same liability." The attack of the defendant's counsel upon the constitutionality of the fellow servant act has been delivered with force and ability, but we cannot perceive that the reasoning in the above

decisions of our highest federal court is otherwise than sound.

The other exceptions taken in this appeal are without merit, and do not require detailed discussion.

The defendant further moved in this court, under rule 22 (22 S. E. vii.), to tax the appellee with the costs of transcript and of printing "all the evidence, there being no exception thereto, and the special instructions asked for by the defendant, and which were given, and the judge's charge in full"; the appellant having objected to sending up this matter, as unnecessary, when settling the "case on appeal,"—citing *Silver Val. Min. Co. v. North Carolina Smelting Co.*, 119 N. C. 415, 26 S. E. 27; *Durham v. Railroad Co.*, 108 N. C. 399, 12 S. E. 1040, and 13 S. E. 1; and *Roberts v. Lewald*, 108 N. C. 405, 12 S. E. 1028. The defendant's exceptions to the charge required that the whole charge be sent up (if the appellee desired it done), as it would be manifestly unjust to single out a single sentence without aid from the context; and for the same reason the instructions asked by the appellant, though given, were not improperly sent us. But there was no exception to evidence, and no dispute as to it, nor any phase of it, presented by exceptions to the charge, which required the evidence to be sent up; there being a hypothetical presentation in the charge and the special instructions of the different states of fact alleged by the parties to have been proved. The sending up of the evidence in full, over the appellant's objection, was unnecessary; and the appellee, though successful here, must be taxed with the cost of transcript of the evidence and the printing thereof. While appellate courts do not encourage motions as to mere matters of costs of appeal, it is their duty, when objection is made at the time of settling a case on appeal to sending up unnecessary matter in the record, to protect appellants, if unsuccessful, from the needless expense thus thrown on them. If the appellant is successful, of course the appellee must bear the charges of his own extravagance, and no motion is necessary. The appellant's motion in this court is allowed in part, but the judgment of the court below is affirmed.

HOCUTT et al. v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. March 21, 1899.)

APPEAL—PARTIES—MISJOINDER—FAILURE TO DEMUR—WAIVER—RIGHT TO OBJECT—HARMLESS ERROR—PLEADING—WATER COURSE—DIVERSION—PERMANENT INJURY TO LAND—RAILROADS—LIABILITY—LIMITATIONS.

1. On an appeal from a judgment in favor of administrators for damages for flooding their intestate's land, minor heirs were properly made parties, on motion of the administrators, through their general guardian, where defendant demanded the assessment of permanent damages in that action.

2. A failure to demur to a complaint by heirs and administrators to recover for loss of crops, and permanent damages caused by overflowing decedent's land, on the ground of misjoinder of parties, is a waiver of the objection.

3. Defendant could not raise such objection, where the heirs were made parties on his demand that permanent damages be assessed.

4. A defendant cannot complain of a judgment for damages to an ancestor's land, in favor of heirs, on the ground that the damages were not apportioned among them.

5. A railroad company demanding assessment of permanent damages, in an action for injuries to crops caused by diversion of surface water by its ditch, thereby changes the action into one for permanent damages, within *Laws 1895, c. 224*, requiring assessment in such actions of the entire amount which the party aggrieved is entitled to receive.

6. A verdict against a railroad company for permanent damages for injury to land caused by an overflow resulting from a digging of a ditch will not be disturbed, though it is not shown that the injury will recur, where the company asked for an assessment of permanent damages.

7. It is not error to refuse submission of tendered issues, where those submitted, taken in connection with the charge, sufficiently present all material points in controversy.

8. Limitations barring an action for damages caused by an overflow resulting from the digging of a ditch begin to run from the date of the injury, and not from that of the digging of the ditch.

9. One diverting a water course, to the injury of another, is liable for damages caused thereby.

10. One digging a ditch through a natural water shed is liable as for a diversion of a water course, where, on the occurrence of an extraordinary freshet, a dam in another ditch breaks, and the waters flow some distance over a flat piece of ground, and then through the former ditch, and overflow and injure the land of another, where such injury would not have occurred, but for the penetration of the water shed.

11. Where a railroad diverted a water course by the construction of a ditch, it is liable for injuries to land caused by the overflow of a ditch dug by another connecting with the former ditch.

Faircloth, C. J., dissenting.

Appeal from superior court, Pender county: Adams, Judge.

Action by W. B. Hocutt against the Wilmington & Weldon Railroad Company. On the death of plaintiff, his administrators, J. D. Hocutt and another, were made plaintiffs. Judgment for plaintiffs, and defendant appeals. Affirmed.

Junius Davis and Marsden Bellamy, for appellant. Allen & Dortch and J. T. Bland, for appellees.

DOUGLAS, J. This is an action brought to recover damages arising from the flooding of land, caused, as alleged, by the unlawful diversion of water through the defendant's ditches. The action was originally brought by W. B. Hocutt, the owner of the land, who died during its pendency. Thereupon J. D. Hocutt and E. McLendon, administrators of W. B. Hocutt, were made plaintiffs.

Before the call of the case the plaintiffs moved in this court to make the minor heirs of W. B. Hocutt parties plaintiff, through

their general guardian, J. D. Hocutt. This motion was proper, and was granted. After it was granted, the defendant moved to rescind this order on the ground that it created a misjoinder of parties, as well as of subject-matter, inasmuch as the damages for loss of crops would go to the administrators, while all the damage to the land itself belongs to the heirs. Had the administrators and the heirs originally brought a joint action for the loss of the crop, together with the permanent damage to the land, there might have been such a misjoinder; but such was not the case. Even if it had been, the defendant could have sustained its objection only by demurrer, as the error would appear from the face of the complaint. *Finley v. Hayes*, 81 N. C. 368; *Silver Val. Min. Co. v. Baltimore, etc., Mining & Smelting Co.*, 99 N. C. 445, 6 S. E. 735; *Hall v. Turner*, 111 N. C. 180, 15 S. E. 1037; *McMillan v. Baxley*, 112 N. C. 578, 18 S. E. 845; *Kliger v. Harmon*, 113 N. C. 406, 408, 18 S. E. 515. The failure to demur would have been deemed a waiver of the objection. The defendant contends that, as the heirs were made parties plaintiff only in this court, it had no occasion to demur in the court below, and now avails itself of its first opportunity to demur *ore tenus* before us. We think the defendant has clearly waived its right to demur by its action in the court below. After the death of the original plaintiff, and the administrators' becoming parties, it demanded that the permanent damages to the land should be assessed. If, as it contends, and which we concede, such damages should go to the heirs, it ill becomes the defendant to object to the heirs becoming parties to an action in which it has demanded an adjudication of their rights. If there is any misjoinder of causes of action, it has been brought about by the defendant itself injecting into this case the issue of permanent damages. A defendant may demur to the complaint, but not to its own answer.

The defendant further contends that it should be granted a new trial because the damages have not been apportioned among the respective plaintiffs, and that a new lawsuit might otherwise become necessary between the plaintiffs themselves, in order to adjust their relative rights. We do not see how this contingency would concern the defendant. In one aspect, it is better for the defendant that the minor heirs should become parties, as they are thereby bound by the judgment, which will thus vest in the defendant the easement it has sought.

The plaintiffs allege that the defendant, in order to drain its roadbed and right of way, has cut deep ditches beside its road, whereby it diverts large volumes of water from its natural course and flow, and empties it into a small branch or flat bottom known as "Rattan Trestle" or "Jumping Run Branch"; that it has provided no sufficient outlet for such accumulated and diverted waters, thereby causing the same to pond or back up and

overflow the plaintiffs' land, whereby they and their intestate have been greatly damaged within the three years next preceding the action. The defendant files three successive answers, denying the cause of action, and alleging that the ditches are properly constructed, and have been used for more than 3 years before the bringing of this action, for more than 5 years, and for more than 20 years; that the railroad was built prior to the year 1840, and has since been in constant operation. In its final answer it "demands to have all permanent damages, if there be any, assessed in this action." Under our decisions, this turns the action into one for permanent damages, whatever may have been the original nature of the plaintiffs' claim. *Parker v. Railroad Co.*, 119 N. C. 677, 25 S. E. 722; *Nichols v. Railroad Co.*, 120 N. C. 495, 26 S. E. 643; *Laws* 1895, c. 224. It is difficult to see how permanent damages can be assessed in all cases where there is no permanent damage, and where the only injury results from causes that are not in their nature permanent, and may never again occur. But as the defendant demanded such an assessment, and as the case was tried upon that issue, we do not feel at liberty to disturb the verdict on that ground. It does not appear when or how the defendant withdrew its demand for permanent damages, unless inferentially from its objection to the issues submitted, but then its own seventh issue tendered was broad enough to admit of such an assessment. In fact, it did not vary from the second issue submitted, as to the character of the damage to the land, but only as to its cause.

It is unnecessary to separately consider each exception, as they naturally group themselves around two or three essential principles. We see no error in the refusal to submit the issues tendered by the defendant. Those submitted, taken in connection with his honor's charge, were sufficient to present and determine all material points of controversy. The charge itself appears to be unexceptionable. It is full, clear, and accurate, in which the principles of law laid down are correctly applied to the facts involved. None of the statutes of limitations appear to bar the action. It is contended by the defendant that the sole damage was done by the freshet of 1895, which happened only a few months before the bringing of the action. It makes no difference when the ditches were dug, provided they did not injure the plaintiff. The defendant had a perfect right to dig its ditches or use its land as it saw fit without injury to another. The digging of the ditches, or the building of the road, or any other act done 5 or 20 or 50 years before, was utterly immaterial to the present controversy, as in themselves they constituted no cause of action. While the plaintiff might, under certain circumstances, have enjoined the commission of an act that threatened irreparable injury, he could not have maintained an action for damages that he had not sustained,

and might never sustain. It is well settled that the injury is the cause of action, and that no statutes of limitation can begin to run before the cause of action accrues. This principle is the only just basis for any statutes of limitation which otherwise would be subversive of common right. They are statutes of repose, intended to force all men to litigate their claims within a reasonable time, while the facts are yet fresh in the memory of living witnesses, and before the probable loss or destruction of important papers. It has been well said that by such statutes the law is constantly building up around the rights of the citizen muniments of title to take the place of those naturally decaying under the touch of Time's effacing finger. But why force a man to sue when he can recover nothing. The principle is well settled. *Ridley v. Railroad Co.*, 118 N. C. 996, 24 S. E. 730; *Beach v. Railroad Co.*, 120 N. C. 498, 28 S. E. 703. The injury complained of is the flooding of the plaintiff's land caused by the unlawful act of the defendant in diverting water from its natural course, and concentrating it at a point where there was no sufficient natural or artificial outlet. It is now well settled that neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert. *Jenkins v. Railroad Co.*, 110 N. C. 438, 15 S. E. 193; *Parker v. Railroad Co.*, 123 N. C. 71, 31 S. E. 381. There was certainly sufficient evidence of diversion to go to the jury, and this of itself disposes of several of the exceptions. In addition to the testimony, there was a map accompanying the record, which shows a natural water shed some distance north of the plaintiff's land, and about 400 feet south of branch No. 2, which flows east. The waters of Big Bay originally flowed into this branch, but were diverted by Devil's ditch, and discharged into branch No. 3, still further to the north. Had the natural water shed remained intact when the dam at Devil's ditch broke, its water would have resumed its old channel in branch No. 2, and would not have reached the plaintiff's land, going far to the northeast. But as outlet into branch No. 2 was closed, and it naturally found its way into the railroad ditch which had been cut through the water shed. It was thus diverted from its natural outlet to the east, and carried back south to the head of Jumping run. It is true the testimony shows that the railroad ditch stopped about 50 feet from Devil's ditch, but it also shows that it was cut through the water shed to a place that lay between it and Devil's ditch. The same diversion was shown as to the water of branch No. 6, which naturally flowed south into Jumping run, about 1,000 feet west of the trestle, but which was carried by Porter's ditches east into the railroad ditch, and by it discharged into Jumping run at its head at Rattan trestle. The effect of this diversion and concentration was to accumulate large amount of water at the head of Jump-

ing run, which it was unable to carry off, and which therefore flowed back upon Hocutt's land. It is true that Jumping run is a natural water course and drain way, as contended by the defendant, but it is such only as to those waters that naturally flow into it. The defendant contends that it should not be held responsible for Porter's ditches. This might be true, were it not for the fact that its own ditch received the water from Porter's ditches, and discharged it upon the plaintiff, thus becoming the proximate cause of the injury. At the request of the defendant, his honor charged that "if the damages to the plaintiffs' land and crops were caused by the water coming down through the ditch of the defendant on the west side of the railroad to Rattan trestle, and then through the trestle and ditch dug by Hocutt from the trestle to his land, then the defendant is not liable, and the plaintiffs cannot recover any damages." The jury evidently did not believe that Hocutt's ditch caused the damage, and their conclusion is not surprising. In view of the fact that this ditch was dug to drain Hocutt's land west into Jumping run. That such a ditch should carry sufficient water upstream, not only to fill its own banks, but to flood the surrounding country, would seem somewhat remarkable. As we see no error in his honor's charge, or his refusal to charge, and as there was sufficient evidence to go to the jury upon the material issues, the judgment must be affirmed.

FAIRCLOTH, C. J., dissents.

HOBBS et al. v. BLAND.

(Supreme Court of North Carolina. March 28, 1899.)

DAMAGES—BREACH OF WARRANTY—COUNTERCLAIM.

Where, in an action for the price of a horse, defendant admitted the contract, and counterclaimed on a breach of warranty of soundness, his measure of damages is the difference between the value of the horse sound and its value unsound.

Appeal from superior court, Duplin county; Robinson, Judge.

Action by Hobbs & Southerland against C. W. Bland. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Stevens & Beasley, for appellants. Allen & Dortch, for appellee.

FURCHES, J. On the 31st of December, 1895, the defendant bought a bay mare from plaintiffs at the agreed price of \$90, for which he executed his promissory note, payable to plaintiffs on the 1st day of November, 1896, and to secure the payment of the note he executed a mortgage on the several articles of personal property therein named, which was duly probated and registered. The defendant took the mare home with him, and kept and worked the same until some time in

the latter part of March or early part of April, 1896, when he carried her back to plaintiffs, saying that she was unsound, and could not do his work. He then took a mule in her place, which he kept but one day, when he carried it back, saying it was old and slow, and did not suit him. He then exchanged this mule for another bay mare, and got a "collar to boot." This last mare he returned to the plaintiffs on or about the 27th day of May, saying she was unsound, and demanded his note and mortgage; but the plaintiffs refused to take back this mare, and also refused to give up the defendant's note and mortgage. The defendant admitted that he bought the mare in December, 1895, and executed the note and mortgage therefor, and that he took the mare and used her; that he took her back, and got the mule, and took it back, and exchanged it for the other bay mare and collar, as stated. But he says that the plaintiffs warranted the mare bought in December, when the note and mortgage were given, to be sound; that, soon after buying the mare, he found out she was not sound, and as soon as he saw the plaintiffs (which was a week or two after that) he told the plaintiffs that she was not sound, and that was the reason he took her back; that he needed another horse in his crop, and the plaintiffs gave him a mule in her place; but the mule was old and slow, and he took it back, and exchanged the mule for the second bay mare and collar; that this mare proved to be unsound, and he took her back on the 27th of May, and demanded his note and mortgage; that plaintiffs refused to take the mare back, or to give up the note and mortgage, but that he left the mare in the lot of plaintiffs. And it was in evidence that plaintiffs notified defendant that, if he did not take the mare out of their lot, they would advertise and sell her to the highest bidder, and give him credit for the price, which they did, and credited the note with \$30. The plaintiffs denied the warranty, and there was a great deal of evidence as to whether there was warranty or not, and, if there was any warranty, whether it was not a conditional warranty to give the defendant another horse in place of the one he bought, and as to whether the plaintiffs had not complied with the terms of the contract. Upon this phase of the case the plaintiffs asked several special instructions, which were refused. We see no error in the court's refusing these prayers for instruction, for the reason that, while some of them contained sound propositions of law applicable to the case, no one of them was correct as a whole.

But when the defendant admitted the trade, the execution of the note and mortgage, and that he got the horse for which they were given, that made him liable for the \$90; and the mortgage is only a security for the debt, and the property therein named is liable for whatever is still due on the note, if anything is still due. But the defendant, by his an-

swer, alleges a breach of warranty, and deceit. The allegation of deceit is not very distinctly stated, but we will treat it as sufficiently stated to be used as a ground of defense, if established. These defenses—false warranty and deceit—are both *ex delicto*, but they might be joined in one action; and, as they might be joined in one action (*Bullinger v. Marshall*, 70 N. C. 520), they may be joined in the defendant's answer, which is but a cross action. To entitle the defendant to damages upon the allegation of false warranty, it is not necessary that he should show the scienter. It is sufficient if he shows a warranty, and breach of the warranty. If there was no warranty, and defendant relies on the allegation of deceit, he must then show the scienter. As these defenses are *ex delicto*, and not on contract, they could not be set up by way of counterclaim, or recoupment, if they had not originated out of the same transaction, or cause of action, upon which defendant is sued; but, growing out of the transaction upon which the action is based, they may be so pleaded and set up. *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122. Then the matters in controversy between plaintiffs and defendant are as follows: The defendant owes the plaintiffs this \$90 note, less the indorsed credit of \$30. But, if the plaintiffs warranted the mare to be sound, when she was not sound, or if the plaintiffs did not warrant the soundness of the mare, but knew that she was not sound, concealed this fact from the defendant, and sold her to him as a sound animal, and for the price of a sound animal, and the defendant was damaged by reason of such unsoundness, he is entitled to recover on his counterclaim such damage as he has sustained by reason of such unsoundness; that is, the difference between the value of the mare if she had been sound, and her value in her unsound condition. He could not recover speculative damages; and, if defendant recovers damages, this amount should be deducted from the amount of the \$90 note, and plaintiffs' judgment should be for the balance, if any. But the matter was not so treated by his honor on the trial, but upon this status of the case he charged the jury as follows: "The defendant having admitted the execution of the note for \$90, and the mortgage to secure its payment, the burden is on him to prove to the satisfaction of the jury, by the greater weight of the evidence, that he is not indebted to the plaintiffs." This part of the charge was excepted to by the plaintiffs. The exception was well taken, and must be sustained.

There were other exceptions taken to the charge, involving the questions as to the return of the three animals, and their exchange, and as to whether this was not a compliance with the contract. The facts with regard to these matters being somewhat involved, we do not discuss or pass upon them; but for the error pointed out there must be a new trial.

PURYEAR et al. v. SANFORD et al.

(Supreme Court of North Carolina. March 28, 1899.)

SUIT TO REMOVE CLOUD FROM TITLE—PRELIMINARY INJUNCTION—TRESPASS—EXECUTION OF CONVEYANCES.

1. In an action by the equitable owners of lands to establish their title thereto, and to remove a cloud therefrom by the cancellation of an invalid deed thereof to third persons by the holder of the legal title, it is error to enjoin the grantees of such alleged invalid conveyance from trespassing on the lands during the pendency of the action, even though they are insolvent and threaten to enter on the lands, because there is an adequate legal remedy.

2. Plaintiffs being in possession, it was error to enjoin such grantees from executing conveyances of the premises, though the assertion of title by them under the invalid conveyance would prevent a sale of the lands by the equitable owners, as persons claiming under a deed executed by such grantees during the pendency of the action would have no greater rights than their grantors.

Appeal from superior court, Granville county; Timberlake, Judge.

Action by James H. Puryear and others against Fanny Sanford and others to remove a cloud from the title to lands. From an order granting a preliminary injunction, defendants appeal. Reversed.

Edwards & Royster, for appellants. Winston & Fuller and J. C. Biggs, for appellees.

MONTGOMERY, J. The plaintiff A. W. Graham claims an interest in the minerals, mineral rights, and privileges in the tract of land described in the complaint by virtue of an alleged contract in writing between himself, on the one part, and the other plaintiffs and the defendant J. D. Puryear, on the other part. As to the plaintiffs' title to the property, the allegations in the complaint are, in substance, that in 1862 the defendant J. D. Puryear contracted with Seth D. Pool to purchase the land for his wife, Susan Ann Puryear, and that with her money the land was paid for; that Mrs. Puryear, with her husband, went into possession of the land and the mineral rights incident thereto in the same year (the deed, however, having been executed by Pool to Puryear, the husband); that Mrs. Puryear and her husband remained in the adverse, notorious, and continuous possession of the property up to the time of her death, which occurred in 1886, and that since her death the plaintiffs, other than Graham, as heirs at law of their mother, Mrs. Puryear, have been in possession of the land, adverse and open, and are still in possession; and that the plaintiff Graham, after his contract in reference to the mineral interests and privileges with the other plaintiffs and the defendant Puryear, went into possession of the mineral rights and privileges. It is further alleged on the part of the plaintiffs that, after the registration of the contract between Graham and the other plaintiffs and the defendant Puryear, there

was found among the papers of the administrator of Dr. Sanford, father of the female defendants, except Mrs. Rebecca Sanford, who is his widow, a deed purporting to have been made by the defendant J. D. Puryear to Dr. Sanford, dated February 14, 1868, for 100 acres of land "on the waters of Crooked Fork, adjoining the lands of W. M. Hill, Thomas Chandler, and others," for the consideration of \$150. It is not alleged in the complaint that the 100 acres above mentioned are a part of the tract of land described in the complaint, but the defendant, in his answer, admits such to be the fact. That deed was recorded on the 12th of April, 1898, after the registration of the contract between Graham and the other plaintiffs and the defendant Puryear. The plaintiffs further alleged that they had no knowledge of the existence of the last-mentioned deed until after its registration. Another allegation is that the defendants, except the defendant Puryear, set up a claim and ownership to the land, and have obstructed a sale contemplated by Graham of his mineral interest in the land, to his irreparable injury, and that by reason of the acts and words of the defendants, and the deed from Puryear to Sanford, the co-plaintiffs, with Graham, will be prevented from executing their contract, by which they will suffer irreparable injury. The relief sought by the plaintiffs in this action is that the defendant Puryear may be declared a trustee for the plaintiffs, and that the alleged parol trust originally created for Mrs. Puryear, as set out in the complaint, when the land was conveyed by Pool to the defendant Puryear, may be established, and for the removal of the alleged cloud on the title to the property caused by the acts and words of the defendants, and the deed to Sanford. The defendants, other than Dr. Puryear, in their answer deny the allegations of the plaintiffs as to their title to the land, and of the plaintiff Graham to the mineral rights and interests therein, and aver that they are the owners of the 100 acres mentioned in the deed from Puryear to Sanford. An injunction restraining the defendants from executing any deed or deeds to said land, minerals, or mineral rights, or from their attempting to enter upon the lands, was prayed for by the plaintiffs, and granted by his honor, who heard the motion, to be continued till the final hearing. The matter now before us for decision grows out of the appeal of the defendants from the order granting the injunction.

We are of the opinion that his honor erred in granting the injunction. There was no allegation that the defendants threatened or intended to enter upon the land, but, on the contrary, the plaintiffs alleged that the defendants had threatened to bring suit for its recovery. It does not appear that the defendants were unable to answer in damages for any trespass upon the land they might commit. But if insolvency of the defendants

had been alleged, and they had threatened to enter upon the land, we do not see how they could have been restrained from making such entry, even though the deed under which they claimed was obviously invalid. "Such entry as a court can enjoin is only an entry under force or color of legal process. It will not enjoin a mere trespass, unless irreparable damage is threatened. There are remedies for a mere trespass, both preventive and punitive, as effectual and more appropriate than through the equitable powers of a court." *German v. Clark*, 71 N. C. 420. The defendants were also enjoined from executing any deed or deeds of conveyance to the lands, minerals, or mineral rights. There was no allegation that the execution of such deeds would injuriously affect the plaintiffs' title. There was, indeed, an allegation that the assertion of the claims of the defendants through the deed from Puryear to Sanford would prevent the plaintiffs from selling the land and minerals, thereby causing the plaintiffs irreparable damage; but it is apparent that the execution of such a deed could not increase the value of the claim already set up under the deed from Puryear to Sanford, nor could the claims of a purchaser under such a deed be calculated to diminish the chances of a sale by the plaintiffs. If the plaintiffs should be entitled to their main relief as prayed for in their complaint, and there should be a decree of the court below granting them that relief, the rights accruing to the plaintiffs under such a decree could not possibly be affected, even if the defendants had, after this action was commenced, sold the 100 acres of land, and made title thereto to the purchaser. The decree would be based upon the findings of the jury—or by the judge, if submitted to him by consent—that the plaintiff Graham procured his interest in the land without knowledge of the deed from Puryear to Dr. Sanford, executed before the registration law of 1885, and that that deed was registered after the registration of the contract under which Graham claimed to have obtained his interest in the land. If the plaintiffs should make good on the trial the allegations in their complaint, the claim of the defendants under the deed from Puryear to Dr. Sanford would be of no avail to them; and, of course, it follows that any purchaser from them under that claim of title could get no higher or greater interest or title than the bargainors had. And, besides, when the complaint of the plaintiffs was filed, that was *lis pendens*; and all subsequent purchasers would have to take notice of the purposes of the action, and of the claim of the plaintiffs. *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351. The injunctive relief prayed for in this case does not rest upon such a condition of facts as appeared in the cases of *Mortgage Co. v. Long*, 113 N. C. 123, 18 S. E. 165, and *Jones v. Buxton*, 121 N. C. 285, 28 S. E. 545. In *Mortgage Co. v. Long*,

supra, the allegation was that the defendants (who were judgment creditors of the mortgagor, and who had docketed their judgments since the registration of the mortgage to the plaintiffs) were making efforts to sell the mortgaged land under execution, thereby casting a cloud upon the plaintiffs' title to the land. The claim of the defendants there was founded upon an alleged misdescription of the land conveyed in the mortgage, and which it was averred rendered the mortgage void. The plaintiffs there prayed for a construction of the deed as to sufficiency of description to the land, and for injunctive relief against the defendants until the final hearing. The injunction was allowed, and this court sustained the order on the ground that the sale of the land under the execution would cause irreparable damage to the plaintiffs, by the almost certainty of preventing a full price being offered for the land when it should be sold by the mortgagee for the purpose of satisfying the mortgage debt. As we have shown, though, such consequences could not follow a sale by the defendants in this action under their deed from Puryear. If the plaintiff Graham procured his mining interest in the land with knowledge of the deed from Puryear to the defendants' ancestor, and the description of the land therein contained is sufficiently definite to pass the title (which we do not now pass upon, for the simple reason that it is not before us, and is a matter which wholly belongs to the trial below), then the plaintiffs have no title to the land. If, on the other hand, the plaintiff Graham got his interest in the land without knowledge of the deed from Puryear to the defendants' ancestor, and had it registered (it having been executed before the enactment of the law of 1885, c. 147) before the deed from Puryear to the defendants' ancestor was registered, then his title is good, and he would be entitled to the relief he seeks, if he makes good the other allegations of the complaint; and any pretended sale on the part of the defendants would be of no effect, for the reasons we have already given.

It is more than probable that injunctive relief was invoked in this case because of the allegation in the complaint that the defendants' claim rested on a deed (the one from Puryear to Sanford) in which the land attempted to be conveyed (100 acres) was described as being "on the waters of Crooked Fork, adjoining the lands of W. M. Hill, Thomas Chandler, and others," and that the answer admitted that the boundaries in the deed were accurately set out in the complaint, and that, therefore, no part of the plaintiffs' land had been conveyed by the deed. We think the answer admits that allegation of the complaint, and also that the 100 acres was a part of the two 76-acre tracts claimed by the plaintiffs. If that question was before us, we would have no hesitancy in deciding that the description of the 100 acres was fatally defective, and could not be

cured by parol evidence. *Allen v. Chambers*, 39 N. C. 125; *Grier v. Rhyne*, 69 N. C. 346. The last two cases were cited and approved in *Perry v. Scott*, 109 N. C. 374, 14 S. E. 294. But that matter belongs to the trial of the case on its merits when it is regularly called in the court below. Injunctive relief is afforded along certain fixed equitable rules, and should never be granted when no equities are involved, and when the question for decision is one purely of law, as in this case. There was error in the order of his honor granting the injunction. Error.

CLARK, J., did not sit on the hearing of this appeal.

BROWN v. MORRISEY.

(Supreme Court of North Carolina. March 28, 1899.)

DOWER—ADVERSE POSSESSION.

1. Adverse possession will run against a widow's right to dower where the person in possession claims adversely to, and not under, the husband.

2. Sole possession and enjoyment of land for the statutory period is sufficient to constitute adverse possession.

Faircloth, C. J., and Douglas, J., dissenting.

Appeal from superior court, Duplin county; Robinson, Judge.

Action by Dicey Ann Brown against D. G. Morrisey. Judgment for defendant, and plaintiff appeals. Affirmed.

Action by plaintiff to compel allotment of dower. Issues were as follows: (1) Were plaintiff, Dicey A. Brown, and George Brown married as alleged in complaint? (2) Is plaintiff the widow of George Brown, deceased? (3) Was George Brown, at the time of his death, seised of the land described in the complaint? (4) What damage, if any, is plaintiff entitled to recover for the detention of her dower? Plaintiff testified: "I am the widow of George Brown. Defendant was living near me in Warsaw, and after our marriage we boarded at my uncle's seven and a half months, and then moved down town. My husband built a house on the land described in the complaint, and we moved on the land. Lived there one year, and during this time cleared a small lot of land around the house. We then moved to Wilmington, but I stayed there only two or three days. My husband did not return with me, but went on South, and I have not seen him since. My husband is dead." Cross-examination: "When I came to Wilmington, I lived with my aunt. I lived about Warsaw two or three years. The war of 1865 had not begun before my husband died. It was seven or eight years after I came back to Wilmington when I heard my husband was dead. Soon after I came back to Wilmington, the defendant was in possession of the land, and has been in possession ever since." B. L. Ezzell, testified for plaintiff: "I knew George Brown between

1840 and 1860. His last wife was the plaintiff. I saw them married in Warsaw. Brown built a house on the land described, and plaintiff and deceased lived in it about one year. There was no cleared land when Brown built the house, but he cleared a small piece around the house. Plaintiff and her husband left for Wilmington about five years before the Civil War. I have not known of any one being in possession of the land since they left for Wilmington, except the defendant." The plaintiff offered in evidence a deed from A. Best to George Brown, dated September 4, 1854, which was duly registered, and which, it was admitted, described the land mentioned in the complaint. Calvin Rogers, for plaintiff, testified: "The tract of land was called the 'George Brown Tract.' I farmed on it 21 or 22 years ago for the defendant. At that time the defendant had cleared 85 or 40 acres." On cross-examination: "I have known the land 40 years, and defendant has been in possession of it ever since I knew it, claiming it and using it as his own. He cleared land on it, cultivated it, and received the rents and profits from it." N. Moore, for plaintiff, testified: "I moved to Warsaw in 1855. Knew George Brown, the plaintiff's husband. He built a house on this land, and in 1855 cleared a few acres of it. I think the land was worth \$5 or \$6 per acre. It would now be worth \$20 to \$25 in the woods. A fair rental value would now be \$6 to \$8 per acre." Cross-examination: "Rental value of land now, as it was when defendant went into possession, would be about \$20 annually. Defendant went into possession of the land after Brown left, and has been in possession ever since." The plaintiff, being recalled, testified: "I was married to George Brown in August. We then lived with my uncle seven and a half months. We then moved to Warsaw, in the alley, during which time my husband built the house on the land, and we then moved on the land, and lived there one year, and went to Wilmington." The plaintiff introduced the summons dated July 8, 1896, and rested. Defendant moved for judgment of nonsuit upon the following grounds: "(1) For that plaintiff had offered no evidence of title in her husband, except a deed dated in 1854, and a possession of a little more than a year thereunder; and that this was not sufficient to vest in him an estate of inheritance which would entitle the plaintiff to dower. (2) For that the uncontradicted evidence of plaintiff showed that defendant had been in the continuous, uninterrupted, adverse possession of the land for more than 30 years, and this conferred a title in fee upon defendant against plaintiff. (3) For that by long delay, and lapse of time for more than 30 years, the release of plaintiff's claim of dower was presumed." Court allowed the motion, and plaintiff excepted, and appealed from the judgment, assigning as error that his honor erred in sustaining the defendant's grounds for judgment of nonsuit, and for that there was evidence to go to the jury upon the possession of defend-

ant. The deed from A. Best to George Brown, above referred to, as introduced by plaintiff, contains the clause, "Hath bargained, sold, and conveyed unto the said George Brown, his heirs and assigns, forever, a certain tract or parcel of land lying in the county of Duplin," etc.; "to have and to hold unto the said George Brown, his heirs and assigns, forever, all and singular the above-bargained premises," etc.

Stevens & Beasley, for appellant. Allen & Dortch, for appellee.

FURCHES, J. This is a proceeding for dower, and defendant denies plaintiff's right, alleges title in himself, and pleads adverse possession, lapse of time, statute of limitations, and release. Upon the trial the plaintiff showed that she was married to George Brown in 1854; a deed to him, dated in September, 1854, conveying the land in controversy to him in fee simple; that he entered upon said land, and built a house, and cleared and cultivated a part of the land, and that she and her said husband lived on it for more than a year, when they left the land, and her husband left the state, and died in 1860 or 1861; that, soon after plaintiff and her husband left the land, the defendant entered, and has lived there ever since, clearing, cultivating, and using the land as his own. The defendant offered no deed or other written evidence of title, but relied on his long-continued possession, which, he contends, gives him a title in fee simple to the land. When the plaintiff showed her marriage, a deed in fee simple to her husband, and his death, this gave her *prima facie* a right to dower. And she contends that defendant has shown nothing that rebuts this presumption or *prima facie* right to dower; that he has shown nothing but his long-continued possession, and this is no bar to her right to dower; that the lapse of time and the statute of limitations does not run against a right of dower,—citing *Spencer v. Weston's Heirs*, 18 N. C. 213, and *Campbell v. Murphy*, 55 N. C. 357. This doctrine is announced in these cases, and is a correct application of the law to them, but, as we think, it would not be to this case. In those cases the defendants claimed title under the husband. In this case, the defendant does not claim under the husband, but adverse to his title. Where the defendants claim under the husband (as heirs or assignees), they cannot dispute the title of the husband, as they claim under him. And while the widow does not claim dower under the husband, she claims it under the same title that the heirs and assignees claim, by force and operation of the law of dower. Upon her marriage she acquired an inchoate right of dower, which the husband could destroy or defeat. Upon the death of the husband this inchoate right becomes a right consummate, but she has no estate until dower is assigned: and when this is done she acquires no new estate, but only the possession and enjoyment of the inchoate

right she acquired by reason of her marriage, ripened into an estate. Her dower right, and her dower when assigned, are a prolongation of her husband's estate in her for the term of her life. *Norwood v. Marrow*, 20 N. C. 448. The estate descends to the heir subject to this incumbrance, and, as he takes it subject to this incumbrance, he cannot hold or claim the estate adversely thereto; and, as he cannot hold adversely to the right of dower when he holds and claims the estate under the same title that the widow claims dower, the statute does not run. It is the same as a grant in fee simple, reserving a life estate; and, as the grantee holds his estate under the grantor, he cannot claim to hold adversely to the estate reserved, and the statute of limitations does not run. *McCormick v. Monroe*, 46 N. C. 13. But this doctrine does not obtain in this case, where the defendant does not claim under the husband as heir or assignee, but claims to hold adversely to the husband of the plaintiff, and by paramount title. We see no reason why he may not do this. And, while this is not directly held in *Norwood v. Marrow*, 20 N. C. 449, it seems to be conceded. If the defendant had a deed conveying a title paramount to that of the husband of the plaintiff, it is admitted that this would defeat her right of dower. So, if he had shown a deed from a stranger, and an adverse possession thereunder since he went into possession, it would have ripened into a perfect title as against the husband, if he were living. And so would a continued adverse possession, without color of title, from 1857 or 1858 until the commencement of this action, in 1896, have ripened into a perfect title against the husband. And there being no reason, that we see, why the lapse of time and the statute of limitation should not count against the husband (the defendant not holding under him), and the plaintiff's right to dower being a continuation of the husband's estate, we see no reason why she is not also barred. It is true, the husband, by his own acts, could not defeat her right of dower, as already stated. But she cannot be entitled to dower unless her husband was the owner of the land, and the theory of the defense is that, though he had a deed, he was never the owner of the land; and as the defendant has shown title in himself, it must be held to be paramount to that of the husband. It was said on the argument that, while the case showed that the defendant had been in possession all this time, cutting, clearing, and cultivating the land as his own, it was not shown that he held adversely. This, it seems to us, is the very strongest evidence that he was holding it adversely. But the fact that he was in the sole possession and enjoyment of the land is sufficient in law to constitute adverse possession. *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748. The judgment must be affirmed.

CLARK, J. (concurring). It nowhere appears how or under what title the defendant

entered. It may be, and the probability is, that, as he went into possession before the husband's death, he entered under a deed from him. If so, as the law then stood, the plaintiff had no claim to dower except of lands "of which her husband died seised or possessed." Rev. Code, c. 118, § 1. Possibly, the deed has been lost or destroyed, or it may even be of record, for the defendant put in no evidence, the plaintiff having been nonsuited at the close of her evidence. If she had wished to raise the interesting question whether the claim for admeasurement of dower would be barred against the heirs, or one claiming under them, she should have shown that the defendant claimed under the heirs; though I am of opinion that, even under those circumstances, the defendant would be protected by section 158 of the Code, which provides, "An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued." That was intended as a sweeping statute of repose for such cases as this, and all others "not provided for" specially, and to cure omissions in former statutes. But, however that may be, no scintilla of evidence suggests that the defendant claims under the heirs of her husband, and to discuss that question would be purely an abstraction. All that does appear is that the defendant has been in undisturbed adverse possession over 40 years, and, nothing else appearing, that gives him a title good against all the world, not under disability. It may be that he had title, mediately or immediately, from the husband, or that he held adversely to him. If so, the statute would not have ceased to run at his death, and the title, as against the husband, and the widow claiming under him, would have ripened. The plaintiff, not having shown that the defendant held under the heirs at law, is simply seeking dower, not in her husband's land, but in some one else's. Like every other plaintiff, she must prove facts entitling her to recover. It is not enough to show merely that at one time, about 40 years ago, her husband had title to the land.

FAIRCLOTH, C. J. (dissenting). This is a petition for dower. The plaintiff's husband was in possession of the land more than a year under a fee-simple deed registered in 1854. In their absence for a few years, from which the husband never returned, the defendant took possession of the land, using it as his own, and has been in possession ever since. He entered without any deed or color of title, and without any right of entry or right of possession. He entered as an intruder and trespasser, without any pretense of right. The defendant's counsel in this court said he would not discuss the title of the husband, but insisted that the defendant's title, growing out of his uninterrupted possession for more than 30 years, was a bar to the plaintiff's claim to dower. This is the question. At common law, upon the death of

the husband, the title, the right of entry, and the right to possession descend to and vest in the heir, and it is his duty to assign dower to the widow, and in certain conditions it is the duty of the sheriff to lay off and assign dower by metes and bounds. If dower is not thus assigned, the widow, having no estate, no right of entry or of possession, is driven to her writ of dower, in the nature of a writ of right. The only limitation on the exercise of this writ was and is 60 years. The law favored dower as a means of maintenance of the widow and the nurture of her husband, and the period of limitation at 60 years was adopted on the belief that no widow would live longer after the death of her husband. I agree that the defendant's long possession would bar an action by the heir for the land, as it would an action by the husband. This is so because the heir claims by descent under and through the husband, which is not true as to the widow. Her right at the death of her husband, whatever it may be called, is not through or under him, but is an interest impressed on the land by the law, in spite of and in theory against his will. This right of dower, as well as that of tenant by the curtesy, is the will of the law, for the encouragement of matrimony. They do not hold by any idea of contract with each other as to their lands, nor by derivation from another as creditors, heirs, or purchasers. In *Norwood v. Marrow*, 20 N. C. 450, *Ruffin, C. J.*, says: "We have so held in respect to the husband's right to his wife's chattels. *Logan v. Simmons*, 18 N. C. 13. All the old authorities say that the tenant by curtesy is 'in the post'; that is, by operation of law. *Co. Litt. 30b*, note 7. * * * But, however the argument may be pursued upon the abstruse point of the old law, how the wife is in, technically speaking, it is certain that, such as her estate is, the law makes it without any act of the husband, and even against his will. She claims, therefore, under the statute, which defines her right of dower, and has made no contract with the husband which constitutes her a purchaser or a creditor." *Randall v. Kreiger*, 23 Wall. 147; *Martin v. Martin's Heirs*, 22 Ala. 86. Does the reason why the action of the heir is barred apply in this case? No statute in England or in North Carolina, and no decision of any court in either country, is cited in support of the defendant's contention, and I know of no limitation except the 60-years limit according to the common law. What reason can be suggested why this cherished right of the widow shall be defeated by the unlawful entry of an intruder without a shadow of right or equitable claim? The petition for dower is, by our act of assembly, substituted for the writ of dower at common law. "We, however, consider the act of 1715, called the 'Act of Limitations, as having been pleaded and relied on in this case. Is that act a bar to this petition? The widow has no estate in the land, for the law casts the freehold upon the heir immediately upon the death of the ancestor. The widow

had no right of entry for dower until it had been assigned to her. She had no estate in the land until assignment. It is not until her dower has been duly assigned that a widow acquires a vested estate for life, which will enable her to maintain ejectment. * * *

A widow, before assignment of dower, has neither any 'right nor title' to the lands of which her husband was seised. She had only an interest in the lands for dower; therefore we think the act of 1715 cannot be pleaded as a bar of her action to recover the same. She is not within the provisions of the act." *Spencer v. Weston's Heirs*, 18 N. C. 213; 4 Kent, Comm. 60. Dower is a favorite of the law, and cannot be lost or forfeited, except for the causes prescribed by the statute or the common law. *Simonton v. Houston*, 78 N. C. 410. "The statute of limitations," says Pearson, C. J., "to a 'writ of right' is 60 years; to a formedon, 50 years [afterwards reduced to twenty]; to a writ of entry, 30 years. The writ of dower is in the nature of a writ of right. There is no statute of limitation in regard to it, for the reason, we suppose, that none was thought necessary, for the right ceased at the death of the widow, which would, in most cases, happen before the expiration of 60, 50, or even 30, years." *Campbell v. Murphy*, 55 N. C. 360, and many cases in the Reports. It appears to me that the plaintiff is entitled to have dower assigned.

DOUGLAS, J. (dissenting). I cannot assent to either of the propositions that what would bar the husband, if living, would also bar the wife; or that one whose only title is the statute of limitations, based upon a naked trespass, is in any better position than the heir, or an innocent purchaser for value, rightfully in possession ab initio. It is conceded that no ordinary statute of limitation ever runs against the right of dower, and that, if the defendant held, directly or indirectly, under the heirs of Brown, the admitted owner, his title would be subject to the widow's right of dower. But it is said that he has a clear title, because he holds under no one, and adversely to all the world by mere occupancy. Why should he be thus preferred? Lord Coke says, "There be three things highly favored in law,—life, liberty, and dower;" and this is still the spirit of our laws. Under our present law the husband could not defeat the wife's right of dower, either by direct conveyance or by permitting adverse possession. Under the old law, the plaintiff was entitled to dower because her husband died seised of the land. At that time, the defendant had no title, and she would have been entitled to dower as against him. If no statute of limitation runs against that right, what has she done to forfeit it? Nothing, that I can see. The view of the court would, in my opinion, offer too great an opportunity, as well as incentive, to fraud. I know nothing of the facts except as they appear in the record. But suppose the defendant had entered right-

fully under a deed from the heirs, how easy it would be for him simply to hold back his unrecorded deed, which may for so many years have been his only muniment of title, but which would now operate as an incubance. Statutes of limitation relating to land were formerly statutes of presumption; that is, they presumed a deed. But from whom was the deed presumed unless from him who held the title? I do not mean to oppose all statutes of limitations, or to denounce those who take advantage of them, oftentimes as the only means of defending substantial rights after the necessary evidence has been lost through lapse of time; but he who defends a title—and much less he who acquires a title—through such statutes, can stand in no better position than one whose title has never been questioned. Giving them, then, their fullest legitimate scope, I do not think we should encourage fraud by permitting a mere disselsor, who, if he had entered by right, would have no defense, to oppose the just claims of the widow with the naked shield of his own wrong.

BANK OF COLUMBIA v. GIBBES et al.

(Supreme Court of South Carolina. April 10, 1899.)

HOMESTEAD — EXEMPTION — ASSIGNMENT TO JUDGMENT DEBTOR.

Under Const. art. 3, § 28, and Act March 9, 1896 (22 St. at Large, p. 190), enacted pursuant thereto, amending Rev. St. § 2126, exempting to the head of a family a homestead in lands to the value of \$1,000, whether held in fee or any lesser estate, appraisers properly assigned to a judgment debtor a lot, and a dwelling house thereon, appraised at \$5,000, in which she owned a life estate only, appraised at \$800, where she was entitled to a homestead therein; the debtor's interest in the land, and not the value of the land, being the proper basis for ascertaining the exemption, though an appraisal of the value of the land was necessary to determine the value of her interest.

Appeal from common pleas circuit court of Richland county; D. A. Townsend, Judge.

Proceedings under a judgment in favor of the Bank of Columbia against J. Wilson Gibbes and Caroline S. Gibbes. From a decree overruling exceptions to and approving a return of appraisers assigning a homestead to the judgment debtor Caroline S. Gibbes, the judgment creditor appeals. Affirmed.

Wm. N. Lyles, for appellant. John P. Thomas, Jr., for respondents.

JONES, J. In proceedings under a judgment entered in 1897 in favor of appellant against respondents, homestead appraisers assigned to the judgment debtor Mrs. Caroline Gibbes, by metes and bounds, as a homestead, a lot, with dwelling house thereon, in the city of Columbia, in which she owned only a life estate, valued by the appraisers at \$800; the fee simple value of the premises being placed at \$5,000, and the premises being re-

ported to be indivisible. From the decree of the circuit court overruling exceptions to this return, and approving said return, is this appeal.

We understand from the record that no question was raised on circuit as to the correctness of the valuation of the life estate. The contention here is that, since the fee-simple value of the land in which the exemption is claimed exceeds \$1,000, the circuit court should have ordered the sheriff to proceed in accordance with the requirements of section 2128, Rev. St., as in case where the value of the property claimed is ascertained to be more than \$1,000 and the property is incapable of partition. The question is whether, in assigning a homestead in lands to a judgment debtor whose interest therein is a life estate, the value of that life estate, or the value of fee simple in said lands, is the proper basis for ascertaining the exemption; whether a homestead in lands held in fee, or any lesser estate, is limited in reference to the value of the land, or the value of the debtor's interest or estate therein.

By the constitution (article 3, § 28) it is provided, "The general assembly shall enact such laws as will exempt from attachment, levy and sale, * * * to the head of any family, * * * a homestead in lands, whether held in fee or any lesser estate, to the value of one thousand dollars," etc. By act of the legislature approved March 9, 1896 (22 St. at Large, p. 190), amending the statute appearing as section 2128, Rev. St., "a homestead in lands, whether held in fee or any lesser estate, to the value of one thousand dollars, * * * shall be exempt to the head of every family residing in this state from attachment, levy and sale," etc. In section 1996, Gen. St., appearing as section 2128, Rev. St., it is provided: "Whenever in the appraisal of a homestead * * * the appraisers shall find that the premises exceed the value of one thousand dollars and that the same cannot be divided without injury to the remainder, they shall make and sign under oath an appraisal thereof and deliver the same to the sheriff, who shall within ten days thereafter deliver a copy thereof to the head of the family claiming the homestead, * * * with a notice attached that unless the person so claiming the homestead shall pay the said sheriff the surplus of the appraised value over and above one thousand dollars within sixty days such premises will be sold," etc. In view of the above quotations, it seems very clear that appellant's view cannot be sustained. To do so would produce this startling result in this case: That, since the fee-simple value of the land is \$5,000, the life tenant, who is the judgment debtor, and whose estate is valued at \$800, must, in order to prevent a sale of her home, pay the sheriff \$4,000,—the excess of the value of the land over her homestead exemption therein. It is not, and could not be, disputed that a life

estate in land may be set off as a homestead, since such an estate is within the term "lesser estate." What, then, is the thing to be valued? Manifestly, the thing exempted from attachment, levy, and sale,—the interest or estate the judgment debtor has in the land,—as the homestead laws have no concern with the valuation of property not belonging to the debtor. Of course, in ascertaining the value of a life estate in land, reference must be had to the value of the land in fee, but only as a means to ascertain the value of the life estate. The cases of *Elliott v. Mackorell*, 19 S. C. 243; *Ex parte Ray*, 20 S. C. 249; *Munro v. Jeter*, 24 S. C. 36; *Bank v. Evans*, 28 S. C. 521, 6 S. E. 321,—cited by appellant's counsel, do not conflict with this self-evident view. Those cases show that the right of homestead is not an estate, but a mere right of exemption, by which the debtor's estate is protected from seizure and sale for the payment of debt, and that in determining this right the nature and quality of the title are not material, since, whatever the interest be,—whether in fee or lesser estate,—the right of exemption therein exists. The question here is not as to the right to a homestead exemption in a life estate in land, but, when such right exists, the extent of the right is to be measured by reference to the value of the property or estate claimed to be exempt from seizure and sale. The fact being conceded that the life estate, the only interest of the judgment debtor in the premises, is worth less than \$1,000, the circuit court did not err in confirming the return of the appraisers. The judgment of the circuit court is affirmed.

STATE v. CHERAW & D. R. CO.

(Supreme Court of South Carolina. April 10, 1899.)

TAXATION—ACTION TO RECOVER PAST-DUE RAILROAD TAXES—NECESSITY OF ASSESSMENT—JURISDICTION—PLEADING.

1. Under Const. art. 1, § 6, providing that property must be taxed in proportion to its value, and article 3, § 29, providing that taxes upon property shall be laid upon its actual value "as the same shall be ascertained by an assessment made for the purpose of laying such tax," an assessment is essential to constitute a liability for an ad valorem tax; and therefore the complaint, in an action under Act March 2, 1897, to recover past-due railroad taxes, must allege that defendant's property was assessed by the proper officers.

2. An allegation in an action against a railroad to collect past-due taxes, that the general assembly levied a certain tax on all property in the county, which became a lien on defendant's property, and that a certain sum was thus levied upon defendant's property, states a mere conclusion, and does not amount to the necessary allegation that there had been an assessment of defendant's property for taxation.

3. Since an assessment of property is necessary to constitute a liability for the tax, such liability must exist at the commencement of an action to recover such tax; and therefore Act March 2, 1897, providing for the recovery of past-due railroad taxes, cannot authorize an

assessment in the proceedings brought to recover the taxes.

4. The circuit court has jurisdiction of an action against a railroad, brought under Act March 2, 1897, to recover past-due taxes.

Appeal from common pleas circuit court of Chesterfield county; G. W. Gage, Judge.

Action by the state against the Cheraw & Darlington Railroad Company to recover past-due taxes. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

The following is a copy of the first cause of action stated in the complaint: "The complaint of the plaintiff in this case shows, first, for a first cause of action: (1) That the defendant is a corporation chartered by the general assembly of this state, and running a railroad extending from the town of Florence, in Florence county, to the town of Cheraw, in Chesterfield county; that there are forty miles of said road, and, valuing its roadbed, real estate, track, depots, water tanks, engines, cars, and tools, and all equipments of every kind, the said road is worth \$12,000 per mile. (2) That thirteen miles of said road, together with valuable depots and real estate owned by said company, lie in Chesterfield county, and the said property in said county is worth one hundred and fifty-six thousand dollars, and was worth that sum on the 1st day of January, 1896. (3) That the general assembly, by statute, levied a tax for the fiscal year beginning November 1, 1895, of four and one-half mills on the dollar for general state purposes, and a tax of three mills on the dollar for the public schools, and a tax of eight and one-half mills on the dollar was levied for general county purposes for Chesterfield county, making in all a tax of sixteen mills on every dollar's worth of taxable property in the county of Chesterfield, and the same became a lien on the property of the defendant situate in said county; that the sum of \$2,496.00 was thus levied upon the said property of the defendant, and the same was due and payable not later than December 31, 1896, and, if not paid then, a penalty of 15 per cent. on the same was levied by the statute of said state. (4) That defendant refused to pay the same, or to make return of its property for taxation, under the claim that the said property was exempt from taxation by a statute of the state of South Carolina, which plaintiff denies, and there is now due from the defendant the sum of \$2,870.40 for said taxes and penalties. (5) That by an act of the general assembly of South Carolina approved March 2, 1897, entitled 'An act to provide for the collection of past-due railroad taxes, and for the distribution of the same,' the state of South Carolina was authorized to sue for and collect all of said taxes in one action. [Then follow 47 similar causes of action, except as to the mileage in the respective counties, the dates, the levies, and the amounts due for taxes and penalties, and in the county of Dar-

lington there was a "special" levy for school purposes for several years, which was set forth in the causes of action for said year. There are 20 years claimed for Chesterfield, 8 years on 5 miles of track are claimed for Florence, 8 years on 22 miles for Darlington, and 12 years on 27 miles for Darlington.] Wherefore plaintiff demands judgment for the various amounts alleged in the various causes of action against the defendant, and for costs."

After the reading of the complaint by the plaintiff, the defendant interposed the following oral demurrer: "The defendant demurs generally to the complaint, and to each cause of action therein, on the following grounds: (1) That the court can take no jurisdiction of this action, inasmuch as the act of March 2, 1897, which purports to give the attorney general the right to bring the action, at his discretion, for the purpose of testing the right of such railroads to exemption from taxation as he should see fit to bring into court, and to claim judgment, as for past-due taxes, in such sum as he may determine (which said act is the sole source of the authority for this action), is void, inasmuch as (a) It is special legislation; and (b) It violates section 5 of article 1 of the constitution of the state of South Carolina, by depriving defendant of property without due process of law, and denying to it the equal protection of the laws; and violates section 3 of article 10 of the constitution, by permitting judgment as for past-due taxes to be entered against the defendant, without naming the defendant or specifying the amount for which action shall be brought, and by thus imposing a tax not levied in pursuance of law, stating the object of said tax; and violates section 14 of article 1, in conferring on the attorney general, an officer of the judicial department, and upon the court, the right to determine the amount of taxes to be imposed on this defendant, and to collect the same,—the former being a function of the legislative, and the latter of the executive, department of the state government. (2) Upon the ground that the complaint fails to state facts sufficient to constitute a cause of action, in that it does not show how the alleged tax became a lien on the property of the defendant, as alleged in paragraph 2 of the complaint; and it fails to show that the property of the defendant was returned for taxation, as required by sections 234 and 235 of volume 1 of the Revised Statutes of 1893, sections 180 and 181 of the General Statutes of 1882, and sections 14 and 15 of the act of 1874; or that the comptroller general notified the board of equalization of the return of defendant filed in his office, or that the board of equalization proceeded under section 20 of the act of 1874, section 186 of the General Statutes of 1882, and section 240 of volume 1 of the Revised Statutes of 1893, or that the comptroller general certified the return of the railroad property to the county auditor of each county, or that the

county auditor charged this defendant's property for taxation under section 21 of the act of 1874, section 187 of the General Statutes of 1882, and section 241 of volume 1 of the Revised Statutes of 1893; and fails to show that the defendant company failed to make return of its property for taxation, and that upon such failure the said board of equalization proceeded, under section 22 of the act of 1874, section 188 of the General Statutes of 1882, and section 242 of the Revised Statutes of 1893, to ascertain and apportion the same, or that the comptroller general certified the same to the county auditors, or that the county auditors placed the same on their duplicates for taxation, and that said property was ever legally assessed, and fails to show that the name of the said defendant appears on the auditor's annual list of taxpayers, required to be made by section 52 of the act of 1874, section 234 of the General Statutes of 1882, and section 285 of volume 1 of the Revised Statutes of 1893; and fails to show that the comptroller general in that year, before 15th October (or the time fixed by statute), gave notice to the county auditor of the rates per centum authorized by law to be levied for the various state purposes, required by section 260 of the General Statutes of 1882 (section 286, 1 Rev. St. 1893), or that the said rates were levied by the county auditor on the property of the defendant as taxable property of the county, charged on the duplicate with the taxes required to be levied and collected for other purposes, as required by section 66 of the act of 1874, or, in the years preceding 1893, the county commissioners assessed the taxes for county purposes, and made out and delivered to the county treasurer with warrant to collect the tax bill for county purposes, as required by section 616 of the General Statutes of 1882 and the act of 1875, or that the county commissioners made the report to be transmitted to the general assembly, showing the amount of the taxes levied and assessed, as required by section 319 of the General Statutes of 1882; and fails to show that the property of the defendant was listed or scheduled as taxable property of the county on the duplicate of the county auditor, as required by section 67 of the act of 1874 and section 235 of the General Statutes of 1882 (section 287, 1 Rev. St. 1893); and fails to show that the county auditor, after receiving from the comptroller general, and from such other officers and authorities as were legally empowered to determine the amount of taxes to be levied for the current year, proceeded to determine the sums to be levied on each tract or lot of real property, and upon the amounts of personal property in the name of the defendant, as required by section 235 of the General Statutes of 1882 (section 287, 1 Rev. St. 1893) and section 67 of the act of 1874; and fails to show that the county auditor entered on the tax duplicate the taxes opposite the name of the defendant, as required by section 70 of the act of 1874, section 237 of

the General Statutes of 1882, and section 289 of volume 1 of the Revised Statutes of 1893; and fails to show that the value of the defendant's property was included in the aggregate value of the taxable property, and the taxes on defendant's property were included in the total amount of taxes assessed thereon, for said years, appearing on the annual abstract of the duplicate of said county required to be transmitted by mail by the county auditor to the comptroller general under section 81 of the act of 1874 and section 248 of the General Statutes of 1882 (section 301, 1 Rev. St. 1893); and fails to show that the name of the defendant appears on the delinquent list, or recorded on the book of the auditor, as required by section 82 of the act of 1874, section 276 of the General Statutes of 1882, and section 333 of volume 1 of the Revised Statutes of 1893; and fails to show that said taxes became payable at any time, as required by law, after their assessment, as prescribed in sections 85 and 87 of the act of 1874, section 266 of the General Statutes of 1882, and section 324 of volume 1 of the Revised Statutes of 1893; and fails to show that the personal property of the defendant became liable to distress and sale under section 90 of the act of 1874, section 280 of the General Statutes of 1882 (section 336, 1 Rev. St. 1893), or that it was ever advertised for sale, or that any chattel tax was unpaid, or returned delinquent, or that the county treasurer either distrained the property for the payment thereof, or sued to recover the same by action at law or otherwise, under section 97 of the act of 1874, section 281 of the General Statutes of 1882 (section 337, 1 Rev. St. 1893); and fails to show that the said taxes were legally assessed, and ever came to be considered or held as a debt payable to the state by the defendant against whom the same were charged, or that said taxes so became a lien, under section 127 of the act of 1874 and section 170 of the General Statutes of 1882 (section 200, 1 Rev. St. 1893), and fails to allege that the property of the defendant was taxable property. (b) Paragraph 3 of the complaint avers that the general assembly levied a tax for the fiscal year — on every dollar's worth of the taxable property in the county of —, and the same became a lien on the property of defendant in said county, but fails to set forth or allege that the property of the defendant was taxable property. (c) Paragraph 3 of the complaint alleges that — dollars were thus levied on the property of the defendant, without stating how, or by what process, said amount was ascertained or reached, or by what authority said specific sum was levied, laid, or imposed, as a tax on the property of, or charged against, the defendant, or by what official, or at what time, or in what manner, the same was levied. (d) Paragraph 3 of the complaint alleges that said sum was due and payable not later than —, but fails to show how it became so due and payable. (e) Paragraph 4 of the

complaint avers that the defendant refused to pay the same, but fails to allege any fact or facts showing that the demand for payment of the said sum, or any sum, for taxes, was ever made on defendant by the state of South Carolina or its authorized officers, or anything showing when, how, or to whom the defendant so refused payment, or that defendant ever became legally liable to pay the said sum, or showing that said tax had ever been charged against or chargeable against the defendant. (f) Paragraph 4 of the complaint alleges that the defendant refused to make return of its property for taxation, but fails to allege at what time, or in what manner, or to what officer, defendant refused to make return of its property for taxation, and fails to state whether said refusal, under the claim that said property was exempt from taxation, was or was not acquiesced in by the state, or that said claim was then or at any other time denied by the state. (g) Paragraph 4 alleges that there is now due from defendant the sum of — dollars for said taxes and penalties, but fails to show facts showing how or when they became so due. (h) Paragraph 5 alleges that by an act of the general assembly of South Carolina approved March 2, 1897, entitled 'An act to provide for the collection of past-due railroad taxes and for the distribution of the same,' the state of South Carolina was authorized to sue for and collect all of said taxes in one action, but it fails to allege that said taxes, or any part thereof, were or ever have been past-due railroad taxes, or taxes of defendant railroad at any time due by it, or at any time past-due taxes."

J. T. Barron and Theo. G. Barker, for appellant. W. A. Barber, W. F. Stevenson, Stevenson & Matheson, E. J. Kennedy, J. J. Ward, and Woods & Shipp, for the State.

JONES, J. This action was brought under the statute approved March 2, 1897, entitled "An act to provide for the collection of past-due railroad taxes, and for the distribution of the same," to recover taxes, state, county, and special, with penalties, alleged to be past due for each of the 20 fiscal years from 1876 to 1896, inclusive, on its railroad property in the territory embraced within Chesterfield, Darlington, and Florence counties. The complaint attempts to set up 48 causes of action, each cause of action being for the amount alleged to be due in each of said counties in each fiscal year. So much of the complaint as is set out in the "case," showing one of these alleged causes of action, is officially reported herewith. The case is here on appeal from an order overruling a demurrer interposed on two grounds: (1) That the court could take no jurisdiction; (2) that the complaint does not set forth facts sufficient to constitute a cause of action. For a detailed statement of the grounds of demurrer, see the official report.

As we analyze the case, the crucial question is whether a legal liability to pay an ad valorem tax arises from an act of the legislature imposing or authorizing a tax levy on all taxable property and the mere possession or ownership of taxable property, or is an assessment of such property for taxation by proper officers an essential prerequisite? In our opinion, an assessment or valuation of property for taxation is essential to constitute a legal liability to pay taxes. The provisions of the constitution on the subject are: Article 1, § 6: "All property subject to taxation shall be taxed in proportion to its value." Article 3, § 29: "All taxes upon property real and personal shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax." Article 10, § 1: "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory. * * *" These provisions of the constitution of 1895 were also contained in the constitution of 1868 (article 1, § 36; article 2, § 33; article 9, § 1). If there had been nothing in the constitution except the provision first quoted, requiring that all property shall be taxed in proportion to its value, by necessary implication some mode of valuation would be necessary in order to ascertain the certain, proportionate share of the public burden to be borne by each individual taxpayer. But nothing is left for implication on this subject. A valuation of all property for taxation is expressly enjoined. Taxes are not to be laid upon taxable property merely, nor upon its actual value, but upon its actual value as ascertained by an assessment made for the purpose of laying such tax. It is thus clear that an official valuation for taxation is essential to constitute a tax, which must not only be certain in amount, but must be justly apportioned. Other provisions of the constitution might be cited; for example, section 13, art. 10, where it is provided: "The general assembly shall provide for the assessment of all property for taxation; and the state, county, township, school, municipal and all other taxes shall be levied on the same assessment," etc.

Pursuant to such provisions of the constitution, the general assembly has passed general and standing laws in reference to the assessment and taxation of property, and the idea that an official assessment is prerequisite to constitute a legal tax runs through it all. Under the scheme of our tax laws, the names of all taxpayers, and a statement of their taxable property, with its value as assessed by proper officers for taxation, the rate of taxation, and the specific amount due by each, are entered by the county auditor on the book known as the "County Duplicate," and this duplicate, when delivered to the county treasurer, becomes his warrant for the collection of taxes,

subject to certain provisions for additional entries after delivery of the duplicate to the treasurer. Taxes are legally assessed, and become a charge against the taxpayer, when so entered according to law. In section 170, Gen. St. 1882, it is provided: "All taxes * * * legally assessed shall be considered and held as a debt payable to the state by a party against whom the same shall be charged, and such taxes * * * and penalties shall be a first lien in all cases whatever upon the property taxed," etc. Touching railroad property, it is assessed by a state board of equalization, and the comptroller general is required to certify such assessment to the county auditor, who is required to charge the respective railroad companies in his county with such valuation. If any railroad company fail to comply with the statute requiring it to make return of its property for taxation, the state board of equalization is required to assess such property, adding 50 per centum as penalty, and to certify the result to the county auditor, who is required to place the same on his duplicate for taxation. So, then, it appears that not only is an assessment indispensable to an ad valorem tax, but it is necessary to an assessment that it be done by the proper officers in the manner provided by law. When, therefore, the legislature imposes or provides for the imposition of a tax levy of so many mills on the dollar upon all taxable property, reference is necessarily made to existing laws in relation to the assessment of property for taxation, whether the levy relates to an assessment previously made for such tax, or to an assessment being made or about to be made for such tax; and so it must be held that an act of the legislature, imposing or authorizing a tax levy on all taxable property, means on all taxable property as assessed for taxation by proper officials, as provided by law. Whatever may be the moral obligation of every person to bear his due proportion of the public burden, no legal liability to pay is created until that proportion is ascertained by an assessment according to law.

The cases of *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, and *King v. U. S.*, 99 U. S. 229, are cited to the effect that an assessment is not essential to a tax. In the first-named case the court construed an act of congress, requiring every savings bank to pay a tax of 5 per cent. on all undistributed earnings made or added during the year to their contingent funds, as imposing a certain sum upon the bank, for which the bank became debtor to the government, and that no other assessment than that made by the statute was necessary. This rule clearly could not apply here, where the constitutional and statutory provisions in relation to assessment of property for taxation exist, which require taxes to be levied on property as assessed for taxation. The second case cited was rested on the first-named, and need not be further noticed. Much more applicable to the case before us is the case of *People v. Weaver*, 100 U. S. 539, where the

court held, quoting the syllabus, that "the provisions of the national bank law that state taxation on the shares of the bank shall not be at a greater rate than is assessed on other moneyed capital in the hands of citizens of the state has reference to the entire process of assessment, and includes the valuation of the shares, as well as the ratio of percentage charged on such valuation." In this last-mentioned case the court uses this pertinent language: "This valuation, then, is part of the assessment of taxes. It is a necessary part of every assessment of taxes, which is governed by a ratio or percentage. There can be no rate or percentage without a valuation." Then the court proceeds to quote the following: "When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, or benefits, or the results of business." "An 'assessment,' strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subject of taxation within the district. As the word is more commonly employed, an 'assessment' consists in the two processes,—listing the persons, property, etc., to be taxed; and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation cannot be apportioned without it." *Cooley, Tax'n*, 258, 259; *Bur. Tax'n*, p. 198, § 94. So, also, Judge Bouvier defines "assessment" to be: "Determining the value of a man's property or occupation for the purpose of levying a tax; determining the share of a tax to be paid by each individual; levying a tax." 1 *Bouv. Law Dict.* p. 154. See, also, 25 *Am. & Eng. Enc. Law*, 199, and cases cited.

In the light of the foregoing, let us ascertain what is the true construction of the statute under which this action is brought. The act, both in its title and in the body thereof, authorizes an action for past-due taxes. This undoubtedly must be held to mean delinquent taxes on property assessed for taxation, for only such taxes are past due. In a complaint for such taxes, it is essential to allege that the property upon which the taxes are claimed was, by the proper officer, assessed for taxation; since, as we have shown, assessment for taxation is one of the basal facts upon which must rest the legal liability to pay the tax. The complaint in this case failed to allege such fact, and defendant's demurrer in this particular should have been sustained. As shown, it is not sufficient to allege the possession or ownership of taxable property with a special value; for taxes are laid on assessed values. There is nothing in the complaint from which we might infer that plaintiff meant, or attempted to allege, that the property was assessed. The complaint informs that the defendant, claiming to be ex-

empt from taxation, did not return its property for taxation. In the absence of any allegation that the state board of equalization, in default of such return, assessed said property, adding 50 per centum as a penalty, the inference is that said property has not been assessed. We cannot assume that the state board of equalization did its duty, and assessed said property, in the absence of the slightest reference thereto. We could, with equal propriety, draw an inference that the board of equalization acquiesced in defendant's claim of exemption, and for this reason did not make the assessment. The fact, too, that the complaint is for taxes alleged to be due on the actual value of defendant's taxable property, instead of for taxes due on the assessed value, with 50 per centum added as a penalty, shows that the pleader did not intend to allege that the defendant's property was assessed for taxation by the state board of equalization in default of a return thereof by the taxpayer. Nor do we think there is anything in paragraph 3 of the complaint to help the plaintiff in this particular. The allegation that the general assembly "levied a tax" of certain specified rates "on every dollar's worth of taxable property in the county of Chesterfield, and the same became a lien on the property of the defendant situate in said county; that the sum of \$2,496 was thus levied upon the said property of defendant, and the same was due and payable not later than December 31, 1896, and, if not paid then, a penalty of 15 per cent. on the same was levied by the statute of said state,"—states a legal conclusion merely, without stating the basal fact necessary to complete a tax levy, to create a tax lien, to make taxes payable, and to authorize a penalty for nonpayment of taxes, viz. an assessment of defendant's property for taxation. The allegations of such conclusions of law raise no issue, and, under the well-established rule, are not admitted by a demurrer. As stated in 25 Am. & Eng. Enc. Law, 320: "The complaint or declaration should show a prima facie valid tax, and the property against which, and person upon whom, it is a charge. It should show the jurisdiction of the court over the subject-matter, and that the property is delinquent. It need not aver how and by whom the levy and assessment were made." And again, on page 323: "It rests with the plaintiff to show a lawful levy and assessment." And again, on pages 324 and 325, where it is stated that the absence of an assessment is always a good defense. It thus appears that while, in a suit to collect taxes, it is not necessary to allege all the probative facts by which a lawful levy and assessment are established, yet it is necessary to allege the levy and assessment.

But it is contended that the act of 1897, supra, authorizes an assessment of defendant's property for taxation in the proceedings brought to recover past-due taxes. The mere statement of the proposition is its refu-

tation. If, as we have seen, an assessment of property for taxation is essential to constitute legal liability for taxes, and if the legal liability of defendant must exist at the commencement of the action, how can it be possible to authorize assessment for taxation in the action brought to recover taxes past due? We have no means of ascertaining the intention of said act but by its language, construed in the light of legislative power. We find nothing in the act to warrant a construction that, in a suit under it to collect past-due taxes, the jury, or the court and jury, trying the cause, are constituted a tribunal to assess defendant's property for taxation. Under this construction of said act, it is irrelevant to discuss points argued before us; as, for example, whether it is competent for the legislature to authorize the assessment of railroad property belonging to companies claiming exemption from taxation as a separate class, and by a different tribunal from that authorized to assess all other railroad property, or whether said act, construed to authorize the jury trying the cause to assess the property of defendant, violates constitutional provisions in reference to "due process of law," "equal protection of the laws," etc.

Construing the act as one authorizing a suit for past-due taxes, there is no doubt the circuit court has jurisdiction. The complaint, however, is demurrable on the ground that it fails to state facts sufficient to constitute a cause of action, in that it fails to state that defendant's property was assessed for taxation in the years for which said taxes are claimed. The judgment of the circuit court is reversed, without prejudice to the right of plaintiff to apply to the circuit court for leave to amend the complaint in the particular discussed herein as it may be advised.

GARRISON v. CITY OF LAURENS et al.

(Supreme Court of South Carolina. March 20, 1899.)

MUNICIPAL CORPORATIONS—TAXATION—EXEMPTION—MANDAMUS—PARTIES.

1. Under the constitution of 1868, requiring all property to be assessed for taxation, a city council had no power to exempt factories from taxation.

2. Nor did the constitution of 1895 give such power to cities, except after approval of such action by the voters of the city.

3. A party who is neither a citizen nor a taxpayer of a municipality cannot prosecute an application for mandamus to compel the payment of taxes to such municipality.

Application by J. H. Garrison for a writ of mandamus against the city of Laurens; W. R. Richey, mayor, and F. P. McGowan and others, aldermen, as the city council of Laurens; L. G. Balle, clerk; and the Laurens Cotton Mills. Returns of all the respondents except the Laurens Cotton Mills held insufficient. Writ stayed to await a trial of issues of fact

between the relator and the last-named respondent.

The petition of relator is as follows (omitting formal parts), viz.:

"Your relator respectfully shows unto the court: (1) That he is now, and was at the times hereinafter named, a citizen of the county and state above written, and of the city of Laurens, residing therein; and your relator owns, and pays taxes upon, considerable real and personal property, to the county and state aforesaid, and to the city of Laurens, on his property situate therein. (2) That the city of Laurens is now, and was at the times hereinafter named, a body politic and corporate, so created under the laws of this state, and is known as and called the 'City of Laurens.' That said the city of Laurens is governed by a mayor and six aldermen, who are now the respondents W. R. Richey, mayor; F. P. McGowan, B. A. Sullivan, J. S. Bennett, C. H. Roper, L. S. Fuller, and C. B. Bobo, aldermen; and said mayor and aldermen are known as and called the 'City Council of Laurens.' (3) That the respondent L. G. Balle is the clerk of the city council of Laurens. (4) That the Laurens Cotton Mills is now, and was at the times hereinafter named, a corporation created by and under the laws of the state of South Carolina, with its principal place of business in the city of Laurens, county and state above written, and is possessed of and owns a great amount of property, both real and personal, situate in the city of Laurens. That for the year of 1896 the Laurens Cotton Mills returned for taxation for county and state purposes property valued in said return at the sum of six thousand and fifteen dollars, which said property was situate in the city of Laurens, and subject to taxation therein for city purposes. (5) That for the year 1897 the Laurens Cotton Mills returned for taxation for county and state purposes property valued in said return at the sum of one hundred and fifty thousand and two hundred and ten dollars, which said property was situate in the city of Laurens, and subject to taxation therein for city purposes. (6) That for the year 1896 the Laurens Cotton Mills returned for taxation for county and state purposes property valued in said return at the sum of two hundred and thirty-five thousand dollars, which said property is situate in the city of Laurens, and is subject to taxation therein for city purposes, and for the purpose of paying the interest on and creating a sinking fund with which to redeem the bonds issued by the city of Laurens for waterworks and electric lights. (7) That the city of Laurens, governed by the city council of Laurens, levied upon the property of her citizens, and collected from them, except the respondent the Laurens Cotton Mills, for the year 1896, 5 mills on the dollar, for the year 1897 5 mills on the dollar, and for the year 1898 9 mills on the dollar, on the assessed value

of their property. (9) That on the 18th day of February, 1893, the city council of Laurens, without authority in law, and overstepping its power as such, passed a resolution of which the following is a copy: 'The council convened in council chamber Feb'y 18, 1893. Present: N. B. Dial, mayor; Messrs. Garrett, Roland, Hudgens, and King, aldermen. It was resolved that all city taxes be remitted for the period of twelve years (12) to any cotton, wool, or thread factory which might be erected within the corporate limits of this city. An ordinance relative thereto is to be drawn up by the mayor. L. G. Balle, Clerk.' (10) That such ordinance has never been drawn up, yet since that time, to wit, in the year 1896, the Laurens Cotton Mills were being built in the city of Laurens, and owned property therein, as hereinbefore alleged; and under and by virtue of said resolution no taxes for city purposes were collected, or attempted to be collected, from the Laurens Cotton Mills for the said year 1896 or for the year 1897, although the city of Laurens, by and through its city council and its clerk, collected from your relator and other citizens of the city of Laurens taxes upon their property at the rate hereinabove alleged. (11) That on the — day of —, 1898, the city council of Laurens, without authority in law, and overstepping its powers as such, passed an ordinance of which the following is a copy: 'State of South Carolina, County of Laurens, the City of Laurens. A resolution to cancel the levy and assessments made by the clerk of the city of Laurens for the year 1898 against Laurens Cotton Mills. Be it resolved by the city council of Laurens: (1) That whereas on Feb. 18, 1893, the city council of Laurens passed a resolution "that all city taxes be remitted for the period of twelve years to any cotton, wool, or thread factory which might be erected within the corporate limits of the city of Laurens," the clerk of the city council of Laurens be, and he is hereby, authorized and directed to cancel the levy and assessment intended for municipal taxation upon the tax book of said city for the year 1898 against the property of Laurens Mills established within the corporate limits of the city of Laurens, since the adoption of said resolution, exclusively for manufacturing purposes, to wit, one hundred and fifty thousand two hundred and ten dollars (\$150,210), and that the said clerk do not collect taxes on said assessment for said year. L. G. Balle, Clerk. W. R. Richey, Mayor.' (12) That by reason of the said resolution, and the ordinance afterwards passed by the city council of Laurens, the clerk of said council has never collected or attempted to collect the taxes justly due and owing by the Laurens Cotton Mills to the city of Laurens, and has canceled the assessments for the years 1896, 1897, and 1898; and by reason thereof your relator has had to pay a great deal more taxes upon the property owned by him in the city of Lau-

rens, and all other citizens of Laurens have in a like manner been more heavily taxed by reason thereof. (13) That no election has ever been held as is required by law for the purposes of determining whether the citizens of the city of Laurens are in favor of the exemption of the Laurens Cotton Mills from taxation, and the city council of Laurens has wrongfully gone beyond the powers conferred upon it by the constitution and laws of this state, in passing the resolution and ordinance herein set forth, and has thereby made an unjust discrimination in favor of the Laurens Cotton Mills, to the great hurt and wrong of the other citizens of the city of Laurens. (14) That your relator is informed and believes that there is now due by the Laurens Cotton Mills to the city of Laurens for taxes for the year of 1896 the sum of thirty and $\frac{75}{1000}$ dollars, for the year 1897 the sum of seven hundred and fifty-one and $\frac{5}{100}$ dollars, for the year 1898 the sum of two thousand one hundred and fifteen dollars; the whole amount now due being two thousand eight hundred and ninety-six and $\frac{125}{1000}$ dollars, none of which has ever been paid. (15) That your relator has no adequate remedy at law whereby he can be relieved from this unjust discrimination and burden placed upon him and other citizens of the city of Laurens, for the benefit of all of whom he brings this action. (16) That a reasonable attorney's fee should be allowed the attorney for relator in this action, for the bringing of the same.

"Wherefore relator prays: (1) That a writ of mandamus do issue from this honorable court, requiring and commanding the city clerk of the city of Laurens to restore to the tax books the assessments against the Laurens Cotton Mills, and collect the same. (2) That the resolution and ordinance be declared unconstitutional and void, and the city council of Laurens be required to repeal and revoke the same. (3) That a reasonable attorney's fee be allowed the attorney for relator herein for the bringing of this action. (4) For such other and further relief as to the court may seem just and equitable."

Following is the return of the Laurens Cotton Mills (omitting formal parts), to wit:

"The Laurens Cotton Mills, responding to the rule to show cause issued by this honorable court, and for cause why the writ prayed for should not issue, respectfully shows: (1) It has no knowledge, or information sufficient to form a belief, as to the allegations contained in paragraphs 1, 8, 10, 11, 12, and 13 of the petition, and it therefore denies the same. (2) It denies the allegations contained in paragraphs 5, 6, 7, 14, 15, and 16 of the said petition. (3) It admits the allegations contained in paragraphs 2, 3, and 4 of the said petition. (4) The respondent admits so much of paragraph 9 as alleges the passage of the resolution by the city council. The balance of the said paragraph it denies.

"By way of defense to the petitioner's sup-

posed cause of action, the said respondent alleges: First. That the petitioner's action ought to have been brought in the name of, and with the consent of, the state of South Carolina. Second. That the petition does not state facts sufficient to constitute a cause of action, or facts sufficient to justify this court in granting the relief prayed for, as against the respondents now before the court. Third. That the petition demands the issuance of the writ against the wrong parties. Fourth. This respondent alleges that none of its property is liable to be assessed for city purposes, nor has any of said property been put upon the tax book of the city of Laurens in the manner prescribed by law. Fifth. That the failure of the city council to do and perform the acts complained of by the relator, if such failures there have been, was the failure of the predecessors in office of the present city council; and this respondent submits that the present council cannot be held responsible for, and required to perform the duties of, their said predecessors in office. Sixth. That the respondent has paid, and taken receipt for, all taxes assessed against it by the city council of Laurens for each and every year since its organization. Seventh. This respondent alleges that the city council of Laurens, in pursuance of the resolution described in paragraph 9 of relator's petition, did duly pass an ordinance in accordance with the terms of the said resolution. Eighth. That the said the city of Laurens and the said city council of Laurens, having held out to the general public and to the respondent that a cotton factory established within the corporate limits of said city should be free for a period of twelve years from assessment and taxation for city purposes, and having by such representation induced many parties at home and abroad to take stock,—among whom was the relator,—and establish said Laurens Cotton Mills within the corporate limits of said city, are now estopped, under this conduct, from levying and collecting taxes upon the property of the said Laurens Cotton Mills for city purposes. Further, that the citizens of the said city, before the building of the said Laurens Cotton Mills, and with a view of securing the building of the same, held several public meetings, which were attended by the relator and others, and announced to the general public that such property should not be taxed for city purposes for a period of twelve years; and the respondent submits that the relator and all other citizens of the said city of Laurens are estopped from bringing and maintaining this action. Further, that the relator and all other citizens of the said city of Laurens were well informed of said public meetings, and of the representations and inducements held out to this respondent to establish itself within the corporate limits of said city, and by their silence, acquiescence, and seeming approval not only influenced this respondent to establish itself within the corporate limits of said city, but by their continued silence, acquiescence, seem

ing approval, and laches after it had established itself, caused the respondent to double its capacity and investment. Whereas, but for the representations and inducements held out to the respondent as aforesaid, and but for the silence, acquiescence, and seeming approval as aforesaid, the respondent would not have established itself within the corporate limits of said city, and but for the continued silence, acquiescence, seeming approval, and laches as aforesaid, the respondent most assuredly would not have doubled its capacity and investment. And the respondent submits that by reason of said silence, acquiescence, seeming approval, and laches, the relator and all other citizens of the said city of Laurens are estopped from bringing and maintaining this action. Wherefore respondent asks that the petition be dismissed, with costs."

J. B. Park, for relator. N. B. Dial and Ferguson & Featherstone, for respondent Laurens Cotton Mills.

POPE, J. This is an application for the writ of mandamus addressed to this court in the exercise of its original jurisdiction. The relator, as a taxpayer and citizen of the city of Laurens, is desirous of having the respondent the Laurens Cotton Mills pay its taxes for the years 1896, 1897, and 1898, from which it was excused under a resolution adopted by the city council of Laurens in the year 1893, wherein cotton mills, thread factories, etc., would be excused from all municipal taxes for 13 years, if they, or either one of them, would locate in the city of Laurens. No ordinance was passed until 1898. The Laurens Cotton Mills were incorporated in 1896. Upon the presentation of the petition (which petition will be reported) for the writ in question, the usual order was passed, requiring the respondents to make return there-to. The respondent the city council of Laurens made a return virtually admitting all the allegations of fact set up in the petition, but insisting that its co-respondent was not liable to pay any taxes for the years 1896, 1897, 1898. But the return (which return, so far as the first, second, third, and fourth paragraphs are concerned, will be reported) of the Laurens Cotton Mills denied that the relator was a citizen or owned property in the city of Laurens; denied the allegations of fact set out in the petition, alleging that it had been assessed to pay taxes in the years 1896, 1897, and 1898, and so on. On the 12th day of December, 1898, the relator demurred to the returns of the respondents. By this step he admits the allegations of fact as set out in the returns. So far as the city of Laurens, or the city council of Laurens, or its clerk and treasurer, is concerned, the demurrer to their return is well taken.

There was no power in the city council of Laurens, in the year 1893, to exempt, or to

promise to exempt, factories from taxation, upon their location in the city of Laurens. Such a step was in palpable violation of the constitution adopted in 1868; for that instrument required all property, real and personal, to be assessed for taxation. It is useless to multiply words in the discussion of this point, for it has recently been considered in the case of *Germania Sav. Bank v. Town of Darlington*, 50 S. C., at pages 366-368, 27 S. E. 846, and that case is practically conclusive of this. If, then, the city council of Laurens had no authority to release the property of the Laurens Cotton Mills from taxation, then their resolution and ordinance directing their clerk and treasurer, the respondent L. G. Balle, to cancel the assessment of the property of such Laurens Cotton Mills for taxation, was illegal, null, and void. No matter what may have been the method recognized in the law for the laying of taxes upon assessed values of property prior to the adoption of the last constitution, it is now required that the assessment of the property within the limits of a municipality for taxation for state and county purposes shall be the assessment of such property for city or town taxes. There never was any power in this state, after 1868, to release property from taxation, until the constitution of 1895 gave cities and towns such power for the limited period of five years, and upon the matter being submitted to the voters of such city or town for their approval.

Thus far we have dealt with the respondents except the Laurens Cotton Mills. The relator is not so fortunate, just yet, with this respondent. Having demurred to the return of this respondent, he has, as before remarked, admitted all the facts set out in its return to be true. If this be so, the relator, J. H. Garrison, is neither a citizen nor taxpayer in the town of Laurens. If these things be true, what right has he to bring this proceeding against the respondent? Again, the respondent denies all the allegations of fact touching the assessment of its property for taxation. Well, in this aspect of the case,—certainly just now,—the relator has no right to proceed any further, in the present status of the pleadings and proofs, against the Laurens Cotton Mills. But we see no reason why the parties—the relator and this particular respondent—may not be required either to have the issue of facts tried by a jury or a special referee. We will overrule the demurrer of the relator, so far as the Laurens Cotton Mills is concerned, and we will let the writ against the city council of Laurens await the termination of the contest between the relator and the Laurens Cotton Mills. It is ordered, therefore, that the returns of all the respondents, except the Laurens Cotton Mills, be held insufficient, but that the demurrer of the relator to the return of the Laurens Cotton Mills be not sustained, with leave to the relator to apply for a trial of the issue of facts between himself and the Laurens Cotton Mills in one

of the methods required by law. In the meantime the issuance of the writ of mandamus against the city council of Laurens will be stayed.

STATE ex rel. MARTIN et al. v. MOORE et al.

(Supreme Court of South Carolina. April 4, 1899.)

CERTIORARI—EXISTENCE OF OTHER REMEDIES—RETURN—SUFFICIENCY—COUNTY BOUNDARIES—ALTERATION—ELECTION—CONTEST—APPEAL—WAIVER.

1. Certiorari cannot be resorted to for the correction of errors which may be corrected by appeal or writ of error.

2. Under Act March 2, 1896 (22 St. at Large, p. 55), declaring all laws of force relating to the formation of county and state boards of canvassers, and defining their powers, duties, and liabilities, applicable to all elections held under the constitution of 1895, until repealed or amended, an election thereunder to determine whether parts of townships of one county shall be cut off to form part of another is subject to Rev. St. 1893, §§ 174-180, providing for the formation of county boards of canvassers to canvass elections of officers, subject to appeal, in cases of contest, to a state board of canvassers.

3. Parties who appear by counsel before the board of county canvassers on the protest of an election, to determine whether parts of townships shall be cut off from one county to form part of another, cross-examine the witnesses, and participate in the arguments on the merits, thereby waive an objection that they were not formally served with notice.

4. It is a sufficient return to an application for a writ of certiorari that respondent has in good faith parted with control of the record sought to be produced.

Application for certiorari by the state, on the relation of J. C. Martin and others, against G. H. Moore and others. There was an ex parte order requiring respondents to show cause why a writ should not issue, and a demurrer was filed to the return thereof. Rule discharged, and petition dismissed.

Sheppard & Grier and Ellis G. Graydon, for petitioners. Frank B. Gary and Wm. N. Graydon, for respondents.

McIVER, C. J. This was an application, addressed to this court, in the exercise of its original jurisdiction, praying that a writ of certiorari be issued out of this court, addressed to the respondents, as commissioners of elections for the county of Abbeville, commanding them to certify and return to this court the record of the proceedings had before them in relation to a certain election hereinafter referred to. Upon the filing of the petition, an ex parte order was obtained from this court, upon the motion of Sheppard & Grier and Ellis G. Graydon, as attorneys for the petitioners, requiring the respondents herein to show cause before this court, upon a day specified, why a writ of certiorari should not issue, addressed to the respondents, as commissioners of elections

for Abbeville county, commanding them to certify and return to this court "all the proceedings concerning the protest and contest in the matter of the special election held at Donalds, on the 22d day of November, 1898, to determine the question whether certain portions of Donaldville, Due West, and Long Crane townships, in Abbeville county, shall be cut off from Abbeville county, and transferred to and incorporated into Greenwood county, had and taken by, and remaining before, them, and all papers, documents, and evidence of every kind and description on which they acted in arriving at their decision in said matter." On the day named the respondents appeared, and filed their return, which was demurred to by the petitioners.

Under the view which we take of this case, it will not be necessary to set out fully the allegations of the pleadings. It will be sufficient to state here that the election in question, in pursuance of the order of his excellency, the governor, was held at Donalds on the 22d day of November, 1898, at which the requisite majority of the votes cast appeared, as counted by the managers of the election, to be in favor of the proposition to cut off certain portions of the townships above named from Abbeville county, and transfer the same to the county of Greenwood; that on the Tuesday following said election the petitioners, as the commissioners of elections for Abbeville county, met at the county seat of said county, and organized as the board of county canvassers; that they proceeded to canvass the votes given as they are canvassed in general elections; that the notice of protest and contest set forth in the seventh paragraph of the petition herein was duly served upon respondents by W. N. Graydon and F. B. Gary, as attorneys for the county of Abbeville; "that in order that all persons interested in the said protest and contest might have an opportunity of being present, and being heard upon the same, your respondents, not knowing what persons were so interested, caused a notice to be published in one of the papers of the said county" (a copy of which is set out in the return) to the effect that the board of county canvassers met at Abbeville on the 29th of November, 1898, for the purpose of canvassing the votes cast at said election; that, a protest against declaring the election having been filed, the board took a recess until the 6th day of December, 1898, at which time all persons interested in the result of said election will appear before the board for the purpose of taking such action as they may deem advisable; that, in addition to this public notice, the respondents, as a board of county canvassers, served upon David Humphreys, one of the managers of said election, and one of the petitioners herein, a certified copy of such protest. It further appears from the allegations in the return, which are admitted by the demurrer, that the respondents, as the

board of county canvassers, then took a recess until the 6th of December, 1898, at which time they reassembled for the purpose of hearing said protest; that the petitioners herein "entered a special appearance, by their attorneys, Sheppard & Grier and Ellis G. Graydon, and objected to your respondents, as county canvassers, exercising any judicial functions whatsoever, on the ground that our duties were purely ministerial; that we could do nothing more than canvass the vote, and certify the same, in tabulated statement, to the secretary of state, and upon other grounds which are set forth in the paper filed with us, and copied in the ninth paragraph of the petition herein"; that respondents, after argument, held that they had the right, and it was their duty, to hear any protest or contest that may be filed with them; and that after this the petitioners, by their attorneys, remained throughout, and participated in the hearing of the protest, cross-examined the witnesses, and argued the case on its merits. The board of county canvassers heard the testimony as to the manner of conducting said election, the substance of which is stated in the return, and held that said election was "fatally irregular and illegal." From this conclusion or judgment of the board of county canvassers there was no appeal. Thereupon the respondents, as the board of county canvassers, forwarded to the secretary of state a tabulated statement of the vote which had been canvassed, together with "all the papers of every kind pertaining to the said election and protest and contest, and that they have not now before them any papers whatsoever concerning the said special election."

From this statement of facts, as disclosed by the pleadings, it seems to us that there are two insuperable objections to issuing the writ prayed for: (1) That the petitioners had another remedy, to wit, by appeal to the state board of canvassers from the action of the board of county canvassers, and for that reason they have no right to a writ of certiorari; (2) because the allegation in the return, which is admitted by the demurrer, that respondents, before this pleading was commenced, had sent all the papers pertaining to said election and protest to the secretary of state, and that they have not now before them any papers whatsoever concerning the said election, shows that it would be impossible for the respondents to comply with the requirements of the writ, even if petitioners were otherwise entitled to it, and for this reason, if there were no other, the prayer of the petition should not be granted.

As to the first objection, it is well settled a writ of certiorari cannot be used as a substitute for an appeal or writ of error. 4 Enc. Pl. & Prac. 51, and the cases there cited; State v. Senft, 2 Hill, 367; State v. Steuart, 5 Strob. 29. Hence, where the right of appeal is provided for, that mode of correcting errors of law in an inferior tribunal must be re-

sorted to, and the writ of certiorari will not be allowed.

The next inquiry, therefore, is whether the right of appeal has been provided for in a case like this. In section 174 of the Revised Statutes of 1893, the commissioners of election for certain officers therein named are required to meet at the county seat on the Tuesday next following the election, "and shall proceed to organize as, and shall be, the county board of canvassers." In section 175 it is provided that the said board of county canvassers "shall then proceed to canvass the votes of the county. * * * The said boards, respectively, shall have the power, and it is hereby made their duty, as judicial officers, to decide all cases under protest and contest, as they may arise, subject to appeal to the board of state canvassers." And in section 186, provision having been made in the preceding sections for the board of state canvassers, it is declared that "they shall have power, and it is made their duty, as judicial officers, to decide all cases under protest or contest that may come before them on appeal from the decisions of the county board of canvassers." It is true that these statutory provisions originally applied only to the election of certain officers, specified in section 174; but by an act approved 2d of March, 1896 (22 St. at Large, p. 55), it is declared "that all laws now of force, relating to the formation of county and state boards of canvassers, and defining their powers, duties and liabilities, * * * be and the same are hereby continued of force, and applicable to all elections [italics ours] held under the constitution ratified on the fourth day of December, eighteen hundred and ninety-five, until repealed or amended by the general assembly." The election now under consideration being an election held under the present constitution, it seems clear that the legislation above referred to is applicable to this election; and, if so, then it follows necessarily that the petitioners had a right of appeal from the decision of the county board of canvassers, and, not having availed themselves of this right, they are not now entitled to a writ of certiorari as a substitute for such appeal. In addition to this, certain provisions contained in sections 3 and 4 of the act of 1896 (22 St. at Large, p. 64), under which the election here in question was held, tend to support the view above advanced; for in section 3 it is declared that "such election shall be conducted in the same manner as general elections in this state"; and the language used in section 4, requiring that the commissioners of elections,—who, as we have seen, constitute the board of county canvassers,—"shall canvass the returns of the managers of each precinct in their county, at which such election has been held, as such returns in general elections in this state are canvassed," may well be regarded as implying an intention on the part of the legislature that an election of this kind shall be conducted, in all

respects, as general elections, in which, as we have seen, the right of appeal from the decision of the board of county canvassers to the state board of canvassers is provided for. Reading the statutory provisions above referred to together, the scheme of the law in reference to an election like this seems to be as follows: The managers of the election make their returns to the commissioners of elections, who are required to meet at the county seat on the Tuesday next following the day of election, organize as a board of county canvassers, and proceed to canvass the votes of the county, and to hear and decide, as judicial officers, all cases under protest or contest that may arise, subject to appeal to the board of state canvassers. If there be no such appeal, as in this case, then the board of county canvassers shall certify the result of the election to the secretary of state, and forward to that officer the papers upon which they acted, as was done in this case. It seems to us, therefore, that the first objection to the issuance of the writ of certiorari, above stated, which we have been considering, is well founded, and for this reason the writ should not be issued.

It is contended, however, that the petitioners had no notice of any protest of the election before the board of county canvassers, and therefore they cannot be affected by any action which said board took in reference to such protest. But, as a matter of fact, it appears that at least one of the petitioners, David Humphreys, was duly notified; for it is so alleged in the return and admitted by the demurrer. But, in addition to this, it also appears by the return that the petitioners appeared by counsel before the board of county canvassers, cross-examined the witnesses, and participated in the argument on the merits. In view of this, the petitioners cannot avail themselves of the fact, if it be a fact, that they were not served with formal notice of the protest. It is true that the petitioners first entered a special appearance, and objected to respondents exercising any judicial functions whatever, insisting that their duties were purely ministerial; but, when such objection was overruled,—properly, as we have seen,—they remained and participated in the hearing and discussion of the case on its merits. By so doing they waived any benefit of such special appearance, and cannot now be heard to say that they had no notice, when, as matter of fact, they did have full notice of the action of the board, and might and should have availed themselves of their right of appeal from such action.

We are of opinion, also, that the second objection, above stated, to the issuance of the writ prayed for, is equally well founded. As is said in 4 Enc. Pl. & Prac. 31, 32: "The writ of certiorari is not a writ of right, but will be granted or denied, in the discretion of the court, according to the circumstances of each particular case, as justice may require." When, therefore, it appears that the

body to which the writ is to be directed has, in good faith, parted with the possession and control of the record, which the writ would require the production of, surely no court would issue a mandate which it was known could not be complied with. Now, in this case, it appears that the respondents had parted with the possession and control of all the papers pertaining to said election by sending them to the secretary of state, "and that they have not now before them any papers whatsoever concerning the said special election." It is manifest, therefore, that the respondents would find it impossible to comply with the mandate of the writ as prayed for; and, there being no allegation or pretense of any bad faith on the part of the respondents in thus parting with the possession and control of the record which petitioners desire to have brought up to this court, the writ of certiorari prayed for should not issue. See 4 Enc. Pl. & Prac. 176-180. See, also, Commander's Case, 1 Strob., at page 199, where Oneall, J., in delivering the opinion of the court, plainly recognizes this view.

In addition to this, it will be observed that the order of this court only requires respondents to show cause why they should not be required by the writ of certiorari to certify and return into this court all the proceedings "had and taken by, and remaining before, them," in relation to the said election; and when the respondents show by their return, which is not traversed, that there are no proceedings remaining before them, as such proceedings have been transferred to the possession and control of the secretary of state, it would seem that they have shown sufficient cause why the writ should not issue. The judgment of this court is that the rule be discharged and that the petition be dismissed.

WILSON v. KEELS et al.

(Supreme Court of South Carolina. April 3, 1899.)

INSOLVENCY—RIGHTS OF DOMESTIC CREDITORS—ESTOPPEL—JUDICIAL COMITY—FOREIGN CORPORATIONS.

1. A proceeding was begun in North Carolina to wind up the affairs of an insolvent bank in that state, under which no creditors were to be preferred. Its creditors in South Carolina appeared, a receiver was appointed to collect and disburse its assets, and they shared in a partial distribution. *Held*, that they were estopped from claiming, in preference to foreign creditors, the proceeds of a real-estate mortgage belonging to the bank, on which the receiver had obtained judgment in South Carolina.

2. They were also prevented from making such claim by judicial comity, it not appearing to conflict with the public policy of South Carolina, nor to infringe the rights of creditors therein.

3. 21 St. at Large, p. 409, declaring the terms on which foreign corporations may do business and own property in South Carolina, provides that a court of competent jurisdiction may

take possession of, wind up, administer, and marshal the assets in South Carolina of a foreign corporation, the same as with respect to domestic corporations, for the protection of citizens of South Carolina who are stockholders or creditors of such foreign corporation, as in the case of resident legatees and creditors of deceased persons whose domicile was at their decease outside the state, in respect to assets within the state. *Held*, that resident creditors are not given the right to appropriate the assets in the state of a foreign corporation to the exclusion of foreign creditors.

Appeal from common pleas circuit court of Sumter county; Ernest Gary, Judge.

Creditors' bill by Thomas Wilson for himself and others, creditors of the Bank of New Hanover, against Mary E. Keels and others. There was a decree dismissing the bill; and plaintiff appeals. Affirmed.

Following is the decree of Judge Gary:

"This action is a creditors' bill, brought by the plaintiff in behalf of himself and all other creditors of the Bank of New Hanover residing in the state of South Carolina. The action comes on for trial before me, upon the pleadings in the cause and an exemplified copy of the record in a cause in the superior court of North Carolina in the case of S. McD. Tate, State Treasurer, et al., Plaintiffs, against the Bank of New Hanover, Junius Davis, Receiver, et al., Defendants. There is no substantial issue as to any matter of fact in the controversy. It appears that the Bank of New Hanover was a corporation created under the laws of North Carolina, with its principal place of business at Wilmington, in said state. The bank became insolvent, and made an assignment for the benefit of its creditors. At the time of such insolvency the plaintiff Wilson was a resident of South Carolina, and a depositor in said bank. On the 19th day of June, 1893, the deed of assignment just mentioned was set aside by the superior court of North Carolina in the case of Holmes & Watters, who filed a creditors' bill in behalf of themselves and all other creditors who might come in and make themselves parties to the action against the Bank of New Hanover and the said Junius Davis, upon the ground that the said assignment was in contravention of the laws of North Carolina. In this same proceeding, and at the same time, the said Junius Davis was appointed the receiver of the insolvent Bank of New Hanover, with full power and direction to take possession of all and singular the real and personal property, chattels, bonds, stocks, choses in action, evidences of debt, securities, and in fact all of the effects of said bank. It appears that among the assets of said bank was a bond executed by Mrs. Keels to said bank, and secured by a mortgage of certain real estate situated in the county of Sumter, this state. As such receiver, the said Junius Davis brought an action upon the bond and mortgage executed by Mrs. Keels to said bank in the county of Sumter, and obtained a decree of foreclosure

and sale against the said Mary E. Keels in favor of the said Junius Davis, as receiver of the said Bank of New Hanover. This decree of foreclosure and sale was granted by Judge Benet on the 10th day of February, 1897. Before a sale was had under the foreclosure proceedings had before Judge Benet, the plaintiff herein brought this suit, as stated above, in behalf of himself and other creditors of the insolvent bank who reside in this state, the main object of which is to have the proceeds arising from the Keels bond and mortgage and other property of said bank in this state applied to the payment of the debts of the creditors of said insolvent bank who reside in this state.

"The real issues in the case may be summed up as follows: The plaintiff's contention is: (1) That the property of a foreign corporation within this state is applicable first to the payment of debts of residents of this state who are creditors of such foreign corporation; (2) that a receiver appointed by a foreign jurisdiction has no extraterritorial power of official action; and (3) that the receiver of a foreign corporation, appointed by a foreign court, is only entitled to property of such insolvent corporation situated within the state under the doctrine of comity, and then only when creditors who are residents of this state are not injured thereby. The defendant contends: That the plaintiff Thomas Wilson went in person into the state of North Carolina prior to the commencement of this action, established his claim in the cause then pending in North Carolina, and participated in the proceeds arising in said cause, by receiving his pro rata of said funds. He thereby became a party to the cause of action in North Carolina, and he is now estopped to question the power or authority of the receiver so appointed. It is true that there are seven separate defenses set out in the defendant's answer, but, from the view I have taken of the case, if the position above stated is tenable, the other questions need not be considered. Did the plaintiff Wilson become a party to the North Carolina suit? And, if so, is he bound thereby, and estopped to proceed with the present action? If all the parties were in South Carolina, such action on his part would unquestionably make him a party, and he would be bound by the fact that he proved his claim under the proceedings in the cause, and accepted his pro rata of the dividends. In *Boyce v. Boyce*, 5 Rich. Eq. 268, the bill was to marshal assets real and personal. *Dunkin, Ch.*, in delivering the opinion of the court uses this language: 'Every creditor who came in and proved his debt under the master's notice became a party to the decree, and actor in the proceedings, and was entitled to move for any order to speed the cause or carry the decree into successful execution.' In *Beach, Rec.* § 718, that author says: 'Any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a

party thereto by coming in and presenting his claim under the decree and submitting himself to the jurisdiction of the court for the settlement and adjustment of his claim upon the fund to be distributed as directed by the decree or order of the court under which such claim is presented.' In *Re City Bank of Buffalo*, 10 Paige, 382, it is said: 'Creditors who are not nominal parties to the suit may make themselves such parties in fact by coming in and presenting their claims to the master under the decree, and by submitting themselves to the jurisdiction of the court for the settlement and adjustment of their respective claims upon the fund, as directed by the decree or order under which such claims are presented.' 'A creditor who comes in and makes his claim under such decree is quasi a party to the suit, and is entitled to the benefit of the decree as such party; and he may be restrained from proceeding at law for the recovery of his debt after he has made his election to proceed in this court for the recovery of his debt under the decree.' In *Herm. Estop.* § 1056, that author states the rule to be: 'When a citizen of one state makes himself a party to the proceedings of his debtor, instituted in another state, to obtain the benefit of the bankrupt or insolvent law, and receives a dividend from the assignee of the bankrupt or insolvent, he abandons the extraterritorial immunity which he might otherwise claim from the operation of those laws.' In *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, it is said: 'But this objection [extraterritorial jurisdiction] would not lie where such citizens had become parties to the proceedings. Hence, in *Clay v. Smith*, 3 Pet. 411, it was held when a citizen of Kentucky sued a citizen of Louisiana, and the defendant pleaded his discharge by a bankrupt law of Louisiana, that the plaintiff who had received a dividend on his debt declared by the assignees of the defendant in Louisiana had voluntarily made himself a party to those proceedings, abandoned his extraterritorial immunity from the bankrupt law of Louisiana, and was bound by that law to the same extent to which the citizens of Louisiana were bound, and it may be considered as settled that state insolvent laws are not only binding upon such persons as were citizens of the state at the time the debt was contracted, but also upon foreign creditors, if they made themselves parties to proceedings under these insolvent laws by accepting dividends, becoming petitioning creditors, or in some other way appearing and assenting to the jurisdiction,'—citing *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409. It therefore appears to me that the plaintiff Wilson, having of his own volition gone in person into the state of North Carolina, and established his claim under the proceedings in North Carolina, and having received dividends thereon from Julius Davis, the receiver appointed in said proceedings, he cannot now say he was not a party to said proceedings, and he is thereby estopped to

deny the authority of the receiver appointed. In this state it is well settled by a number of cases that, when a nonresident defendant appears and answers, all defects as to service are cured; and if they voluntarily submit themselves to the jurisdiction of the court they are bound by all proceedings had therein. *Chafee v. Telegraph Co.*, 35 S. C. 378, 14 S. E. 764; *Pepper v. Shearer*, 48 S. C. 492, 26 S. E. 797; *Oliver v. Fowler*, 22 S. C. 540; *Graveley v. Graveley*, 20 S. C. 104; *Ex parte Perry Stove Co.*, 43 S. C. 186, 20 S. E. 980; *Smith v. Walke*, 43 S. C. 381, 21 S. E. 249; *Campbell v. Insurance Co.*, 1 S. C. 158. It is therefore ordered that the complaint of the plaintiff herein be dismissed."

Purdy & Reynolds and Frasers & Cooper, for appellant. Lee & Moise, for respondents.

JONES, J. The Bank of New Hanover, a corporation created under the laws of North Carolina, having its principal place of business at Wilmington, being insolvent, on the 19th of June, 1893, made an assignment for benefit of creditors of all its property to the defendant Davis as assignee. Soon thereafter, under a creditors' bill, this assignment was set aside as void, and the defendant Davis was appointed receiver by the superior court for New Hanover county, in North Carolina. Then, in July, 1893, in the suit of Tate, as treasurer of the state of North Carolina, against the Bank of New Hanover, said Davis, as assignee under the assignment, and said Davis as receiver under the creditors' bill, the superior court for Wake county, in said state, appointed the defendant Davis as receiver of all the assets and property of said bank, pursuant to a statute of that state which provides that, whenever the state's bank examiner reports a bank as insolvent or in imminent danger of insolvency, the state treasurer shall file a bill for winding up the affairs of the bank, and administering its assets among all of its creditors without any preference or priority. The plaintiff, as well as all other creditors of the bank residing in South Carolina, appeared in the proceedings above mentioned, established their claims, and from time to time received their pro rata dividends from the bank assets distributed by said receiver. The greater part of the bank assets from which these payments were made were situated in the state of North Carolina. Among the assets of the bank was the bond and real-estate mortgage of Mary E. Keels, defendant, a citizen of this state; and this bond and mortgage went into the actual custody of the said Davis as receiver, who, as receiver, brought an action in the court of common pleas for Sumter county to foreclose said mortgage, and in February, 1897, obtained judgment of foreclosure thereon. But before sale of the land, plaintiff, for himself and all creditors of said bank in South Caro-

lina, brought this action, claiming that he and the other creditors in this state were entitled to be paid out of the assets of said bank in this state before any part thereof is removed from the state to the exclusion of the creditors not citizens of this state, and to this end prayed for a receiver here to administer the assets in this state. It appears that in April, 1897, Judge Buchanan made an order appointing D. M. Young as receiver in this state, and, among other things, ordered the master of Sumter county to proceed to sell the bond under the said foreclosure proceedings, and to pay proceeds to D. M. Young as receiver. These proceeds—\$2,294.27—are now in the hands of Young, receiver. A number of creditors in this state have proved their claims before Young as receiver, but it appears that all these creditors, like plaintiff Wilson, had established their claims under the proceedings in North Carolina, and had likewise received their pro rata of the funds disbursed there. Inasmuch as all the creditors of said bank in South Carolina are in like plight with the plaintiff Wilson, no further reference to such creditors need be made. The circuit court, whose decree is officially reported herewith, sustained the contention of defendant Davis, and dismissed the complaint herein on the ground that, plaintiff having established his claim in the cause pending in North Carolina, and participated in the proceeds arising in said cause by receiving his pro rata of said funds, he thereby became a party to the cause of action in North Carolina, and he is now estopped to question the power or authority of the receiver so appointed.

We are satisfied that the plaintiff ought not to be permitted to interfere with the collection and disbursement of the proceeds of the bond and mortgage in question by the North Carolina receiver, both upon the ground that he is concluded as to the question of such receiver's right to collect such asset of the bank by becoming a party to the proceedings in North Carolina and upon the ground of judicial comity. The bond and mortgage were in the actual custody of Davis, receiver, by virtue of proceedings to which plaintiff was a party, and as to plaintiff it was the right and duty of the receiver to collect the same. The court of common pleas for Sumter county, in this state, had permitted the said North Carolina receiver to obtain judgment of foreclosure, and thus the bond and mortgage in the actual custody of the North Carolina receiver were merged into a judgment in favor of the North Carolina receiver. Under this judgment the land has been sold, and the proceeds are in the custody of the court. Such proceeds should be paid over to the North Carolina receiver unless it is made to appear that to do so would conflict with the policy of our laws, or infringe the right of creditors in this state. In 20 Am. & Eng. Enc. Law, pp. 65, 66, the rule as to foreign receivers is, we think, correctly stated in the

following language: "The rule in this country is said to be that receivers appointed by one jurisdiction are not entitled, as of right, to recognition in other jurisdictions, and that courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers. But expressions of this character have been considered to go too far, and the correct and current doctrine appears to be that under the principle of comity the courts of one jurisdiction will recognize the authority and permit the exercise of the functions of a receiver appointed in another jurisdiction, except in those cases where a court of the former jurisdiction finds that its own policy would be displaced, or the rights of its own citizens invaded or impaired; and this seems to be especially true where such receiver is, by the terms of his appointment, to gather the assets wherever found. * * * Nor is the right to confer such authority to be questioned upon any theory that the receiver's power is limited to the property found within the state where he is appointed, for it is not necessary that the property should be within the jurisdiction of the court." See, also, *Id.* pp. 241, 242, where it is stated that citizens in the jurisdiction of the court appointing the receiver will not be aided by foreign courts in evading the effect of the appointment. Thus, if a creditor of the bank residing in North Carolina, and within the jurisdiction of that court, were here seeking to prevent the North Carolina receiver from collecting and disbursing the fund in question according to appointment, he would not be aided by the courts of this state. A creditor, though resident in this state, who has voluntarily submitted himself to the jurisdiction of the court appointing the foreign receiver, has no stronger claim to evade the effect of the appointment. To permit the fund in question to go into the hands of the foreign receiver in this case is not contrary to any established policy of our law, nor injurious to the rights of domestic creditors. As seen, all the creditors residing in this state have established their claims in North Carolina, and have been receiving dividends from the insolvent's assets there. The North Carolina receiver now represents them, and is seeking to realize this particular asset for their benefit as well as the other creditors of the bank. His claim therefore is not hostile to or adverse to their just rights. It appears that under the law of North Carolina the assets of the bank will be administered among all the creditors of the bank without preference or priority. But plaintiff asserts that under the act approved December 20, 1893 (21 St. at Large, p. 409), entitled "An act to declare the terms on which foreign corporations may carry on business and own property within the state of South Carolina," creditors of said bank resident in this state have an exclusive right to appropriate to their claims the assets of the bank in this state. This contention is based on section 6 of said act, which is as follows:

"That it shall and may be lawful for any court of competent jurisdiction in this state to take possession of, wind up, administer and marshal the assets in this state of any such foreign corporation in like manner and in like cases as by law may be done with respect to corporations chartered under the laws of the state for the protection of any and all citizens of this state who may be stockholders or creditors of such foreign corporation, as in the case of legatees and creditors (citizens of this state) of deceased persons whose domicile was at the time of their decease outside this state in respect to assets within this state." We do not construe this act as attempting to give creditors residing in South Carolina the right to appropriate to their claims the assets of a foreign corporation in this state to the exclusion of citizens of other states, who are also creditors. There is no doubt that it is the duty of the courts of this state to protect the interests and rights of domestic creditors concerning assets of a foreign corporation in this state, but there is a vast difference between protecting domestic creditors and sequestrating to them exclusively assets which ought, in justice and right, be administered for the benefit of all creditors. If so construed as to exclude nonresident citizens who are creditors from participating in the assets in this state of a foreign corporation, a grave question as to the constitutionality of the act might be raised. See *Blake v. McClung*, 19 Sup. Ct. 165, wherein the supreme court of the United States recently decided that while a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute them or their proceeds among creditors according to their respective rights, yet it cannot, under article 4 of section 2 of the constitution of the United States, deny the right of citizens of other states to participate in such distribution on equal terms with its own citizens. Moreover, the act in question was passed after the foreign corporation involved here had ceased to do business, and whose property had already been placed in the hands of a receiver; hence such act is not applicable to this case. It thus appears that plaintiff and the creditors of the said bank in this state have, by their appearance in the jurisdiction of the court of the domicile receiver, already secured the right to participate in the equal distribution of the assets of the foreign corporation,—all that they have a right to do. Thus no interest of domestic creditors intervenes to prevent the exercise of that comity which should induce the courts of this state to recognize the claim of the foreign receiver to collect for equal distribution the particular asset in question. Nor do we know of any established policy or statute in this state which prevents the exercise of such comity. The exceptions to the decree of the circuit court are overruled, and the judgment of that court is affirmed.

COGDELL v. WILMINGTON & W. R. CO.
(Supreme Court of North Carolina. March 28, 1899.)

NONSUIT — GROUNDS — AFFIRMATIVE DEFENSES —
CARRIERS—UNSAFE PLACE OF DELIVERY—
INJURY TO SERVANT OF CONSIGNEE.

1. On a motion for nonsuit, after plaintiff rested, in an action for death by wrongful act, decedent's contributory negligence and assumption of risk, being pleas in confession and avoidance, are affirmative defenses, and hence cannot be considered.

2. To transfer freight from its cars to boats, a railroad built a wharf, with tracks, over a river, and alongside of the tracks, at a level with the floors of the cars, a platform onto which the contents of the cars were to be unloaded. There was a space between cars on the track and the platform, and this was covered by an apron fastened to the platform with hinges, and when in use the loose end of the apron rested against the car. The apron was built of inferior material, partially rotten, and while an employé of a consignee of goods was standing on it, in unloading the consignment from the car to the platform, the boards broke, and he fell through into the water below and was drowned. *Held*, in an action against the carrier to recover for the death of such employé, the question whether the carrier was negligent in leaving the apron in its dangerous condition was for the jury.

Appeal from superior court, Beaufort county; Norwood, Judge.

Action by Maris Cogdell, as administratrix, against Wilmington & Weldon Railroad Company. Plaintiff was nonsuited, and appeals. New trial.

The plaintiff alleged, among other things, that the intestate fell through a platform into the water, and was drowned, and that the accident occurred through the alleged negligence of defendant in not maintaining a sound and proper platform over the water of Pamlico river, at a point where it had built a warehouse and trestle upon piles, and that the planks were rotten; that the space so covered with the plank was used as a wharf for receiving freight and passengers; that defendant carelessly and negligently built the warehouse platform, and omitted to cover the space between its rails and the edge of the platform with plank; that the water at this point was about 10 feet deep; that the intestate went upon the premises of the defendant to unload one of its freight cars, then loaded with coal, and standing upon that part of the track which extended alongside of the platform and over the water, and while engaged in unloading the car, without fault on his part, fell between the car and platform and was drowned. Defendant denied the allegation as to neglect in construction of the platform, and alleged that the accident occurred by the fault of the intestate; and further alleged that the coal was consigned to the Styron Transportation Company, which was engaged in unloading the same, and that this defendant's duty had ceased upon delivering the same to the consignee; that plaintiff's intestate was not in the employ of this defendant, nor had it any knowledge that he was en-

gaged in unloading the car; that defendant is informed that plaintiff's intestate was not in the employ of the consignee, the Styron Transportation Company, and was improperly on the car and on the premises of defendant; that plaintiff exercised due care in the construction of the platform and track, and that the same were safe and skillfully built and maintained; and that intestate's death was not caused by negligence of defendant. Plaintiff having produced her evidence and rested her case, and defendant having moved for a judgment as in case of nonsuit, under chapter 100, Laws 1897, it was adjudged that the motion be allowed, and plaintiff take nothing, etc., and the plaintiff appealed.

Evidence of plaintiff:

Peter Langly testified: That he knew intestate, and that he was an industrious man, and could always secure work, and could earn seven dollars or eight dollars a week on the docks. He was about 52 years old. The Styron Transportation Company steamer connected with and used defendant's wharf, and had been receiving coal from defendant's cars, and intestate was engaged in unloading the coal from a car of defendant at the time he was drowned. "The warehouse of the railroad is built partly over the water, resting on piles, but does not extend as far out in the river as the wharf. Q. On the inside of the warehouse, where it extended over the water, how was it floored? (To this the defendant objected. Objection sustained, and plaintiff excepted. Counsel for plaintiff admits that the point at which this question is directed is not where the accident happened, and that the place inside the warehouse is well floored.) Witness was then asked: Describe the manner in which the wharves, tracks, and buildings of defendant are built in the town of Washington. (To this the defendant objected, on the ground that it was too general. Objection sustained, and plaintiff excepted.) Witness then continued: There is a track and platform on the east side of warehouse. Platform $3\frac{1}{2}$ or 4 feet wide, and extends the full length of warehouse. The track is 12 or 18 inches from the edge of this platform, and the side of the coal car was about one foot from the edge of the platform. There was just room enough for a man to walk sideways between the car and platform. There was space for a man to drop between the car and the edge of the platform, into the water, which at this point was 8 or 10 feet deep. It was an open coal car. I saw deceased that morning, and he was sober. He said he was unloading a car on the railroad track. Shortly afterwards I heard he was missing, and I went to the wharf, and saw his coat on the platform. I also saw broken plank. The break in the plank was about midway the 'apron.' Witness gave evidence that the hinges which held the apron were broken, and made statements intended to show that the intestate fell through the platform. "The intestate was taken out of the water, and laid

on the platform. His body was found in about an hour from the time I had the conversation with him." On cross-examination the witness stated that intestate was drowned in October, 1895. "I don't know whether he had constant work on the wharf. He made \$7 or \$8 per week while he worked with me, and it would take regular work in loading and unloading boats and cars to earn that much in a week. Cannot say how many weeks in a month he earned \$7. Have rarely seen intestate take a drink, and have never seen him drunk. He was sober that morning. There were a number of weeks I did not see him at all. Do not know, of my own knowledge, what he was doing or where he was standing when the accident occurred. There were three planks in the apron, and the one next to the platform was broken. I think they were 10-inch boards. The broken plank was rotten. It was covered with coal dust." Upon redirect examination he stated, among other things, that there was about a foot's space between the end of the cross-ties and the point immediately beneath the edge of the platform, and this place was not floored.

At this stage of the testimony, by consent of all parties, the court and jury and counsel for both parties proceeded to the place of the accident, and permitted the jury to view the wharf, track, etc., where the death occurred.

Dr. Arthur testified, after describing the platform, etc.: That the plank next to the platform was protected, and that his attention was called to marks or scratches on the side of the car over the break in the plank, and it seemed that these marks might have been made by fingers. "If the lumber had been sound, it would not have been broken by a man stepping or falling on it. Have known the intestate for years. He was a very industrious man, and seemed to be always employed. He would load and unload vessels and steamers. Hands are paid for that kind of work 20 cents an hour. I never saw him drunk, and I saw him frequently." On cross-examination he testified: "I have heard that the intestate drank." He also gave other evidence about the condition of the plank, and stated that he did not know whether the intestate earned anything above his living expenses; and upon redirect examination stated that the broken plank was covered with coal dust, and one could not know it was unsound until after it was broken. "Have heard of intestate's being drunk, but have never seen him in that condition. He was about 52 years old when he was drowned. Had a wife and three children. He always provided bountifully for his family. I do not undertake to say, of my own knowledge, how much he earned or spent on himself or family. His wife also worked."

George Lewis testified: "I am a carpenter, and have examined the place. If plank had been sound, it would not have broken with a man of Cogdell's weight. If the place

had been floored from the end of the cross-ties to under the platform, I think a person falling between the car and platform could not have been drowned." On cross-examination, among other things, he stated that he was a house carpenter, and had had no experience in building railroads and wharves.

Dr. Blount testified: That he examined the body of the deceased, and in his opinion he was drowned. "There was a slight abrasion on the back of the head, and under the right knee, and also on the right shoulder. His brain was sound. Did not examine his lungs. There was no fracture of the skull and no bones broken." On cross-examination he stated that, in all probability, the intestate was conscious when he fell into the water, but possibly may not have been.

There was evidence that the intestate was employed about two weeks before he was drowned to unload coal by the Styron Transportation Company. Mr. Harris, of the transportation company, sent for him to work for that company Sunday night before he was drowned. He was drowned on the next day, Monday, October 28, 1895. Had been engaged five or six months unloading cars for the transportation company at that place, as testified to by Samuel Cogdell, Jr., who was a stepson of the deceased. This witness also gave evidence of a similar character to that of the preceding witnesses, in reference to the platform, etc., and upon cross-examination stated that he took a drink with deceased that morning. "I did not say that day on the wharf that, 'If I had not given him that last drink, this would not have happened.' He was employed by the steamboat company at the time of his death, and was making from \$24 to \$40 per month at that time. He would take a drink sometimes, but I never saw him drunk a half-dozen times in my life. He was sober when I went with him to the elevator. The scratches on the car seemed as if he was trying to get on the car, and slipped." On redirect examination he testified: "I could not tell how it occurred,—whether he was on top of the car and fell or not. When I left him at the elevator, he started to the car."

John Rogerson testified, among other things: That the deceased seemed to be sober, and that he discovered nothing wrong with him. "He got on the bumper next to the river, and began throwing off coal, with his hands, on the platform. I was standing at the time about 10 feet from him. The last I saw of him he was throwing off coal. I saw the body after it was found," etc.

J. G. Blount testified similarly as to the condition of platform, etc., and, further, that: "There was no flooring over the water, and no cover whatever under the platform. The car was loaded very full. It was higher in the center than on the sides, and was full to its edges." The witness was then asked: "Taking into consideration the loaded condition of the car as you have testified, how

would it be as to safety to the person unloading it? (To this the defendant objected. Objection sustained, and plaintiff excepted.)" The witness further stated that he had known the deceased for many years. He was industrious. Generally employed about the wharves. At times he drank a good deal, but never knew him when he could not work, drunk or sober. He could earn seven dollars or eight dollars a week.

The witness Rogerson signed the statement referred to by him two or three days after the death of Cogdell. "No suit had been brought against the defendant. (A photograph is exhibited to the witness.) This is a correct photograph of the place, except the same car is not there and the apron is missing. In other respects it is just the same now as it was then. (The photograph was then offered in evidence, and admitted by the court.)" On cross-examination this witness stated that deceased would sometimes drink to excess, but not often. "I think he drank regularly. Have never seen him so drunk that he could not work well. A liberal provider for his family. There was no danger in standing on the top of the car, which was pretty full of coal around the edges, and higher in the center, but a man could have worked there until he had thrown off some of the coal. Don't know what intestate spent for his own living or for whisky." The statement of John Rogerson, above referred to, is offered in evidence, and admitted by the court as evidence, to corroborate, and is, in substance, as follows: "I was at the door of the fish house, and saw Cogdell get on the projection of the car, at the end of the car, and begin throwing off coal. He was sober. I left him at work at the end of the car next to the river. I examined the side of the car and the apron. The breach occurred just opposite the scratches on the car. The plank was thin, and not a good solid board. If it had been solid, it would not have broken under a man's weight, or by a fall from the top of the car. If it had been planked in over the water, under the platform and track, as it is in the warehouse, he would not have been drowned. He had had for some time the job of unloading the coal at that place. With the coal dust on the plank, it could not have been discovered that it was not solid. I saw the body shortly after it was taken from the water. It was lying in front of the warehouse, next to the river. The deceased seemed, from appearances, to have been drowned."

Fred Nelson testified, among other things, that deceased did not act like he was drunk, and that he was throwing off coal when the witness left. "Saw scratches on the side of the car, as if some one had fallen off, and was grabbing the side," etc. There was other evidence with reference to the habits of the deceased, the condition of the platform, etc., as testified to by other witnesses.

Defendant moved, under chapter 100, Laws 1897, to nonsuit the plaintiff. Motion of defendant allowed, and plaintiff excepted, and moved for a new trial on the following grounds: (1) That the court erred in refusing to admit the evidence as to the flooring of the warehouse where it extends over the water; (2) that the court erred in refusing to admit the evidence as to the manner in which the wharves, tracks, and buildings of defendant in the town of Washington are constructed; (3) that the court erred in refusing to admit the evidence as to the safety of a person unloading the car; (4) that the court erred in granting the motion of defendant for judgment as in case of nonsuit. Motion for new trial overruled, and plaintiff excepted, and appealed from the judgment rendered.

Chas. F. Warren, for appellant. John H. Small, for appellee.

DOUGLAS, J. This is an action brought by the administratrix to recover damages for the death of her intestate, alleged to have occurred through the negligence of the defendant. The following facts, among others, are either admitted in the pleadings or rest on substantial evidence tending to prove them: The defendant had constructed a wharf out into the river, upon which it had built a warehouse and side tracks, for the purpose of connecting with water transportation. This wharf was built on piles, and was so arranged, by lowering the track, as to bring the floor of the cars on a level with the platform, for convenience in loading and unloading. The scene of the accident was apparently at the end of the wharf furthest into the river, where an open coal car had been left for the purpose of being unloaded into the steamers of the Styron Transportation Company, which habitually obtained its coal in this manner. The width of the platform alongside the car was about four feet, and the open space between the inner edge of the platform and the car was about two feet. This space for several feet was covered by a wooden apron, that was hinged onto the platform, and rested against the side of the car when in use, or could be turned back, so as to lie on the platform when not needed. The cross-ties projected but little beyond the edge of the car, leaving the remainder of the space open between them and the timbers supporting the platform. The main beams went across this space, but they were about 8 or 10 feet apart. One of the witnesses testified as follows: "There is no planking under the platform over the water, and none from the side of the warehouse to the end of the cross-ties over the water. There was room for a man to drop between the sides of the car and edge of the platform, and, if he should fall, there was nothing to catch him, and prevent his falling into the river. The water at this point was 8 or 10 feet deep." No one saw

the accident, but all the circumstances tend to show that he fell or was standing upon the apron, which broke beneath him, and let him drop between the platform and car into the river, at the bottom of which his body was soon afterwards found. The apron was made of inferior lumber, and was partly rotten. After the accident one plank was found broken, and two of its three hinges broken or pulled out, so that it was held to the platform only at one end. The dangerous condition of the apron, which was used to keep loose coal from falling into the water and for a man to stand on while unloading, was not apparent before the accident. At the close of plaintiff's evidence, the defendant moved to nonsuit the plaintiff. The court granted the motion.

The defendant alleged that the apron was built there by the consignee of the coal, and was not intended to stand on; and that therefore the deceased, being employed by the consignee, assumed the risk, and was also guilty of contributory negligence. Contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses, and cannot be considered on a motion for nonsuit. *Bolden v. Railroad Co.*, 123 N. C. 614, 31 S. E. 851. It is equally well settled that, in such cases, the evidence must be taken in the light most favorable for the plaintiff, and that if, when so construed, there is more than a mere scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence. *Sprull v. Insurance Co.*, 120 N. C. 141, 29 S. E. 39; *Cable v. Railroad Co.*, 122 N. C. 892, 29 S. E. 377; *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848.

The plaintiff contends that there were three distinct acts of negligence on the part of defendant directly contributing to the death of the deceased: (1) Leaving the apron in its unsound and dangerous condition, so as to become a death-trap instead of a protection; (2) so constructing the wharf as to leave, without any necessity, so large a space between the platform and the car, which was in itself dangerous to any one engaged in unloading the car; (3) failing to cover the open space between the end of the cross-ties and the platform. It may be that none of these acts would be negligence per se, but they are all evidence tending to prove negligence. In the absence of any one of them, the deceased would not have lost his life. If there had not been so large a space between the platform and the car, the deceased would not have fallen through. If the apron had been sound, it would not have broken, and the deceased would simply have rolled onto the platform. If a plank had been placed on the cross-beams at the end of the ties, even if the apron had broken and the deceased had dropped between the car and the platform, he would have landed on the plank only four feet below. In either event, the probability of serious injury would have been slight. At

least two of these precautions, either one of which would have saved a human life, could have been taken at trifling expense, and without any apparent inconvenience. A new apron and a few planks at the end of the cross-ties would have cost but little. We see no necessity for the wide space between the platform and the car, which has proved to be dangerous. It is common knowledge, at least with those who have any knowledge of railroads, that freight cars do not vary in width to any such extent. It may be said that it was necessary to have this space to permit employes to walk beside the car; but, if so, on what would they walk? If a plank had been there for them to walk on, then, in all probability, the deceased would have caught on that plank, and would not have been drowned. It should be borne in mind that the location of the accident was not along the main track, where the trains were in the habit of running, but was at a terminal point, where the cars were carried only to be unloaded. As unloading the car was the object of its location, then it was the duty of the carrier to give the consignee a reasonable opportunity of unloading, essentially including a safe and convenient place.

The duty of a carrier is threefold,—to receive, carry, and deliver. The common-law requirement of personal delivery has been necessarily relaxed in favor of railroads, but the duty still remains of delivery at some safe and convenient place. If the goods are such as can be conveniently unloaded by the carrier, and placed in an ordinary depot warehouse, then it is its duty to do so; but if the freight is such as, by necessity, custom, or contract, must be unloaded by the consignee, he has a right to demand of the carrier that the car be placed so that it can be unloaded with reasonable safety and convenience. Hutch. Carr. § 378a; 3 Wood, Ry. Law, p. 1909, § 444; 4 Elliott, R. R. §§ 1519, 1521. Until this duty is performed, there is no delivery, and for its negligent performance the carrier will be liable. Independence Mills Co. v. Burlington, C. R. & N. Ry. Co., 72 Iowa, 535, 539, 34 N. W. 320. The liability of common carriers, and those in the nature of such, for negligent injuries to those upon their premises by invitation, express or implied, is well settled. 4 Elliott, R. R. § 1590; 2 Wood, Ry. Law, §§ 310, 310a; Whart. Neg. §§ 349, 821, 823; 1 Thomp. Neg. p. 316; 1 Fetter, Carr. Pass. § 46. The general rule is well laid down by Judge Cooley, in his work on Torts, in the following words, quoted with approval in *Bennett v. Railroad Co.*, 102 U. S. 577, 580: "Where one, expressly or by invitation, invites others to come on his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." For error in the direction of a nonsuit a new trial must be ordered. New trial.

MOORE v. WILMINGTON & W. R. CO.
(Supreme Court of North Carolina. April 4, 1899.)

RAILROADS—DAMAGES BY FIRE—INSTRUCTIONS.

In an action against a railroad company for damages in burning timber adjacent to its right of way, an instruction that, if the fire originated off the right of way, the burden is on plaintiff to show that it was communicated by defendant, is proper.

Appeal from superior court, Duplin county; Adams, Judge.

Action by L. W. Moore against the Wilmington & Weldon Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Junius Davis and H. L. Stevens, for appellant. Allen & Dortch, for appellee.

FAIRCLOTH, C. J. This action is for damages in burning the plaintiff's timber trees, wood, undergrowth, and other property adjoining the defendant's right of way. The allegation is that sparks emitted from defendant's engine fell upon its right of way, and fired combustible and ignitable matter on the right of way, which fire was communicated to the plaintiff's premises, and that the fire was produced as a result of the defendant's negligence. There was no direct evidence as to the origin of the fire. There was conflicting evidence as to the place where, and the time when, the fire broke out. The plaintiff's evidence tended to show that the fire originated on the right of way, and he contends that it came from sparks thrown out by defendant's engine. The defendant's evidence tended to show that on the same day, at a later hour, a pile of cross-ties off the right of way, but near by, was burned, except the ends of the ties, and it contends that there was the origin of the fire which burned the matter on the right of way and the plaintiff's property. Of course, these contentions and the evidence were submitted to the jury. During the trial the defendant asked the court to give the following instruction to the jury: "That if the jury shall believe the fire that burned the land of the plaintiff originated in a pile of cross-ties, and that the pile of ties was off the right of way, then the burden of proof is upon the plaintiff to satisfy the jury by a preponderance of the evidence that the fire was communicated to the pile of ties by the engine of the defendant [and, even if the jury shall believe that the fire was communicated to the pile of ties by the engine of the defendant, then the plaintiff cannot recover if the engine of defendant was in good order and repair, and equipped with an approved spark arrester for preventing the escape of sparks, and was managed and operated in a careful manner by a skillful and competent engineer, and the evidence on the part of defendant as to this is uncontroverted, and not contradicted]." His honor refused to give that part of the prayer embraced within brackets. "It is

admitted by the plaintiff that the engine was in good condition, and had a proper spark arrester, and was skillfully operated." With this admission, the question of negligence in having defective machinery is eliminated. If sparks should escape such an engine as the above, properly handled, and should set on fire combustible matter along the right of way, the defendant would be liable for injuries resulting therefrom, not because the sparks escaped, but for allowing inflammable matter to remain on its premises; but if sparks from such an engine go beyond the defendant's right of way, and ignite such matter over which the defendant has no control, it would not be guilty of negligence in that respect, nor for the escape of the sparks. Or if the fire originated outside the right of way from some other cause, and communicated itself to the right of way, and then to the plaintiff's premises, the defendant would not be chargeable with negligence. The prayer refused embraced an inquiry for the jury how and where the fire originated, and, as it was not substantially given in any part of the charge, we think it was error to refuse it.

The plaintiff's brief says the pile of ties is not referred to in plaintiff's evidence. We do not know what that statement means. In the record we find several witnesses who speak of the burning ties in the edge of the woods outside of the right of way. From our view, there is no need to examine into other questions made in the record until another hearing below. New trial.

DUNN v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. March 28, 1899.)

RAILROADS — ESCAPE OF STEAM — FRIGHTENING HORSES — NEGLIGENCE — QUESTIONS FOR JURY.

1. In an action for personal injuries, where a verdict was directed for defendant, a question whether there was sufficient evidence that defendant was negligent to go to the jury will be construed in the light most favorable to plaintiff.

2. Plaintiff was injured by the running away of his horses, which were frightened at 1 p. m. by the escape of steam from an automatic safety valve of an engine that remained standing on a side track, immediately adjoining a much-frequented public street, every day from 8 a. m. to 4:30 p. m. The engine, without practical inconvenience, could have been kept on another track, where it would have been out of the way. It was not proved that it was necessary to keep up sufficient steam in the engine to open the safety valve. *Held* a question for the jury whether the railroad company was negligent.

Faircloth, C. J., and Furches, J., dissenting.

Appeal from superior court, Duplin county; Robinson, Judge.

Action by Joseph Dunn against the Wilmington & Weldon Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

Allen & Dortch and Simmons, Pou & Ward, for appellant. Junius Davis and H. L. Stevens, for appellee.

DOUGLAS, J. This is an action to recover damages on account of personal injuries received by the plaintiff through the alleged negligence of the defendant, in causing or permitting steam to escape from one of its engines while standing in or near a public street, whereby the horses driven by the plaintiff became frightened, ran away, and severely injured the plaintiff. The usual issues were submitted, the first being as follows: "Was the plaintiff injured by the negligence of the defendant?" The court directed the jury to answer this issue in the negative, which ended the case.

The following facts appear by evidence or admission: The defendant's side track, on which the engine was standing, ran along and immediately adjoining a public street leading to the warehouse of the defendant, and much frequented. On the day of the injury, about 1 o'clock, the plaintiff, driving a team with a loaded wagon, drove past the engine to the warehouse, where he unloaded the goods. He then came back the same street, and while directly opposite the engine the horses were frightened by steam escaping therefrom, which came into the street near, and directly towards them. The horses ran, and threw the plaintiff out of the wagon, thus causing the injuries of which he complains. The engine came regularly into the town of Warsaw every morning about 8 a. m., and remained until its return trip, about 4:30 p. m. During the eight hours intervening it was, prior to the accident, kept on the side track where it was when the plaintiff was injured. It was not necessarily there, but could have been kept without practical inconvenience on another side track below the warehouse, where there is little passing, or it could have been placed on the Clinton track, where it would have been out of the way. Since the injury to the plaintiff, it does not stand where it did, but stands below the warehouse. What caused the escape of the steam is not clearly shown. One of the defendant's witnesses testified that "an engine standing generates steam, and pops off"; while another of its witnesses stated that "the noise described by the plaintiff could not have been made except when the donkey pump was working or when the injector is put on," thus requiring human agency. It was admitted that the engine was in good condition, and was standing on the side track, and that Mack Jones, who was then on the engine, was a fireman in the employ of the defendant. There was other evidence, some of which tended to prove the contributory negligence of the plaintiff, but this cannot be considered on a motion for nonsuit or a direction of the verdict upon the issue of the defendant's negligence.

The case, as now before us, presents the single question whether there was sufficient

evidence to go to the jury as to the negligence of the defendant, and, for the purpose of this inquiry, the evidence must be construed in the light most favorable for the plaintiff. These principles have been fully and recently considered and affirmed in *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39; *Cable v. Railway Co.*, 122 N. C. 892, 29 S. E. 877; *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848; and many other cases. We think there was sufficient evidence to go to the jury tending to prove the negligence of the defendant, arising not only from negligently causing or permitting the escape of steam, but also from keeping the engine for more than eight hours, during the busiest part of the day, in a position where it might naturally frighten the horses of those lawfully upon the street. *Andrews v. Railway Co.*, 77 Iowa, 669, 42 N. W. 513. Railroad companies are, at least in contemplation of law, organized primarily for the public benefit, and it is this public use that is the sole foundation for the extraordinary powers that are conferred upon them, such as the right of condemnation. Given such exclusive privileges, they are held to an equal responsibility; and they will be protected in the proper exercise of all lawful acts that may be reasonably necessary in the performance of their exacting duties to the public as common carriers. If it had been necessary for any public purpose to have kept the engine by the side of a public street, then the mere act would not, of itself, have been negligence; but to keep an engine under steam, in a place of danger to the public, when it could just as well have been placed beyond all opportunity of danger, is at least strong evidence of negligence. It is true the mere presence of the engine was not "*causa causans*" of the injury to the plaintiff, but it was certainly "*causa sine qua non*," without which the injury would not have happened.

Whether the steam escaped through the automatic safety valves, or was blown off in any way by the fireman, is immaterial to the issue, as either might be negligence. It is urged that safety valves are necessary to prevent explosion. That may be true; but was it necessary to keep up, for so long a time, a head of steam sufficient to open these valves? It is also said that it becomes necessary to put on the injector, so as to force water into the boiler when it gets too low; but was it necessary to do so at the precise moment when the plaintiff was passing? All these are questions for the jury.

The use of the highway belongs to the public by common right, and no one can obstruct it without paramount necessity. This is equally true whether the obstruction is in the highway or so immediately adjacent thereto as to obstruct its use. It is unnecessary to add that whatever renders dangerous the use of a highway is an obstruction. The public has certainly as much right to the highway as the railroad company has to its right of way, and each should respect the relative rights of

the other. The rule is the same whether they intersect or are merely contiguous. The public would not be permitted to unnecessarily obstruct the track, or to do anything that would endanger a passing train; neither must the company unnecessarily obstruct the highway, nor place in useless jeopardy the life of the individual. We think that the cases of *Myers v. Railroad Co.*, 87 N. C. 345, and *Harrell v. Railroad Co.*, 110 N. C. 215, 14 S. E. 687, fully decide the principles now under discussion, but, as they are of increasing importance, it may not be amiss to show that they are practically sustained by the uniform current of authority.

The following extracts from leading authors will show the general tenor of decisions, many of which are therein cited: "A railway company is liable to indictment if it unreasonably obstructs a highway, either by its trains or by leaving objects thereon or near thereto, as a hand car, which are calculated to frighten horses, and it is liable civilly for all the damages that ensue therefrom." 3 Wood, R. R. § 336. "And, generally, if these companies do any acts in a public street or highway which are detrimental to the public, without authority, or if, with authority, they exercise the powers conferred in an improper or negligent manner, they are liable to indictment so far as the rights of the general public are infringed, and to a civil action in favor of any individual who is specially injured thereby." *Id.* "Although a railroad company is not liable, under ordinary circumstances, for the fright of horses caused by the operation of its road in the usual manner, it is liable for frightening horses, and causing injury by unnecessary and excessive whistling, or letting off steam, under such circumstances as to constitute negligence or willfulness." *Elliot*, R. R. § 1264. "When a railway company is entitled by law to run its trains along a street, it is not liable for damages caused by the horses of a traveler taking fright at the necessary blowing off of steam from one of its locomotives, but, if the steam were blown off negligently, it would be liable." 1 *Thomp. Neg.* § 15. "In most cases, whether the blowing of the steam whistle was a reasonable and proper exercise of the company's rights is a question of fact for the jury." *Id.* "Neither is the company responsible for the fright caused by its giving, with ordinary care, signals required by statute or by ordinary prudence upon the approach of its trains. But such noises as blowing whistles, sounding large bells, or letting off steam, made without necessity, when animals are near and likely to be frightened, and when ordinary care would have permitted or dictated a postponement of the noise until the animals were out of hearing, will sustain a verdict of negligence." 2 *Shear. & R. Neg.* § 426.

In the English case of *Railway Co. v. Fultarton*, 14 C. B. (N. S.) 54, very similar to

that at bar, it was held that where a railway crosses a highway on a level, at a place where there is considerable traffic, the fact of the engine driver blowing off the steam from the mud cocks in front of the engine, so as to frighten horses waiting to pass over the line, was sufficient to warrant the conclusion that the company had been guilty of actionable negligence; Erle, C. J., saying for the court that "It is clear that the company have not used their railway with that attention to the rights and the safety of the queen's subjects which, under the circumstances, they were bound to exercise."

In *Jones v. Railroad Co.*, 107 Mass. 261, it was held that "a railroad corporation is liable for injuries sustained by a traveler driving a horse upon the highway with due care, through the fright of the horse, occasioned by a derrick which the corporation maintained projecting over the highway so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading freight on the cars."

In the well-considered case of *Railroad Co. v. Barnett*, 59 Pa. St. 259, 263, where the engine of the defendant, having given no notice of its approach, whistled under a bridge while a traveler was passing over it, whereby his horses took fright, ran off, and injured him, the defendant was held liable, the court saying: "The degree of care demanded of the company in running its train depended on circumstances, and whether it observed due care in approaching the bridge, or was guilty of negligence in not sounding an alarm whistle, was a question which properly belonged to the jury to determine. If there had been no evidence of negligence, or any facts or circumstances from which negligence could be fairly inferred, the court ought not to have submitted the question to their determination. But it is as clearly the duty of a railroad company as it is of a natural person to exercise its rights with a considerate and prudent regard for the rights and safety of others, and for injuries occasioned by negligence both are equally responsible. Nor is it any excuse or justification that the act occasioning the injury was in itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. If there was no danger to the persons and property of those who might be traveling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But, if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning, in order that it might be avoided. * * * The sounding of the alarm whistle as the train was passing under the bridge was the cause of the horses becoming frightened and running away, and the injury to the plaintiff was the result. This was an act of gross negligence,

and a sufficiently proximate cause of the injury to render the company liable therefor."

In the recent case of *Tinker v. Railroad Co.* (N. Y. App.) 51 N. E. 1081, where the plaintiff was injured by being thrown from a wagon in consequence of the horses becoming frightened at two old pieces of timber lying on the side of the highway, about 10 feet from the traveled part, it was held that whether so placing the timber was reasonably necessary in the conduct of repairs, and not an unreasonable interference with the rights of the public, was a question for the jury, and upon their finding the defendant was held liable. After stating that the law recognized the right of temporary obstruction of the highway under certain circumstances, the court lays down the following rule, quoted from *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, which meets our approval: "Two facts, however, must exist to render the encroachment lawful: (1) The obstruction must be reasonably necessary for the transaction of business; (2) it must not unreasonably interfere with the rights of the public."

The rule that the existence of obstructions in a street is such evidence of negligence as requires of the authorities explanation in order to escape liability is laid down in *Mayor v. Sheffield*, 4 Wall. 189, 196, and we do not see why it should not apply to the circumstances of the case at bar. We do not think there was sufficient evidence of wantonness or malice to justify an issue as to punitive damages. For the error of his honor in directing a verdict upon the issue, thus taking the case from the jury, a new trial must be ordered. New trial.

FAIRCLOTH, C. J. (dissenting). I am unable to hold that the evidence was sufficient to let the case go to the jury. This question has probably been discussed by every court in the Union. From those I have seen, the rule seems to be that the evidence should be such as would satisfy the mind of a reasonable man that the defendant was guilty of negligence, and the burden of showing negligence is upon the plaintiff. In the present case, there is not a scintilla of evidence that the steam was unnecessarily let off, or that it was done in a careless manner, or recklessly, in disregard of the plaintiff's rights. *Wittkowsky v. Wasson*, 71 N. C. 451; *Kahn v. Railroad Co.*, 115 N. C. 638, 20 S. E. 169. "There is or may be, in every case, a preliminary question for the judge, not whether there is absolutely no evidence, but whether there is more than a scintilla of evidence, upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof is imposed." *Commissioners v. Clark*, 94 U. S. 278. It is well settled thus: "While negligence is an inference to be drawn from the facts, the existence of the facts themselves must not be left to conjecture, but facts must

be established by evidence which would warrant a reasonable man in inferring negligence." *Railroad Co. v. Clarke* (Neb.) 53 N. W. 970. The question is not what, by possibility, might be proved at another trial, but what has been proved in this case. The evidence on the part of the plaintiff was, without reciting it in detail, in substance: That the defendant's engine was standing on the side track of defendant's road, about half way between two street crossings, in the town of Warsaw; that the plaintiff drove his team by the engine, along the adjacent street, to the defendant's warehouse, unloaded, and returned on the same street, and when opposite to the engine the engineer let off some steam, which flew in the direction of the horses and frightened them; that they dashed towards the sidewalk, threw the plaintiff out of his wagon, and he was thereby injured. The defendant's evidence was in substance: That the engine was in good condition, and was at its usual place when not in action; that there were times when it is necessary to turn off steam, whether standing or in motion, to avoid danger to the engine; that the noise was not loud and unnecessary; and that the plaintiff did not have his reins in hand at the time of the accident. His honor instructed the jury, upon the whole of the evidence, to answer the first issue, "No," and plaintiff appealed; that is, "Was plaintiff injured through the negligence of the defendant?" I think his honor's ruling should be affirmed.

FURCHES, J. I concur in the dissenting opinion.

TEDDER v. WILMINGTON & W. R. CO. et al.

(Supreme Court of North Carolina. April 4, 1899.)

LIENS—HAULING.

A teamster who hauled cross-ties from a swamp to a railroad, to which they were there-after sold by the owner, has no lien thereon for his labor, either at common law or by statute.

Appeal from superior court, Columbus county; Adama, Judge.

Action by J. G. Tedder against the Wilmington & Weldon Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

R. O. Burton, for appellants. J. B. Schulken, for appellee.

FAIRCLOTH, C. J. In August, September, and October, 1897, the plaintiff, at the request of the defendant Sikes, hauled from the swamp, and delivered on the right of way of the railroad, cross-ties, for which service, and no other, Sikes is due him \$140.85. On December 11, 1897, plaintiff filed, and had recorded, a lien on said cross-ties. Before De-

cember 11, 1897, Sikes sold and delivered said cross-ties to one Wade, who sold and delivered the same to the defendant railroad, without notice of plaintiff's claim; and Sikes had no interest in the cross-ties when said lien was filed. The court held that the plaintiff was entitled to recover.

At common law, laborers engaged in cutting, hauling, and driving timber had no lien thereon. A lien may be acquired by continued possession. The moment that possession is voluntarily surrendered, the lien is gone. 1 Jones, Liens, § 702. So, where a laborer repaired a wagon, and surrendered it to the owner before payment, the laborer had no lien. Possession is absolutely necessary to the existence of the lien. *McDougall v. Crapon*, 95 N. C. 292. The constitution (article 14, § 4) declares, "The general assembly shall provide by proper legislation, for giving to mechanics and laborers an adequate lien on the subject matter of their labor." Accordingly the legislature has enacted (Code, § 1781) that for every building built, rebuilt, repaired, or improved, together with the necessary lots on which said building may be situated, etc., shall be subject to a lien for material furnished or for work done on the same. Code, § 1782, secures a lien for work on crops or farms. Id. § 1783: "Any mechanic or artisan who shall make, alter or repair any article of personal property at the request of the owner or legal possessor of such property shall have a lien on such property," etc., and may retain possession until his reasonable charges are paid. If, however, he surrenders possession of the same, he loses his lien. *McDougall v. Crapon*, supra. Code, § 1796, provides that servants' and laborers' share of the crops for wages by contract shall not be subject to sale under execution against their employers, or the owners of the land cultivated.

Applying the law as above stated to the facts in the present case, the plaintiff has no lien, either at common law or statutory. It seems, so far, that the legislature has provided a lien only when the service or labor is for the betterment of the property on which the labor is bestowed, leaving the laborer in all other cases to secure himself as at common law. Error.

CULBRETH et ux. v. SMITH.

(Supreme Court of North Carolina. March 28, 1899.)

JUDGMENT—OPENING DURING TERM—EXECUTORS—PERSONAL OBLIGATIONS.

1. A court may modify a judgment during the term at which it was rendered, so as to strike out parts authorizing an issue of execution against defendant's person, and adjudging him to be guilty of fraudulent misapplication of funds.

2. An executor is not guilty of fraudulent misapplication of the funds of his testator's estate by his failing to pay over the amount of a note executed by himself in favor of testator in his lifetime.

Appeal from superior court, Cumberland county; Bryan, Judge.

Action by John Culbreth and wife against J. B. Smith, executor of the will of Euphenia Keith, deceased. From a modification of a judgment, plaintiffs appeal. Affirmed.

S. H. MacRae, for appellants. N. A. Sinclair, for appellee.

MONTGOMERY, J. This action was commenced by the plaintiffs to recover of the defendant the sum of \$273.02, a balance found to be due to the feme plaintiff by the defendant on his final account as executor of Euphenia Keith. It appears from the complaint that the defendant had filed his final account, to which, in some way, exceptions had been made by the feme plaintiff, and that upon appeal the judge had made an order, directed to the clerk of the superior court of Cumberland county, to state the account between the defendant and the estate of the testator. The clerk, in accordance with this order, restated the account, and the same is made a part of the plaintiff's complaint. It appears on the face of the account that the balance found due to the estate by the defendant consists of a balance due upon a note executed by the defendant himself to the testatrix in her lifetime. There was an allegation in the complaint that the defendant had fraudulently misapplied the balance found due on the account, by converting the same to his own use, and had refused to pay the same to the plaintiff. In default of an answer by the defendant, judgment was rendered by the court for the balance found due on the account, and it was adjudged that the defendant had fraudulently misapplied the same to his own use. Execution, also, was ordered to be issued against the property of the defendant for the amount of the judgment and costs; and, on failure of the satisfaction of the judgment under the execution against property, execution was to issue against the person of the defendant. At the same term of the court that judgment was changed and modified by having struck out of its provisions all that part of the same which authorized the issue of execution against the person of the defendant, and also that part which adjudged that the defendant was guilty of fraudulent misapplication of any part of the estate to his own use. To the modification and alteration of the original judgment the plaintiff excepted and appealed.

His honor clearly had the power to alter or amend the judgment during the term at which it was rendered. The only question then is, was the judgment such a judgment as the plaintiff was entitled to upon the complaint? We are of the opinion that it was. The complaint, it is true, alleged that the defendant had fraudulently misapplied a part of the assets of the estate. But the final account was made a part of the complaint, and upon its face it appears that the funds alleged to be misapplied and converted by the defendant

were a balance due upon a note executed by the defendant himself to the testatrix in her lifetime. If the defendant had collected the note of some other person, belonging to the estate, or had used it for himself, by assignment or hypothecation, and had been charged in the complaint with a fraudulent misapplication and conversion, and had put in no answer to the charge, then, upon judgment by default, it would have been proper to adjudge the defendant guilty of conversion, and the case of McLeod v. Nimocks, 122 N. C. 437, 29 S. E. 577, cited us by the plaintiff's counsel, would have been in point. Affirmed.

McALLISTER v. PURCELL et ux.

Appeal of WORTH et al.

(Supreme Court of North Carolina. March 28, 1899.)

MORTGAGES — PRIORITY — REGISTRATION — ACTUAL NOTICE — ACKNOWLEDGMENTS — OFFICERS — DISQUALIFICATION — RELATION.

1. A second mortgage takes precedence over an unregistered mortgage, though the second mortgagee had actual notice of the first mortgage when his mortgage was executed.

2. A husband's acknowledgment to a mortgage and a privy examination of his wife are not invalid because taken by an officer who was related to them.

Appeal from superior court, Robeson county; Allen, Judge.

Action by J. A. McAllister, receiver, against O. A. Purcell and wife and Worth & Worth, second mortgagees, to foreclose a mortgage. From a decree for plaintiff, defendants Worth & Worth appeal. Affirmed.

A. W. McLean, for appellants. Proctor & McIntyre and Shepherd & Busbee, for appellee.

CLARK, J. The plaintiffs' mortgage was executed in 1884, and duly registered. An interlocutory decree of foreclosure thereon was entered in this action in 1890; but, before sale made, the defendants executed a second mortgage to Worth & Worth, in 1897, who are made parties defendant, and plead that they should be preferred in the decree of foreclosure, by reason of the fact (which is admitted) that the justice of the peace who took the acknowledgment of Purcell, the mortgagor, and the privy examination of his wife, was the brother of Purcell. Whether this made the registration of the first mortgage taken upon such acknowledgment and privy examination void, is the vital question in this case; for, if it did, no notice of the first unregistered mortgage, however full and explicit (Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99), would bind the second mortgagee, and the interlocutory judgment of foreclosure was effective, therefore, only as between the parties thereto. In White v. Connelly, 105 N. C. 72, 11 S. E. 177, Turner v. Same, 105 N. C. 72, 11 S. E. 179, and Freeman v. Person, 106 N. C. 253, 10 S. E. 1037, it was held that, by

virtue of the Code (section 104[3]), the probate of a deed by a clerk of the court, though upon an acknowledgment and privy examination taken by a justice of the peace, is void, if the clerk or his wife is a party to the deed, or a subscribing witness thereto. *Long v. Crews*, 113 N. C. 256, 18 S. E. 499, holds that an acknowledgment and privy examination taken before a justice of the peace is a judicial, or at least a quasi judicial, act, and cites numerous cases where probate and registration were void because based upon an acknowledgment and privy examination before an officer who by reason of his locality had no power to take them. This was a defect apparent upon the face of the record. *Long v. Crews* went further, and held that the same principle invalidated an acknowledgment and privy examination before an officer who was a party, trustee, or cestui que trust in the deed. The decisions have carried the doctrine no further. Here neither the probate nor the acknowledgment and privy examination was had before an officer who was either party, trustee, or cestui que trust in the deed, and the justice of the peace and the grantors resided within the county in which the acknowledgment and privy examination were taken, as was provided by the Code (section 1246[1]), and, if there had been defects in the last regard, it was remedied by the curative acts (Acts 1891, c. 12; Acts 1893, c. 293), before the second mortgage was executed. *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501; *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691. There is no principle of law, nor precedent, which invalidates an acknowledgment and privy examination taken before an officer who has neither any interest in the instrument, nor is a party thereto, simply because he is related to the parties. Such proceeding is not adversary, and the acknowledgment and privy examination are in the nature of declarations against interest of the relatives making them. The persons claiming thereunder are strangers. Certainly an officer can administer an oath to a relative in an ex parte proceeding in which the officer is neither a party nor interested, and this is of no higher dignity. While propriety might discourage an officer taking acknowledgment and privy examination of instruments where the parties thereto are nearly related to him, there is no illegality attaching to his action.

The court below properly adjudged that in the decree of foreclosure the second mortgage must be subordinate to the first mortgage. Affirmed.

PROCTER v. GEORGIA HOME INS. CO.
(Supreme Court of North Carolina. March 28, 1899.)

INSURANCE—ACTION BY MORTGAGEE—PARTIES.

A mortgagee cannot maintain an action on a policy payable to himself and the mortgagor "as their interests may appear," without making the mortgagor a party, though the mortga-

gor has left the state, and kept his whereabouts unknown.

Appeal from superior court, Wake county; Timberlake, Judge.

Action by Ivan M. Procter against the Georgia Home Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Edward O. Smith, for appellant. Armistead Jones, for appellee.

CLARK, J. One McCullers, having given to the plaintiff a mortgage on realty for \$110, as collateral security, took out a policy in the defendant company for \$150, expressed to be paid to the plaintiff and insurer "as their interests may appear." A fire occurred, and the loss of \$150 has been sustained. McCullers has departed the state, or keeps his whereabouts unknown, and this action is brought by the mortgagee alone; and the question is, can it be sustained, or is McCullers a necessary party? We are of opinion that he is. As to the mortgaged property, the mortgagee, being made trustee, can, upon proper advertisement, sell, and receive the proceeds, by virtue of the trust expressed in the mortgage; i. e. to pay the debt, and to pay the surplus to the mortgagor. But that is not the contract as to the policy of insurance. It is not made payable to the mortgagor or a trustee. It is made payable to two persons "as their interests may appear." The defendant would not be released by a payment to either one from its obligation to the other. Suppose the mortgagee could not be found; would a payment of the whole to the mortgagor discharge the defendant? It is simply a case of an obligation, irrespective of the relation between the payees, to A. and B., "as their respective interests may appear"; and, until that is ascertained, the defendant would not be acquitted, if he pay one too much. Nor can a judgment ascertaining the amount due to one be a bar upon the other, unless made a party, with opportunity to contest as to the amount of his interest. It may be that a part or the whole of the mortgage debt has been paid.

These principles are so elementary that we presume the question now raised would never have entered the mind of any one, but for the practical difficulty in getting service upon McCullers. There is an historical illustration of the principle in the incident which first brought Thomas Egerton, afterwards the famous Lord Chancellor Ellesmere, into notice, and which is thus given by Lord Campbell in his *Lives of the Lord Chancellors*: "Three graziers had deposited a sum of money with a worthy old lady who kept an inn in Smithfield, to be returned on their joint application. One of them, pretending he had authority to receive it, induced her to give him the whole sum, and absconded with it. The other two brought their action against her, and, as the story goes, were about to recover, when young Egerton, then a law student, ask-

ed, as *amicus curiæ*, to point out a fatal objection which had escaped her counsel as well as the judge. Said he: 'This money, by the contract, was to be returned to three, but two only sue. Where is the third? Let him appear with the others. Till then the money cannot be demanded of her.' The result was the plaintiffs were nonsuited." And the young student had taken his first step towards success in a profession in which fame never comes by chance, though accident may furnish opportunities. Naturally, McCullers should be a party plaintiff; but, if he does not come in and make himself co-plaintiff, the Code (section 185) provides that he may be made a defendant, the reason thereof being stated in the complaint. If the policy had been made payable to the mortgagee alone, then he could have maintained the action; the amount of the loss, when paid over to him, being held on the same trust as the mortgaged property,—i. e. to pay his debt, and the surplus, if any, to be paid by him to the mortgagor. But here the contract is that the defendant is to pay A. and B.; neither A. nor B. is made agent or trustee for the other; and, not only that, but the amount made payable to each is left to be determined, if not by agreement, then by an action in which both payees and the defendant must be parties, and the Code (section 424[1]) provides that the judgment in such cases shall be framed "to determine the ultimate rights of the parties on each side as between themselves."

It was error to refuse to sustain the demurrer for failure to make a necessary party. It was not waived by the subsequent agreement as to the facts, presenting the question of the necessity of making McCullers a party, as a question of law, to the court. When the case goes back, it will be in the discretion of the court below to permit an amendment making McCullers a party. Code, § 273; *Plemmons v. Improvement Co.*, 108 N. C. 614, 13 S. E. 188; *Bray v. Creekmore*, 109 N. C. 49, 13 S. E. 723. Whether sufficient service by publication can be made upon McCullers, under Code, § 218, subsecs. 2, 4, is a question not now before us. We can pass only upon action taken below, and exception noted there-to. Error.

BANK OF FAYETTEVILLE v. NIMOCKS et al.

(Supreme Court of North Carolina. April 4, 1899.)

REVIEW — EXCEPTIONS — FAILURE TO SPECIFY GROUNDS — INSTRUCTIONS — REFUSAL — BILLS AND NOTES — COLLATERAL SECURITY — SURRENDER — ACCOMMODATION INDORSER — DISCHARGE.

1. Exceptions to the submission of certain special issues to the jury, for which no grounds of objection are stated, cannot be reviewed.

2. Where the evidence on an issue was conflicting, a requested instruction that, if the jury believed "the whole evidence," they should answer a special interrogatory in the negative, was properly refused, since it would be impossi-

ble for the jury to believe "all" the evidence, and the part they should reject was a matter entirely for their determination.

3. Surrender of collateral deposited with the holder by the maker of a note to secure it, without the consent of an accommodation indorser, operates to release the indorser *pro tanto*; and, where the amount was greater than the balance due on the note, the indorser is discharged.

Appeal from superior court, Cumberland county; Bynum, Judge.

Action by the Bank of Fayetteville against R. M. Nimocks and others. From a judgment in favor of defendant Nimocks, plaintiff appeals. Affirmed.

R. P. Buxton, for appellant. N. W. Ray, N. A. Sinclair, and D. H. McLean, for appellee.

DOUGLAS, J. The plaintiff brought this action upon a promissory note for \$3,000, executed by the defendant Nimocks to the defendant McArthur, and by him indorsed to the plaintiff. There were certain admitted credits upon the note. The defendant McArthur, hereinafter called the defendant, as Nimocks made no defense, alleged: That the plaintiff discounted the note for Nimocks, well knowing that the defendant was only an accommodation indorser. "That for his protection, and to save himself against loss by reason of said accommodation indorsement on said note, he procured Nimocks to lodge with the plaintiff bank collaterals ample in value to secure the payment of the note, the net proceeds of which were to be applied by the bank to the payment of said note; and the bank well knew of the arrangement and purpose for which the collaterals were so deposited with it, and this defendant is informed and believes that the credits on the note were the proceeds of part of the collaterals which the plaintiff collected, and applied the net proceeds in accordance with said agreement. The bank still held as part of the collaterals so deposited with it to secure the note a note or obligation for payment of \$1,000 and interest, amounting to more than the balance due on the \$3,000 note, on which collateral note or obligation said Nimocks and one Slocomb were liable, and said collateral note was solvent and ample to secure the payment of the balance due on the \$3,000. That thereafter the plaintiff so holding the collateral note, without any notice to this defendant, and without his knowledge, surrendered said collateral note to said Slocomb without making any credit therefor on the \$3,000 note, and refused to account for any proceeds of the same, or the value thereof; and, as this defendant is informed and believes, said collateral note has been destroyed." In its replication the plaintiff denied that the note for \$1,000, made by Nimocks and Slocomb, was deposited with or held by it as collateral security to the note sued on. The issues and answers thereto were as follows: "(1) Was defendant McArthur an accommodation indorsee and surety for Nimocks on the note

sued on? Ans. Yes. (2) Did the bank have knowledge of that fact when it took the note? Ans. Yes. (3) Did the plaintiff agree with defendant McArthur to hold the Slocomb note of \$1,000 as collateral security, and to apply it to the note sued on? Ans. Yes. (4) Did the plaintiff surrender and part with the Slocomb note without the knowledge and consent of McArthur, and without placing any credit thereon on the note sued on? Ans. Yes. (5) Is defendant McArthur indebted to the plaintiff, and, if so, in what amount? Ans. Nothing." The plaintiff excepted to the submission of the first, second, third, and fourth issues, but, as it states no ground of exception, and none suggests itself to our minds, it cannot be sustained.

The only exception seriously pressed was that to the refusal of the court to instruct the jury that, "if they believed the whole evidence, there was nothing tending to show that the bank had agreed with McArthur to hold the Slocomb note as collateral security to the note sued on, and they should answer the third issue 'No.'" As this instruction could not properly have been given, there was no error in its refusal. It is well settled that no such instruction can be given where there is any material conflict in the testimony, as it would be impossible for the jury to believe all the testimony; and what part they shall believe and what they shall reject is for their exclusive determination. Of course, this rule applies only to admitted evidence, as the jury cannot consider evidence excluded by the court, or withdrawn from their consideration. The competency or mere existence of the evidence is a question of law for the court, but its weight is a question of fact for the jury. In all such cases the request for such an instruction presumes the truth of the evidence as construed in the light most favorable to the adverse party. *Cable v. Railway Co.*, 122 N. C. 892, 29 S. E. 377; *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848. In the case at bar there was ample evidence to go to the jury. The defendant testified that the president of the bank, shortly before Nimocks' assignment, told him that the Slocomb note was all right. Witness McKethan testified in part as follows: "In May, 1897, I was director in and vice president of the bank. McArthur told me, some time before 1897, that he was liable to the bank for \$3,000 for Nimocks, and was uneasy about it. After the conversation with McArthur, I looked at the books of the bank, and found this entry in the collection book: 'January 15, 1897. Bank of Fayetteville credit to discount 15 757 A. H. Slocomb, R. M. Nimocks, December 31, 60 days, Mar. 4th, \$1,000.' I asked one of the officers of the bank what 15 757 meant, and he said it was Alexander McArthur's note." It is a common custom among banks to enter all bills receivable, whether discounts or collections, in the proper books under consecutive numbers, and a reference to this serial number identifies the paper. The jury might well

conclude that this entry meant that the proceeds of the Slocomb note had been credited to the note now in suit.

The plaintiff contends that the so-called Slocomb note, which was executed by Nimocks as principal and Slocomb as surety, was placed in the bank by Nimocks merely for collection. In nearly all transactions there are certain inherent probabilities, which are strongly marked in the case at bar. It seems scarcely reasonable to suppose that the maker of a note, remaining still its owner, should place his own note in bank, to be collected from himself, and placed to his own credit. It seems more probable that the surety was willing to indorse for only a thousand dollars, and that the maker, needing a greater sum, was willing to relieve his principal indorser pro tanto by the deposit as collateral security of the smaller note. This view was undoubtedly taken by the jury. Cases are often complicated by the testimony of witnesses, who, however honest may be their intentions, testify to assumed facts which are in reality merely conclusions of law. Viewing the Slocomb note as collateral security to the note in suit, its surrender to Slocomb without the consent of the defendant operated as a release pro tanto; and, as it was for an amount greater than the balance due on the note in suit, the judgment must be affirmed. *Cooper v. Wilcox*, 22 N. C. 90; *Nelson v. Williams*, Id. 118; *Pipkin v. Bond*, 40 N. C. 91; *Bell v. Howerton*, 111 N. C. 69, 15 S. E. 891.

Affirmed.

HUYETT & SMITH MFG. CO. v. GRAY.
(Supreme Court of North Carolina. April 4, 1899.)

SALES — ACCEPTANCE — BREACH OF WARRANTY —
MEASURE OF DAMAGES — REMEDIES OF PARTIES — SELLER'S LIEN.

1. A buyer of machinery, who continues to use it after discovering that it is not as warranted, and who denies the seller's right to it, is deemed to have accepted it.

2. Though a buyer of personal property accepts it with knowledge that it is not as warranted, he is entitled to damages for the breach.

3. A buyer of personal property may recoup damages for breach of warranty in an action by the seller for the price.

4. The measure of damages for breach of warranty as to personal property is the difference between the contract price and the real value of the property received.

5. Where the seller of personal property expressly retains title thereto until payment shall be fully made, he has a lien to secure the amount due, and, if not paid, is entitled to a foreclosure of the lien and sale of the property.

6. Where the buyer of personal property accepts it with knowledge of a breach of warranty, the seller may recover the price less the amount paid and damages for the breach.

Appeal from superior court, Craven county; Brown, Judge.

Action by the Huyett & Smith Manufacturing Company against S. H. Gray. From a judgment for defendant, plaintiff appeals. New trial.

W. D. McIver, for appellant. Simmons, Pou & Ward and O. H. Guion, for appellee.

FUCHES, J. It seems to us that this action was brought without a very clear conception of the rights of the plaintiff, and the complaint is so defective in stating the cause of action that it would have been difficult to reach the merits of the case but for the aid received from the defendant's answer, which makes the contract between plaintiff and defendant, under which defendant purchased the property in controversy, a part of his answer. From this contract it appears that on the 11th of April, 1888, the defendant purchased of the plaintiff a "No. 80 Smith dry-kiln hot-blast apparatus" at the price of \$2,337, to be paid for in different installments. The plaintiff warranted this machine to dry 25,000 feet of green sap pine lumber of a specified thickness in 24 hours. The defendant, before this machinery was shipped from plaintiff's shops in Detroit, Mich., paid plaintiff \$400 as a part of the purchase money, and failed and refused to pay anything more thereon, but continued to hold and use the kiln and apparatus. The defendant failing and refusing to pay plaintiff the balance of the purchase money, this action was commenced on the 11th day of April, 1891, for the possession of the property. But the defendant, by his answer, set up a contract between the parties, which, as we have said, gives point and vigor to plaintiff's action, and enabled the court to go to the merits of the controversy. It seems that the law governing purchases with warranty and the rights of the parties may be correctly stated as follows: That if the property purchased is present, and may be inspected, the warranty is collateral to the contract, and the title to the property immediately passes to the purchaser; and, if the warranty is false, the purchaser's redress is an action for damages upon the warranty. But, if the property is not present, where it might be inspected, the warranty may be treated as a condition precedent, as well as a warranty; and if the property purchased is not what it was warranted to be, the purchaser, upon delivery of the property, may treat the warranty as a condition precedent, and refuse to receive or accept the property, and notify the party from whom he purchased; and, if he has not paid for the property, he need not do so; and, if he has paid the purchase money, or any part of it, he may recover the money so paid from the seller. The purchaser is not compelled in all cases to reject the property at once upon its receipt. If it is machinery, he has a reasonable time to operate the machinery for the purpose of testing it. But when this is done, and it is found that the machine or the machinery does not fill the specifications of the contract and warranty, he must then abandon the contract, and refuse to accept and use the property; and if he does not do this, but continues the possession and use of the property, he will be deemed in law to have ac-

cepted the property, and his relief then will be an action for damages upon the breach of the warranty. 2 Benj. Sales, p. 1147. In this case, the property not being present at Newberne, N. C., where the trade was made, the defendant might have treated the warranty as a condition precedent, and, after he tested the machine, refuse to accept, or pay for, the same. *Id.* p. 1153. But, as he continued to hold and use the machine until he was sued for it, and then denied the plaintiff's right to it, and replevied and held the same, he must be deemed to have accepted the property, and to have held and used it as his own. His only remedy, then, was one for damages for breach of warranty. This remedy he might have by a separate action, or he might have it by way of counterclaim and recoupment, as he has done in this case. But when he does this, the measure of damages is the difference between the price paid or agreed to be paid and the real or true value of the property received. This is the only rule by which damages may be assessed upon breach of warranty, unless there are special damages pleaded as resulting from the breach of warranty; and these must be such as might have been within the contemplation of the parties, and the natural result of the breach. *Alpha Mills v. Watertown Steam-Engine Co.*, 116 N. C. 797, 21 S. E. 917; *Ashe v. De Rossett*, 50 N. C. 301; *Hadley v. Baxendale*, 9 Exch. 341. But we need not pursue this line of thought further, as all claim for resulting damages is expressly abandoned in this case, and, had it not been, it has been held by this court, when the case was here on a former appeal, that such damages were too remote, and could not be sustained. 111 N. C. 96, 15 S. E. 940. When the defendant retained the possession of this machine, and used and claimed it as his own, he became liable to plaintiff for the purchase money, \$2,337. But the plaintiff retained the naked legal title, which was a lien on the property,—an equity in the nature of a mortgage,—as a security for its debt. The plaintiff, therefore, was entitled to judgment for the amount of his debt against the defendant, less the amount he had paid, and the difference between the price he agreed to pay and the true value of the property when he received it. *Hobbs v. Bland* (at this term) 32 S. E. 683. And the plaintiff is also entitled to a foreclosure and sale of the "dry kiln and apparatus," and an application of the proceeds to the satisfaction of his judgment, if he recovers judgment, as it seems from the facts stated in this appeal he should do.

There was error in the rule of damages laid down by the judge below in stating that defendant was entitled to recover of plaintiff on his counterclaim, upon a breach of plaintiff's warranty, the difference between the value of a dry kiln that would dry 25,000 feet of green sap pine lumber in 24 hours and the price he was to pay for the dry kiln sued for. This error led to an erroneous finding and judgment, in which the jury found that the de-

defendant had sustained \$2,000 damages in the purchase of a dry kiln for which he agreed to pay \$2,337, and which is admitted by the answer, and found by the jury, to have been worth \$1,500 when it was received by defendant. In fact, it seems that the case was tried without any true conception of the real matters at issue between the parties.

There were some exceptions as to evidence in giving the declarations of Cunliffe, which should have been sustained, as they do not seem to have been a part of the *res gestæ*, and therefore only what is called hearsay evidence. But, as these objections will not likely be presented on a new trial, we do not discuss them further. New trial.

GORRELL v. GREENSBORO WATER-SUPPLY CO.

(Supreme Court of North Carolina. April 4, 1899.)

WATER COMPANIES—BREACH OF CONTRACT—ACTIONS—PARTIES—PROXIMATE CAUSE.

1. Where a water company contracts to furnish a city and its inhabitants with an adequate supply of water for protection against fire, a taxpayer whose property is destroyed by fire through the failure of the company to supply sufficient water for its extinguishment, being a beneficiary of the contract, may, in his own name, sue the company for the damages sustained.

2. Where a water company contracts with a city to furnish water in such quantity that it may be used to extinguish fires in the city, the damage resulting to an owner from a destruction of his property by fire by failure to furnish the water is the proximate consequence of the breach.

Faircloth, C. J., and Furches, J., dissenting.

Appeal from superior court, Guilford county; Robinson, Judge.

Action by Charlotte J. Gorrell against the Greensboro Water-Supply Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

King & Kimball, for appellant. Boyd & Brooks, for appellee.

CLARK, J. This cause is presented upon complaint and demurrer. The complaint avers authority conferred upon the city of Greensboro by its charter to provide water supplies, either by erecting waterworks itself or by contract, and that in pursuance thereof the city contracted with the Greensboro Water Company to furnish said city "with pure and wholesome water for the use of its citizens, and of force at all times sufficient to protect the inhabitants of the city against loss by fire," giving to said company exclusive rights of eminent domain over its streets, alleys, sidewalks, and public grounds for the purpose of laying and operating water mains, pipes, hydrants, stands, etc.; that subsequently all the rights and property of said water company passed by sale to the defendant, who at the same time assumed all the

duties and obligations imposed by the aforesaid contract, and both the defendant and the city had acquiesced in the same; that by virtue of said contract it was stipulated and agreed, *inter alia*, that the water company should "supply the city and inhabitants with pure, good, and wholesome water, suitable for all domestic, sanitary, and fire purposes, and for individual use"; should "erect and maintain settling basins, filtering galleries, reservoirs, water towers, pump houses, and other appurtenances and attachments necessary or expedient for the proper conducting and carrying on said waterworks, so as to afford at all times the most adequate supply for all domestic uses and the greatest protection against fire." The remainder of the complaint is as follows: "(8) That it was also stipulated and agreed by and under said contract that the said water company should use only first-class machinery, pipes, hydrants, valves, pumps, etc., in connection with said waterworks, and that the said works should be complete in all its details with a capacity to furnish one and a half million gallons of water every twenty-four hours against a pressure of two hundred feet head; and should erect a storage water tank whose top water level should be one hundred feet above the surface of the ground at the center of the public square and to be of a capacity of 100,000 gallons of water, and that the same shall be filled by the said water company to its top every day an hour before sundown. And for the extinguishment of fire in said city the company shall erect a pump house, and put therein a pumping engine, which shall be kept ready at all times to supply the needed fire pressure. (9) That it was further stipulated and agreed by and under said contract that the said water company should erect and put in seventy-five hydrants at such places as the city might designate, and for the rents of which said city of Greensboro was to pay them annually \$2,875. And in pursuance of such agreement and compliance therewith on the part of the city, the water company did erect, and their successor, the Greensboro Water-Supply Company, had in possession and use at the times hereinafter mentioned, two hydrants, one 100 and the other about 200 feet distant from plaintiff's store houses which were destroyed by fire on the date hereinafter mentioned. (10) That by the terms of said contract it was further stipulated and agreed that the said water company should keep a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants, to a vertical height of 100 feet in still air, each stream being taken from one hydrant and with 100 feet of hose and a 1-inch ring nozzle; and the said company shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said service. (11) That said contract was made with the said Greensboro Water Company

and extended to and acquiesced in by their successor, the defendant Greensboro Water-Supply Company, for the use and benefit of all its property owners and inhabitants, among which was the plaintiff, who was a property owner in said city at the times hereinafter referred to and for several years prior thereto, in common with that of other citizens of said city, which said property was taxed at its full value to raise money with which to pay said hydrant rents. (12) That on the night of the — day of June, 1897, a fire broke out in a building some thirty feet distant from plaintiff's store rooms on the south side of South Elm street in said city. That the fire alarm was at once turned on, and in less than ten minutes thereafter the Greensboro Fire Company arrived at said fire with their hose, fire engine, and other appurtenances necessary for the ready extinguishment of said fire. That the said fire company attached its hose, which were in every respect adequate and sufficient for the demands of the occasion, as plaintiff is advised and believed, to the two hydrants above mentioned, one 100 feet from said store rooms and the other about 200 feet distant, each of which said hydrants were sufficiently near to said store and lot to have afforded water adequate for the ready extinguishment of said fire, if the proper pressure had been on same. That, notwithstanding the promptness of the fire company in reaching said fire, and the perfect sufficiency of its equipments to convey the water to same, the defendant, as plaintiff is advised and believes, persistently, carelessly, and negligently refused to furnish said hydrants above described and referred to with a sufficient pressure of water to extinguish said fire, and by reason of such tortious and negligent conduct on the part of the defendant the said fire spread from the building in which it originated, and ignited the store room of the plaintiff. (13) That after the fire had spread to and caught in flames the building of the plaintiff, the said fire company, as plaintiff is advised and believes, was still present with its hose, ladders, buckets, engine, etc., ready to use its every effort to extinguish same; and while the said fire company had its hose attached to said hydrants sufficiently near, with the proper pressure, to have quickly extinguished same, and saved plaintiff's property from burning, the defendant persistently refused, neglected, and omitted to have the fire pressure agreed to and required by its contract, and only furnished pressure sufficient to throw a stream 10 feet from end of said regulation hose, by carelessly, negligently, and wrongfully failing to keep any water in its water tank, or even its hydrants and pipes full, and not having its pumping engine at work; by reason of which negligent, wrongful, and tortious conduct on the part of the defendant the plaintiff's property was totally destroyed by fire, and by reason of such loss she has been damaged in the sum of \$5,000. (14) That the said fire origi-

nated in an adjacent building to plaintiff's, and that the destruction of her property by same was not occasioned by any mistake, carelessness, or negligence on her part, but solely on account of the careless, willful, and wanton neglect on the part of the defendant to furnish the hydrants above referred to with the water which they were required, and had obligated themselves, to do, and upon their doing of which plaintiff confidently relied. (15) That, as plaintiff is advised and believes, defendant's failure to provide sufficient water for the extinguishing of said fire was not occasioned by any unavoidable accident or lack of water in the reservoir from which they originally take same, but was the result of a wanton, careless, and willful neglect and disregard for their duties and obligation contracted and owed to the several inhabitants of the city of Greensboro, including the plaintiff. Wherefore plaintiff demands judgment against the said Greensboro Water-Supply Company for the sum of \$5,000 damages and the cost of this action, and for such other and further relief as the court may deem plaintiff entitled."

The demurrer admits the allegations of the complaint to be true. Those grounds of demurrer which allege omission of technical or formal averments in the complaint, we deem not well taken, and to require no discussion. The demurrer so far as it relates to the merits of the case, is, substantially, that the complaint has stated no cause of action (1) because the plaintiff, though a citizen and taxpayer of Greensboro (as alleged in the complaint), is neither a party nor privy to the contract, the breach of which is the foundation of the action; (2) the failure of the defendant to furnish water was not the proximate cause of the plaintiff's loss. It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease, and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges, benefits, and payments made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with adequate supply of water, and the protection of their property from fire, was the largest duty assumed by the company. One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere.

Ellis v. Harrison, 104 Mo. 270, 16 S. W. 198; *Lawrence v. Fox*, 20 N. Y. 208; *Simson v. Brown*, 68 N. Y. 355; *Vrooman v. Turner*, 69 N. Y. 280; *Wright v. Terry*, 23 Fla. 160, 2 South. 6; *Austin v. Sellman*, 18 Fed. 519; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398. And even when the beneficiary is only one of a class of persons, if the class is sufficiently designated. *Johannes v. Insurance Co.*, 66 Wis. 50, 27 N. W. 414. It was considered, though without decision, by this court, in *Haun v. Burrell*, 119 N. C. 544, 548, 29 S. E. 111, and *Sams v. Price*, 119 N. C. 572, 29 S. E. 170. Especially is this so when the beneficiaries are the citizens of a municipality whose votes authorized the contract, and whose taxes discharge the financial burdens the contract entails. The officials who execute the contract are technically the agents of the corporation, but the corporation itself is the agent of the people, who are thus effectively principals in the contract. The acceptance of the contract by the water company carries with it the duty of supplying all persons along its mains. *Griffin v. Water Co.*, 122 N. C. 206, 30 S. E. 319; *Haugen v. Water Co. (Or.)* 28 Pac. 244. In *Paducah Lumber Co. v. Paducah Water-Supply Co. (1889)* 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, it is held: "If a water company enter into a contract with a municipal corporation whereby the former agrees, in consideration of the grant of a franchise and a promise to pay certain specified prices for the use of hydrants to construct waterworks of a specified character, force, and capacity, and to keep a supply of water required for domestic, manufacturing, and fire protection purposes for all the inhabitants and property of the city, a taxpayer of the city may recover of the water company when, through a breach of its contract, he is left without means of extinguishing fire, and his property is, on that account destroyed;" and it is therein further held: "Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking." This opinion is based upon sound reason, and is adopted by us. It is conclusive of both points raised as to the merits of the controversy by the demurrer. Indeed, it could not be doubted that, if the city buildings were destroyed by fire through failure of the defendant to furnish water for their protection, as provided by the contract, the city could recover. *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.*, 18 C. C. A. 519, 72 Fed. 227. Besides, the complaint, in paragraphs 13 and 14, alleges that the defendant's failure to furnish water as per contract was the direct and sole cause of the loss, and this is admitted by the demurrer. Thus, the question really narrows down to the question whether the beneficiaries of a contract, who furnish the consideration money

of the contract, can maintain an action for damages caused by its breach. The case of *Paducah Lumber Co. v. Paducah Water-Supply Co. (Ky.)* 12 S. W. 554, is exactly in point, was reaffirmed on a rehearing (13 S. W. 249), and is followed by *Duncan v. Water Co. (Ky.)* 12 S. W. 557, making three decisions altogether. The decisions, however (12 in number), in other states where the question has been presented, are the other way. But this is a case of the first impression in this state, and decisions in other states have only persuasive authority. They have only the consideration to which the reasoning therein is entitled. They are to be weighed, not counted. We should adopt that line which is most consonant with justice and the "reason of the thing." Did the people of Greensboro have just cause to believe that by virtue of that contract they, as well as the corporation, were guaranteed a sufficient quantity of water to protect their property from fire; and did the water company understand it was agreeing, for the valuable considerations named, to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when, by breach of that contract, private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he, and he alone, can maintain an action for his loss. As is said by Judge Freeman, the learned annotator of the American State Reports, in commenting on the fact (*Britton v. Waterworks Co. [Wis.]* 29 Am. St. Rep. at page 863; s. c. 51 N. W. 84), that the majority of decisions so far rendered were adverse to the position taken in the Kentucky case above cited, and approved by us: "As none of the courts have fairly faced what seems to be the logical result of these decisions, viz. that the injured person is left without any remedy at all, it must be admitted that the subject is left in an extremely unsatisfactory position. It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of taxpayers from fire, unless made liable by express statutory provisions. *Wright v. City Council of Augusta*, 78 Ga. 241. And it seems equally clear that the city would have no right of action in such case in behalf of the taxpayer, for the basis of all the [adverse] decisions is that there is no privity of contract between the taxpayers and the water companies. If the contract is not made for the benefit of the taxpayers in such a sense that they can sue upon it, it can hardly be maintained that the same contract is made for one of those taxpayers in such a sense that the city can recover damages in his name. * * * If, then, neither the taxpayer himself nor the city on his behalf can sue the company, the conclusion seems to be that

the loss by fire in these cases is regarded by the law as damage for which there is no redress." This is a complete *reductio ad absurdum*, and we prefer not to concur in cases, however numerous,—there are probably a dozen scattered through half a dozen states,—which lead to such conclusion. All these cases (when not based on reference to the others) rest upon the narrow technical basis that a citizen, because not a privy to the contract, cannot sue, whereas authorities are numerous that a beneficiary of a contract, though not a party or privy, may maintain an action for its breach. 7 Am. & Eng. Enc. Law (2d Ed.) 105-108. Here the water company contracted with the city to furnish certain quantities of water for the protection of the property of the city as well as of the city, and received full consideration, a large part of which comes in the shape of taxation, paid annually by those citizens. On a breach of the contract, whereby the property of a citizen is destroyed, he, as a beneficiary of the contract, is entitled to sue; and under our Code requiring the party in interest to be plaintiff he is the only one who can. Whether there was a breach of the contract, and whether it was the proximate cause of the loss, regarded as matters of fact, will be determined by the jury, if, when the case goes back, the defendant shall file an answer, as it has a right to do (Code, § 272), raising those issues. But in overruling the demurrer to the complaint there was no error. As was said by the supreme court of Kentucky, when affirming, on a petition to rehear, the decision in the Paducah Case, *supra*: "The water company did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe, and, if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of the plaintiff's property, which involves issues of fact for determination by a jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract." Affirmed.

FAIRCLOTH, C. J., and FURCHES, J., dissent.

MONTGOMERY v. DELAWARE INS. CO. OF PHILADELPHIA.

(Supreme Court of South Carolina. April 18, 1899.)

INSURANCE—REMOVAL OF GOODS—WAIVER—INSTRUCTIONS.

1. The defense to an action on a fire policy was that the insured property had been removed into another building without the company's consent. There was evidence that the company's agent knew of the removal, but neither

did nor said anything; that the premium remitted by the agent after the fire was retained by the company; that the adjuster after the fire stated to insured that he would not question the removal, and endeavored to adjust the loss; that, during protracted negotiations for settlement, the company never raised the question of removal; that the company wrote insured that the agent had written the risk in the wrong company, but was aware of its liability unless it could ascertain that its agent had issued the risk in another company, and erroneously placed it on defendant's register; otherwise, it would have to pay the loss. *Held*, that the evidence was sufficient to go to the jury on the question of waiver.

2. Where the contention was as to which of two places the parties had in mind as the location of the insured property, a charge that if insurer thought of one place, and insured of another, the contract was good for any place in the town, and the question of location was not material, was error.

Appeal from common pleas circuit court of Marion county.

Action by J. D. Montgomery against the Delaware Insurance Company of Philadelphia. There was a judgment for plaintiff, and defendant appeals. Reversed.

Willcox & Willcox, for appellant. Johnson & Johnson, for respondent.

JONES, J. The defendant company appeals from a judgment against it in favor of plaintiff, upon a complaint alleging a contract of insurance, whereby, on January 24, 1896, for one year, defendant, in consideration of a premium of \$17.50, insured, against loss or damage by fire, plaintiff's printing press, composing stones, stands, types, and other material and appliances usual to the printing business, situated in the town of Marion, S. C. The special defense made by defendant was that the property was so insured "while located in the two-story frame, shingle-roof building, on the west side of Main St., in said town, and that said property was, without the consent of defendant, removed therefrom to a different building, where it was burned." The plaintiff alone offered testimony in the case, which was to the effect that no written or printed policy was ever issued and delivered to plaintiff, but that he paid the premium to defendant's agents for such insurance, leaving them to deliver the policy thereafter. That on the agents' policy register the property was entered as insured under policy No. 274,373, and described as located in these words: "All in two-story frame and shingle-roof building on west side of Main St., Marion, S. C.;" and in the agents' "Daily Report" to the company mailed January 24, 1896, it was so described. In plaintiff's "Proofs of Loss" claim was made under policy No. 274,373, "according to the terms and conditions printed in said policy," in which plaintiff described the property as located as above stated, and in said proofs of loss is this statement: "The building described, or containing the property described, in said policy, was occupied at the time of the fire as stated in said policy, and for no other purpose what-

ever. A fire occurred on the 2d day of December, 1896, * * * by which the property described by said policy, and situate as therein named, was destroyed," etc. That this "Proof of Loss" was made out by defendant's agents, and was signed by plaintiff without attention being directed to the statement as to the location of the property. It appeared that plaintiff the year previous insured the same property at the agency of Montgomery & White, then also acting as agents for defendant, in same company, and at that time the property was located as above described, in the building known as the "McKerall Building," where the rate was 5%, and that after some three months plaintiff removed said property to a one-story frame and shingle-roof building on the west side of Main street, known as the "Clark Building," and secured from Montgomery & White a rebate. Defendant's agent White stated that he knew the property had been moved from the McKerall Building to one of less risk, and that he had paid a rebate therefor to plaintiff, but he was not positive as to the time of the removal; that he had paid no rebate from the premium received for the insurance in question, and did not remember any other policies; and that the rate paid for the insurance in this case was the rate of the Clark Building (3½%), and not the rate of the McKerall Building (5%). On the other hand, plaintiff was positive that at the time of the insurance in this case the property was located in the Clark Building, and that the description locating it in the McKerall Building was a mistake. But it further appeared, from undisputed testimony, that after the insurance the property was removed to the Harlee Building, and then later to the Stackhouse Building, where it was burned on December 2, 1896. There was also some evidence tending to show that, while no application was made to defendant's agents for consent to removal, they had knowledge of the removal, but neither did nor said anything about it; that the premium paid to the defendant's agents at the time of the insurance was remitted to defendant after the fire, and was retained by defendant; that defendant's adjuster after the fire, and with full knowledge of the removal, stated to plaintiff that he would not make the matter of removal a question, and thereafter endeavored to adjust the loss with plaintiff, the only difference between them being as to the value of the printing press; that, in the protracted negotiations for settlement thereafter, the defendant never raised any question as to the removal, which was raised for the first time in the answer filed; and that the only reason offered by defendant for not settling the loss was that policy No. 274,373, according to records of the general manager's office, was issued to another person, W. W. McEachen, and expired February 21, 1896, which complication defendant wished time to solve by correspondence with other companies, represented

at the time by their agents Montgomery & White, to ascertain if any of them had issued a policy to plaintiff on said property. From the letter of the general manager to plaintiff's attorneys dated April 27, 1897, we quote this language: "A claim is made against us under a policy, No. 274,373, which was issued by Montgomery & White to W. W. McEachen, being \$500 on stock of merchandise. It was erroneously entered on our policy register as having been issued to J. D. Montgomery. The original daily report was received by us in due course of mail, and our records show that, being issued for only two months, we queried our agents in reference thereto. In some manner this daily report became mislaid in our office, and, when the loss was reported under this same number, we wrote the agents for a duplicate in the name of J. D. Montgomery. It was not until after our special agent, Clower, had been to Marion, that we discovered the original daily report in our files. Every policy furnished the Marion agency has been properly accounted for. Therefore it is evident that no policy was ever issued to J. D. Montgomery for the Delaware Insurance Company. It is true that Montgomery & White accepted premium for this insurance from J. D. Montgomery, and entered it on their policy register, but did not report it to us until after the fire, and then in response to our request for a duplicate daily report. We are aware of the fact that this action on the part of our agents would create a liability against the company, from which we cannot escape, unless it can be ascertained that in the general carelessness which seems to have prevailed in the Montgomery & White agency, that a policy of another company was issued and erroneously placed on our register. We have written to our agents for a list of the companies which they represent, and it is our purpose to ascertain if such a policy ever had been reported to one of the other companies. If not, then it is perfectly evident to us that we will have the loss to pay, and the head office will have to decide whether we shall look to Montgomery & White to reimburse us."

After all the evidence was in, defendant moved for a nonsuit on the following grounds: "That the testimony shows that the contract was to cover property located in a certain building, while the loss was sustained in an entirely different building, and that no request was ever made, and no permission ever given, for such removal; that they have shown no insurance contract covering any property of the plaintiff located in the house in which the property is proven to have been destroyed." The motion was refused on the ground that it had not been proven that the parties agreed upon any location of the property, and that the question of fact between the parties was as to where, if anywhere, this property was to be located.

Exceptions 1, 2, 3, and 4 impute error to this ruling. The question we have to con-

sider is whether there was error in refusing the nonsuit, and not whether the reason given therefor is correct. We are of opinion the nonsuit was properly refused, not upon the ground assigned by the circuit judge, but for the reason that there was some evidence tending to show waiver of the right to deny liability on the ground of removal of the property, which was proper to be submitted to the jury. This conclusion involves a ruling by us that the right to deny liability, under a policy wherein the property insured is specifically located, on the ground that the property was removed and was destroyed at a different place, may be waived without a new contract, upon consideration, and that the evidence to sustain such waiver may be acts and declarations of the insurer after loss which tend to show the intention of the insurer to relinquish such right after knowledge of the removal. *Kingman v. Insurance Co.* (S. C.) 32 S. E. 762. In *May, Ins.* (3d Ed.) § 401a, it is stated: "Place is also material in the contract, and, unless under special exceptions, the removal of the subject-matter—as, for instance, a stock of goods—from the place where situated when insured leaves nothing to which the policy can attach at the time of the loss, though no doubt a recognition by the insurers of the validity of the policy after notice of removal will have the effect to protect the goods in their new place of deposit." There can be no doubt of the general proposition that no action will lie for loss of property insured at a specific place if the property is destroyed at a totally different place, because location is an element in the risk assumed. This is so, not because the policy is made void by the act of removal; for removal merely does not void the policy, since if the insured returns the property to the original place where insured, during the term of insurance, the policy then covers as a valid subsisting contract, unless voided on some other ground. Nor is it true that a policy is void for removal of the subject-matter of insurance because there is nothing to which it may attach after removal, since the policy will attach to the property insured wherever, during the term of the policy, the property is located as warranted in the policy; but the action does not lie because at the time of the loss, if lost at a place different from that specified, the risk or loss is not such as comes within the terms of the contract, which is valid and subsisting. Manifestly, the insurer could consent to the removal of the chattels at the time of removal, and thus protect them in their new place under the original policy. So, also, could the insurer, at any time before loss, give such protecting consent. We see no good reason why such consent may not be given by acts and conduct, even after loss. The question at last is, has the insurer at any time relinquished the right to deny lia-

bility for the cause of removal after knowledge, or has it, by its conduct, recognized the policy as not invalid on such ground, and thereby subjected the insured to expense or inconvenience in the reasonable belief that such removal was consented to or acquiesced in by the insurer?

But we think the circuit judge committed reversible error in charging the jury as follows: "If their [the parties to the contract] minds did not meet on the question of the place,—if one thought one place and another thought another place,—and the money passed, then I charge you that in all other respects the contract of insurance was intact, and it was good for any place in Marion, and the question of location was not a material matter upon which the minds of the parties met,"—which charge is the basis of the fifth exception; and, having so charged, in failing to charge, as requested in defendant's fourth request, as follows: "In order for you to find that defendant made a general contract of insurance, covering property wherever located, you must find that, at the time when the contract was made, the agent of the defendant understood that he was making such a contract,"—which refusal to charge is the basis of the seventh exception. The charge was erroneous, for under it, if the jury should conclude that plaintiff intended to insure the property in the Clark Building, where it actually was, and the defendant's agent intended to insure it in the McKerall Building, where he mistakenly supposed it to be, then the jury were at liberty to regard the contract as covering the property anywhere in Marion, without regard to the question of waiver. There was no evidence whatever that either party contemplated insuring the property at the time of the contract in any other place in Marion than in one or the other of two places, the Clark Building or the McKerall Building; nor was there the slightest evidence that either party, certainly not the defendant, contemplated insurance without regard to the location of the property. The most plaintiff could expect, under the evidence, on this point, was to have the contract treated as insuring his property where it actually was at the time of the contract, and this result is not seriously questioned by defendant. This point is not the pivotal point in the case; for, it being an undisputed fact that the property was not burned at either the Clark or McKerall Buildings, but at the Stackhouse Building, the plaintiff must fail in his action, unless he shows waiver, which is the pivotal point. These views render it unnecessary to consider, in detail, the other exceptions, which have been practically disposed of in the general consideration of the case. The judgment of the circuit court is reversed, and the case remanded for a new trial.

BRAFFORD v. REED.

(Supreme Court of North Carolina. April 4, 1899.)

APPEAL—TRANSCRIPT—DOCKETING—MOTION TO DISMISS.

1. When the transcript, on appeal, reaches the clerk of the supreme court, it becomes part of the record, and the parties have no further control over it.

2. If a motion to dismiss is not in writing, as required by rule 45, the appeal will not be dismissed, though the record was not printed when the case was reached, as required by rule 30 (28 S. E. v.).

Appeal from superior court, Cabarrus county;

Action by W. J. Brafford against Joel Reed. From a judgment for the latter, the former appeals. On motion to dismiss. Denied.

Jones & Tillett, for appellant. H. S. Puryear, for appellee.

FURCHES, J. The transcript of appeal in this case was received by the clerk of this court on Tuesday morning, a short time before 10 o'clock, and in time to have been docketed before the call of the Eighth district. When the package containing the transcript was received by the clerk, the attorney of the appellant was present, and said to him, "Give me the case; I don't want it docketed." The clerk handed him the case, and he took it out with him. In a few moments the counsel for the appellee inquired of the clerk if he had received the transcript in this case, and he told him that he had, and stated to him what had taken place between him and the appellant's counsel. Counsel for the appellee insisted that the case should be docketed, and the clerk sent to the appellant's counsel for the transcript, and put it on his docket. When the docket for the Eighth district was called, the matter was brought to the attention of the court, and the appellee's counsel contended that the case was docketed, and moved to dismiss the appeal, for the reason that the record had not been printed; while the appellant's counsel contended that it was his appeal, and he had a right to control the matter, and did not want it docketed at that time, as he would not have time to have the record printed before the case would be called; that, as he had a right to control it and had directed the clerk not to docket the case, it was not in fact or in law docketed. As this point had not been directly before the court, it reserved the question for consideration in conference, where it was held that when a case on appeal comes into the possession of the clerk it is his duty to docket it at once, and it will be deemed to be docketed from that time; that when the transcript reaches the clerk it then becomes a record of this court, and neither the counsel of the appellant nor of the appellee has any control over it. While the question is not directly decided, it is strongly sustained in *Caldwell v. Wilson*, 121 N. C. 423, 28 S. E. 303. The court having held that the case was dock-

eted, the appellee's motion to dismiss, for the reason that the record had not been printed, as required by rule 30 (28 S. E. v.), would have been allowed, but for the fact that the counsel for the appellee failed to comply with rule 45 by filing his motion in writing. The case will therefore stand continued for such further action as the parties may be advised and as the court may deem proper.

LE DUC v. SLOCOMB.

(Supreme Court of North Carolina. April 4, 1899.)

JUDGMENT BY DEFAULT—VACATION—EXCUSABLE NEGLIGENCE—DEFENSE TO ACTION—BONA FIDE ASSIGNER.

1. An agreement, made pendente lite between plaintiff and defendant, which was not filed or known to the court when judgment was entered, cannot authorize the vacation of a default judgment on the ground of mistake, inadvertence, or excusable neglect.

2. Where a defendant who is liable for a debt makes an agreement with plaintiff pendente lite that no judgment shall be entered against him, and that he shall have credit for a partial payment then made, and plaintiff, in violation of the agreement, enters judgment by default for the full amount of the debt, defendant has no equity against the judgment in the hands of a purchaser without notice of the agreement.

3. A party moving to set aside a judgment by default must show, *prima facie*, that he has a meritorious defense.

4. The party aggrieved must move to vacate a judgment before the rights of innocent third persons have intervened.

Appeal from superior court, Cumberland county; W. P. Bynum, Jr., Judge.

Action by W. G. Le Duc, receiver, against A. H. Slocomb and others. From a judgment in favor of plaintiff, and an order denying a motion to set it aside, defendant Slocomb appeals. Affirmed.

H. L. Cook, for appellant. N. W. Ray and N. A. Sinclair, for appellee.

FAIRCLOTH, C. J. The law of this case must be applicable to the following facts: "This cause coming on to be heard, upon motion of defendant Slocomb to set aside the judgment obtained in the action, the matter being heard upon affidavits submitted by both sides, the court finds the following facts: (1) That summons issued, returnable to the January term, 1891, of the superior court of said county, on the 11th day of December, 1890, and was duly served on December 15, 1890. (2) The action was brought upon a note for \$390, dated March 15, 1889, due thirty days after date, with interest at eight per cent. from maturity, signed by A. H. Slocomb, E. F. Moore, Thomas McDaniel, G. Rosenthal, and D. Rose, administrator of Murphy, deceased. (3) That shortly after the service of the summons, to wit, December 27, 1890, and before the commencement of the court to which it was returnable, and before the plaintiff bank went into the hands of the receiver, as hereinafter stated, the defendants, A. H.

Slocomb and G. Rosenthal, paid to the plaintiff bank \$221.38 as their proportionate part of the note, upon the understanding, at the time of the payment, that the bank would not take judgment in the case as to them at the term of court to which it was returnable; that said agreement was made with and assented to by F. W. Thornton, president of the bank, and G. P. McNeill, its cashier, in the presence of its attorney, Thos. H. Sutton, who had charge of the case, and the said attorney, in the presence of said parties, drew a certain paper writing, or bond, embodying the terms of the said agreement, as follows, to wit: 'I, A. H. Slocomb, hereby bind myself unto the People's National Bank in the sum of \$300 for the payment to them of the balance of the judgment to be obtained in the suit against myself, G. Rosenthal, Lucy McDaniel, administratrix of Thos. McDaniel, and D. Rose, administrator of David Murphy, deceased, now pending in the superior court of Cumberland county. The purpose and condition of this bond is that said bank will not take judgment against said A. H. Slocomb and G. Rosenthal on the \$300 in suit, and, if they shall fail collecting out of the other parties the amount due by them, the said A. H. Slocomb is responsible for the balance. This is done upon the said A. H. Slocomb and G. Rosenthal paying an amount which would be their proportionate share in the event that the other parties are solvent, and, if the said bank shall find it necessary to pursue said A. H. Slocomb and G. Rosenthal further in the collection of the balance, then this amount, \$221.38, is to be credited upon the judgment vs. claim. [Signed] A. H. Slocomb. Witness: [Signed] D. D. Haigh.' (4) That upon the payment of the amount aforesaid, and the signing of said bond, the said president and cashier instructed the attorney, Thos. H. Sutton, to nonsuit said case as to said Slocomb and G. Rosenthal, and he promised Slocomb that he would do so, and said officers promised Slocomb that said case should be so nonsuited, as they agreed to do. (5) That, notwithstanding said agreement, at the May term, 1891, of said court judgment was entered against Slocomb and the others for the entire amount of the note, without the credit even of the amount paid as alleged. (6) That said Slocomb did not learn or actually know that said judgment was rendered against him until a long time after it was taken, namely, in July, 1893; did not know that said judgment was still standing against him; and he caused notice of a motion to be made at November term, 1893, of this court to be served upon said Ray, the purchaser of the judgment, that he would move that said judgment be set aside upon the ground that it was rendered through mistake, inadvertence, excusable neglect, and in the face of an agreement on the part of the plaintiff that judgment would not be taken, but the case nonsuited, at first term, upon the ground set out in the bond or agreement signed by said Slo-

comb to said bank; a copy of said bond being attached to said Slocomb's affidavits on file in the hearing of this motion. (7) That the notice of motion for leave to issue execution before the clerk was continued by him to the said November court, and by the judge thereof, from time to time. (8) That, after the issuing of the summons, the plaintiff bank was placed in charge of W. G. Le Duc, receiver, by the comptroller of the currency, and said Slocomb, after learning that at the return term judgment was rendered against him, a short time before the sale of assets and purchase by N. W. Ray went to said receiver, and he promised that said judgment should not remain against him, but that said agreement would be carried out as far as was possible by cancellation of the judgment as to him. (9) That at the sale of the assets of the bank by the receiver the said judgment on the \$300 note executed by Slocomb and others was purchased by N. W. Ray for value, without notice of any agreement or understanding between the bank and Slocomb or the receiver and Slocomb, and the said judgment was duly transferred and assigned to said Ray, who is now the owner thereof. (10) That the defendant Slocomb has shown no meritorious defense to the action on the said note. (11) That the bank did not pursue its remedies by seeking to collect the balance of the note or judgment out of the other defendants. Upon the foregoing facts the court refuses the motion to set aside the said judgment because (1) there was no mistake or excusable neglect in the taking of said judgment; (2) because, even if there had been an agreement between the bank and Slocomb that the bank would nonsuit the case as to him, the purchaser of this judgment is not affected by any such agreement; (3) the application to set aside said judgment is not made in due time. Leave to issue execution is granted. The defendant Slocomb excepts to this judgment, and appeals to the supreme court. The facts found by the court and the judgment shall constitute the case on appeal."

Parties to an action, when brought in, must take notice of all orders and judgments made therein; and this case is an illustration of the consequence of failure to attend and take actual notice of the proceedings. The defendant failed to answer the complaint, and judgment final by default was entered. The judgment is regular in all respects, and has no infirmity in it. The defendant had a private written agreement with the bank that no judgment should be entered at that term of the court. This agreement was not filed, or brought to the attention of the court. There was, then, only a breach of said contract, which in no way affects the regularity of the judgment. The defendant has no equitable ground for his motion to set the judgment aside, because it is admitted the defendant owed and was liable for the debt, and that the judgment was entered for the

true amount, and the plaintiff agrees to credit the judgment with the amount paid by the defendant before judgment. There was, then, no equity to follow the judgment into the hands of the assignee or purchaser of the judgment, who took it without notice of said agreement between the original parties.

There is another ground fatal to the defendant's motion,—that he does not, in his affidavit or otherwise, allege that he has any meritorious defense to the action if the judgment should be set aside. The mover in such cases must at least set forth a case amounting *prima facie* to a valid defense, to be determined by the court, and not by the party. *Mauney v. Gidney*, 88 N. C. 200. The party aggrieved must move to vacate a judgment before the rights of innocent third parties have intervened. *Vick v. Pope*, 81 N. C. 22. The same principle is declared, and the subject discussed at length, by *Merrimon, J.*, in *Stancill v. Gay*, 92 N. C. 455. No error. Affirmed.

KENDRICK v. MUTUAL BEN. LIFE INS. CO.

(Supreme Court of North Carolina. April 4, 1899.)

LIFE INSURANCE—POLICY—DELIVERY—CONSTRUCTION—PAYMENT OF PREMIUM—ESTOPPEL—INSTRUCTIONS TO AGENT—PAROL EVIDENCE—SUBMISSION OF ISSUES.

1. In the absence of evidence, a policy of life insurance is presumed to have been delivered at the time it bears date, where, on the death of insured, it is in possession of the beneficiary.

2. An acknowledgment, in a policy of life insurance, of the receipt of the premium, cannot be contradicted by parol, to invalidate the contract, in the absence of fraud in procuring the delivery of the policy.

3. In the absence of fraud or concealment, payment of the premium on a delivered policy of life insurance a few hours before the death of insured, who was then very ill, is a compliance with a condition that the policy shall not be effective "unless the first premium shall have been actually paid during the lifetime of the insured."

4. Instructions to an agent of a life insurance company, of which insured had no knowledge, are not binding on the latter.

5. Where an insurance policy is reasonably susceptible of two constructions, the one more favorable to insured is adopted.

6. Where a policy was susceptible of two constructions, and the insurance agent gave it one, and insured was misled thereby, the company could not claim forfeiture because insured did not follow the other construction.

7. Where an agent of a life insurance company received a check in payment of a premium, and directed it to be mailed to the company, the time of mailing was the time of payment, the check being honored on presentation.

8. The court having submitted an issue presenting every phase of a party's contention without prejudice, it need not submit other issues, though requested so to do.

Appeal from superior court, Mecklenburg county; Starbuck, Judge.

Action by Mattie A. Kendrick against the Mutual Benefit Life Insurance Company.

From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Burwell, Walker & Cansler, for appellant. Jones & Tillett, for appellee.

CLARK, J. John F. Kendrick applied for insurance on his life in the defendant company for the benefit of his wife, the plaintiff, and on the 15th of July, 1897, the defendant issued its policy in accordance with the terms of the application, which was delivered by its agent to him a few days thereafter. He was afterwards taken ill with typhoid fever, and died on the 15th of September, 1897. The policy recited the payment of the premium, though in fact it was not paid until a few hours before and in fact on the same day on which the insured died; the payment being then made for him by a friend, and accepted by the local agent with full knowledge of Kendrick's critical condition. This agent had theretofore indulged the payment, stating that it would be sufficient if the payment was made during Kendrick's life. The policy contained a provision: "This policy does not take effect until the first premium shall have been actually paid during the lifetime of the assured." There was in the instructions of the company, in the hands of its agents, a further provision that "when a premium is paid more than thirty, and within sixty, days after due, a certificate of good health, signed by the applicant, will be required." It was not shown that John F. Kendrick had notice of this instruction.

These, in substance, were the facts: The plaintiff, to whom the policy was payable, was in possession of the policy, and, the death of the insured being admitted, this made out a *prima facie* case. In the absence of evidence, the policy is presumed to have been delivered at the time it bears date. *Meadows v. Cozart*, 76 N. C. 450; *Lyerly v. Wheeler*, 34 N. C. 200. The authorities are numerous and quite uniform that the acknowledgment in the policy of the receipt of the premium estops the company to contest the validity of the policy on the ground of nonpayment of the premium. In so far as it is a mere receipt for money, it is only *prima facie* like other receipts, and will not prevent an action to recover the money if not in truth paid; but, in so far as it is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy. The rule is thus stated in 2 Bid. Ins. § 1128: "As a general rule, it has been held in the United States that, while such a receipt will prevent the insurer from proving the premium was unpaid in order to show the policy was void from its inception, it may be contradicted in order to show, on a suit for premium, that no payment had been made,"—citing numerous cases in the note. To same effect, the law is summed up and stated in 19 Am. & Eng. Enc. Law, 1126; and in *Basch v. Insurance Co.*, 35 N. J. Law, 429, in a very clear statement by *Beasley, C. J.*, citing

Insurance Co. v. Fennell, 49 Ill. 180; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 471. Chancellor Kent says (3 Comm. 280): "The receipt of the premium in the policy is conclusive of payment, and binds the insurer, unless there is fraud on the part of the insured." To like purport, *Insurance Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118; *Golt v. Insurance Co.*, 25 Barb. 189, 192; *Insurance Co. v. Booker*, 9 Helsk. 606; *Insurance Co. v. Wolf*, 37 Ill. 354, 356; *Insurance Co. v. Mueller*, 77 Ill. 22, 24; Phil. Ins. §§ 514, 515; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869; *Michael v. Insurance Co.*, 10 La. Ann. 737; *Insurance Co. v. Cashow*, 41 Md. 60, 76. In striking analogy is the same rule as to receipts in deeds. In 3 Washb. Real Prop. 614, the fourth rule applying to receipts in deeds is as follows: "Although it is always competent to contradict the recital in the deed as to the amount paid, in an action involving the recovery of the purchase money, or as to the measure of damages, in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed in creating or passing a title to the estate thereby granted." This is quoted and approved in *Barbee v. Barbee*, 108 N. C., at page 584, and 13 S. E. 216; and it may be said, in passing, that the difficulty in reconciling opinions expressed in that case was due to the failure to note the double aspect of a recital in a deed of payment as being a mere receipt for money, and therefore only prima facie, in an action to recover the money, and as being sometimes also a part of the contract, and therefore not to be impeached, except for fraud, etc., when the validity or effect of the contract depends on prepayment,—a distinction which is clearly pointed out by Ashe, J., in *Harper v. Dall*, 92 N. C. 394, citing *Wilson v. Derr*, 69 N. C. 137.

The above proposition being true, even when the policy is made payable to the estate of the insured, a fortiori the defendant company is estopped when the beneficiary is a third party. *Kline v. Association*, 111 Ind. 462, 11 N. E. 620. Certainly, it is not the defendant who can except, because the court charged the jury: "If, when the policy was handed to Kendrick by the agent, it was not the understanding that it should then take effect as a policy, then Kendrick could not, by sending this amount as a payment, create or put in force a contract of insurance, although the agent, during Kendrick's sickness, may have agreed and directed that he should do so. On the other hand, although defendant may show that, as a fact, the recital of the payment of premium was not true, yet, if the policy was delivered to operate as a contract of insurance, it cannot contend that the policy was invalid because the premium was not paid" at time of delivery. If it be conceded, contrary to authorities above recited, that the proviso in the policy that it shall not be effective, "unless the first premium shall have

been actually paid during the lifetime of the insured," removed the estoppel arising from the acknowledgment of the receipt of the money, the condition was complied with by the actual payment of the money in the lifetime of the insured, which related back to the date of the policy. The instruction to agents, as recited in the letter of the general agent, that, if the premium was paid more than 30 days after due, there must be a health certificate, is evidence against the company that credit or indulgence on payment was allowable; but the terms that, after 30 days' delay, a health certificate is required, is not binding on the insured, who is not shown to have had knowledge of it, and who, even if he had, might well rely upon the simple provision in the policy itself that the payment must be made "during life," and the assurance of the agent that, if it was done, it would be sufficient. *Horton v. Insurance Co.*, 122 N. C. 498, 29 S. E. 944; *Insurance Co. v. Wilkinson*, 13 Wall. 222. It is true, in *Whitley v. Insurance Co.*, 71 N. C. 480, it is held that the representation of good health continues up to the consummation of the contract. There, the policy was not delivered till more than a month after the death of the insured, and the agent was ignorant of the condition of the insured. In the present case the contract was consummated by the unconditional delivery of the policy acknowledging receipt of payment, and, if that acknowledgment can be varied by the provision that the policy was not valid unless the premium was "actually paid during life," this condition was complied with. There was no suppression of information or fraud, for the agent knew the condition of the insured when he received the premium. The authorities cited in *Whitley's Case*, supra, do not support the construction sought to be placed on that opinion by the defendant. It would be contrary to every rule of construction to restrict the obligation of a promisor beyond the plain meaning of his words. On the contrary, the uniform rule of construction of insurance policies is that, if reasonably susceptible of two constructions, that one will be adopted which is more favorable to the insured. *National Bank v. Insurance Co.*, 95 U. S. 673. In *Hoffman v. Insurance Co.*, 32 N. Y. 413, the rule is laid down by the New York court of appeals as follows: "It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *Potter v. Insurance Co.*, 5 Hill, 147, 149; *Barlow v. Scott*, 24 N. Y. 40. It is also a familiar rule of law that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee. *Co. Litt. 183; Bac. Max.*

Teg. 3; *Doe v. Dixon*, 9 East, 16; *Marvin v. Stone*, 2 Cow. 806. This rule has been very uniformly applied to conditions and provisos in policies of insurance, on the ground that, though they are inserted for the benefit of the underwriters, their office is to limit the force of the principal obligation." In *Goodwin v. Association*, 97 Iowa, 228, 66 N. W. 157, the supreme court of Iowa states the rule as follows: "The tenets established for the guidance of the courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a clear necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted." The court cites a large number of authorities to sustain the proposition, and, indeed, the authorities seem uniform.

Besides, the agent of the company put the same construction upon the policy, and said that it would be sufficient if the payment was made "during lifetime," and, if this had misled the insured, it would have been fraud for the company to avail itself of a forfeiture thus procured. *McMaster v. Insurance Co.*, 78 Fed. 86; *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87. The agent directed the "check to be mailed," and the time of the mailing was the time of payment (the check being honored on presentation). *Whitley v. Insurance Co.*, supra. Every phase of the defendant's contention could be and was presented without prejudice, under the issue submitted by the court, and therefore the refusal to submit other issues, though asked, is not error. *Pretzfelder v. Insurance Co.*, 123 N. C. 164, 31 S. E. 470.

Affirmed.

LEHMAN et ux. v. TICE.

(Supreme Court of North Carolina. April 11, 1899.)

SET-OFF AND COUNTERCLAIM—INSTRUCTIONS.

On an issue as to whether defendant is entitled to recover on counterclaims, an instruction that, if it is shown by a "greater weight" of the evidence that he is entitled to recover, the jury should ascertain to how much he is so entitled, is erroneous; the set-off being a judgment which plaintiff admitted and a note which he did not claim had been paid.

Appeal from superior court, Forsyth county; Green, Judge.

Action by T. P. Lehman and wife against Cicero Tice. From a judgment for plaintiffs, defendant appeals. Reversed.

Jones & Patterson, for appellant. Watson, Buxton & Watson, for appellees.

MONTGOMERY, J. The plaintiffs, in their complaint, allege that in March, 1891, the defendant proposed to the plaintiffs to convey to the feme plaintiff a certain lot of land

in Winston, N. C., and to build a house thereon at the cost of \$1,250, and take a note for the purchase price, secured by mortgage on the property; that the plaintiffs declined the proposition, whereupon the defendant, to induce the plaintiffs to make the trade, guaranteed verbally that, if the plaintiffs would buy the property on the terms proposed, within 12 months the property should bring double the price agreed to be paid for it; and that, as a further inducement to the plaintiffs to buy the property, the defendant promised the male plaintiff that he would give him employment in his furniture store and real-estate office at \$75 per month, and that he would give to two sons of the plaintiffs, of the ages of 17 and 19, respectively, employment in his furniture factory at \$1 and \$1.25, respectively, and board, until the wages of the three should extinguish the debt for the purchase of the property; that the proposition was accepted; and that the defendant, after procuring the note and mortgage, refused to comply with his contract, refused to make good the guaranty as to the increased value of the property, and refused to give employment to the plaintiff and his sons, as agreed upon; but, on the other hand, sold the property, by direction of the superior court of Forsyth county in a proceeding brought to foreclose the mortgage, and became the purchaser thereof himself, from the commissioner appointed by the court. The defendant, in his answer, denies the allegations of the complaint, except as to the sale of the property to the feme plaintiff, and the execution of the note and the mortgage for the purchase money, but without guaranties, set out in the plaintiffs' complaint, and the sale by the commissioner and the purchase of the property by himself. The defendant in his answer, set up two counterclaims,—one of \$783, by judgment, as the balance due on the judgment in the foreclosure proceedings; and the other in the sum of \$500, with accrued interest due, by notes and mortgage of the plaintiffs, executed to the defendant, for the purchase of two vacant lots in Winston. The seventh issue submitted to the jury was in these words, "What amount is defendant entitled to recover of the plaintiffs on his counterclaims;" and, upon the instructions of his honor on that issue, the jury responded, "Nothing." The defendant excepted to the instructions, and that exception furnishes the chief question for us to consider. The defendant introduced the judgment in evidence which he claimed as a set-off in the action, and the notes of the plaintiffs for the vacant lots, and testified that nothing had been paid on either. The male plaintiff, himself a witness, made no contention over the notes; but did say that, before the judgment was had in the foreclosure proceedings, he had made some payments on the notes, upon which the judgment was afterwards taken. Upon this condition of facts, the court instructed the jury upon the sev-

enth issue as follows: "The plaintiffs contend that the jury should answer the seventh issue 'Nothing.' The jury are instructed that, if defendant has shown, by a greater weight of the evidence, he is entitled to recover anything on his counterclaims, they will ascertain how much he is so entitled to recover, and give such sums as their answer to the seventh issue. Defendant testified that he sold the two vacant lots under the mortgage he held, and bid them off at his own sale, and the jury are instructed that by such a sale the relations of the parties are not changed with regard to the lots, and that defendant still remains a mortgagee and plaintiff a mortgagor,—the defendant having the right to have the amount due him paid, holding the lots as security, and the plaintiff being entitled to his equity of redemption; and if he has failed to show, by a preponderance of the evidence, that he is entitled to recover anything on his counterclaims, they will answer the seventh issue 'Nothing.'" There was error in the instruction. The rule of the greater weight of evidence had no application. The judgment was proved, as required by law, and the defendant introduced the notes of the plaintiffs for the vacant lots, without any indorsed credits, and testified that nothing had been paid upon them. The plaintiffs admitted the judgment, and made no claim that the notes had been paid. The jury should have been instructed to find the amount of the judgment to be a set-off, to which the defendant was entitled; and, further, that if they believed the notes for the vacant lots had been executed, and that no payments had been made upon them, they should find the defendant was entitled to the amount of the notes and interest, as a further set-off.

It is not necessary to consider the other exceptions. We will suggest, however, that it is not certain that the plaintiffs can sustain themselves as to that part of the action growing out of such a guaranty as the plaintiffs allege that the defendant made to them in reference to the future value of the real estate sold by the defendant to the plaintiffs. As that feature of the case, however, embraces only a part of the present cause of action, and as a new trial will have to be granted for the error pointed out, the case will go back for trial without prejudice on the quære suggested. New trial.

WITTKOWSKY v. GIDNEY.

Supreme Court of North Carolina. April 11, 1899.)

HOMESTEAD — DEED — WIFE'S SIGNATURE — BONA FIDE PURCHASER—NOTICE.

1. Under Const. art. 10, § 8, providing that a deed by the owner of a homestead shall be void without the wife's signature, such a conveyance passes no interest.
2. An attorney who drafted a mortgage, pending an action to correct the description, in

which he was the mortgagor's attorney and admitted there was a mistake, accepted a deed from the mortgagor to land he knew was included in the proper description. *Held*, that he had actual notice of the mortgagee's equity.

Appeal from superior court, Cleveland county; Norwood, Judge.

Action by S. Wittkowsky against J. W. Gidney. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Montgomery, Webb & Webb, and G. A. Frick, for appellant. Burwell, Walker & Cansler and Jones & Tillett, for appellee.

FAIRCLOTH, C. J. Action for possession of land. It is not denied that B. Justice had a good title. Both parties claim under him, and neither claims by any title superior to his. The plaintiff owns all the interest conveyed to him and E. Block. The original defendant, J. W. Gidney, has since died, and his heirs are now parties.

Facts: On February 5, 1877, B. Justice and wife, Mahala, who died in 1898, agreed to convey by mortgage, to plaintiff and E. Block, a lot of land (described in the first paragraph of the complaint) containing 125 acres. On that day the defendant Gidney, as attorney of Justice, drew a deed, and by mistake the description embraces an adjoining tract, containing 200 acres, more or less. In 1883 (the day does not clearly appear) the plaintiff brought his action against B. Justice and wife and others, entitled "Wittkowsky vs. Kiser et al.," to have said mistake corrected. The matter was referred, and the report of the referee, finding that there was a mistake in the description, at fall term, 1887, was confirmed, and the mortgage of February 5, 1877, was adjudged to be corrected according to the report and the original agreement. There was a foreclosure decree of sale at the same term. Sale was made, and the plaintiff became the purchaser, on February 6, 1888, and by order a deed was made to him, and registered May 16, 1888. During the pendency of this action the defendant, J. W. Gidney, represented Justice and wife, as one of their attorneys. Both parties put in evidence a mortgage deed from B. Justice, not signed by his wife, to defendant, J. W. Gidney, and J. C. Gidney, dated and registered February 10, 1883, conveying land described "as the homestead of B. Justice, being the lands set apart to the said B. Justice, as a homestead, under an execution issued from the superior court of Cleveland county." The homestead return was also in evidence. The land in said return is the same as that described in the deed of February 10, 1883. Defendant introduced another mortgage deed from Justice to him, dated September 15, 1888, and the record of foreclosure proceedings of the said two mortgages, commenced July 22, 1890. It was shown by judgment dockets that on and prior to February 10, 1883, there were several judgments against said B. Justice, which were and are still unsatisfied.

We have read 30 or 40 prayers for instructions, but we find it unnecessary to discuss them. Issues were submitted, and his honor instructed the jury that, if they believed the evidence, they should answer: (1) That plaintiff is the owner of the land in dispute; (2) that defendant unlawfully withholds possession thereof; (3) that there was a mistake by the party in describing the land in the deed dated February 5, 1877; (4) that defendant did not purchase the land in controversy for value, and without notice of the plaintiff's equity, to correct said mortgage of February 5, 1877. Upon these findings, judgment was entered in favor of the plaintiff.

The plaintiff has unquestionably a good title, unless the defendant has acquired a better one; so we will look to his contention. By his deed, dated February 10, 1883, from B. Justice, without the wife's signature, the land assigned and allotted to Justice as a homestead was conveyed to him. This conveyance was invalid. The constitution (article 10, § 8) provides "that no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law"; and all our statutes on this subject are in conformity thereto. Whatever diversity of opinion may have been expressed by members of this court on the homestead question, in no instance has the court held that the homesteader, under such facts as are here presented, could convey the land set apart as his homestead without the assent of his wife, duly signified; but the court has repeatedly held that such a conveyance is invalid, and passes no interest. *Markham v. Hicks*, 90 N. C. 204; *Castlebury v. Maynard*, 95 N. C. 281; and a number of subsequent cases. The first-named case was a sale under an execution; the second was by the homesteader himself.

The defendant obtained another mortgage from Justice, dated September 15, 1888. The plaintiff insists that the defendant's rights under this deed were subject to the plaintiff's legal and equitable rights, and, upon investigation, we find that we have to sustain the plaintiff's contention. The defendant drafted the original mortgage deed of 1877 as an attorney. He testified that he knew where the Warlick land was, and that in taking his deed he knew that Justice's homestead was a part of the Warlick land. He, as an attorney, appeared, and resisted the action of the plaintiff for correcting the mistake heretofore pointed out, which action was closed by a final decree before the defendant took his last deed. We need not discuss the principles of *lis pendens*, either at common law or by statute, as the above facts show that the defendant had not only constructive, but actual, notice of the pendency of plaintiff's action to perfect his title to the land now in dispute and of plaintiff's equity. "If anything appears calculated to excite attention and stimulate inquiry, the party is affected

with knowledge of all that the inquiry would have disclosed." *Bunting v. Ricks*, 22 N. C. 130; 2 Pom. Eq. Jur. 680. A learned discussion of the principles of notice is found in *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. pt. 1, p. 144. A party taking with notice of an equity takes subject to that equity, and the rule of priority, which governs transfers and charges of an equitable interest, is the same as that governing transfers of legal estates; that is, that the order of date prevails. *Adams*, Eq. 145, 148. This rule is in analogy to the rule at law when different liens are created by docketed judgments, levy, or otherwise, i. e. priority of date. Affirmed.

MERRIMON et al. v. LYMAN et al.
(Supreme Court of North Carolina. April 11, 1899.)

APPEAL — ABANDONMENT OF EXCEPTIONS — TAX DEEDS — QUESTIONS FOR JURY.

1. An exception which appellant does not refer to in his brief is presumed to be abandoned.
2. Evidence that a tax collector received redemption money is sufficient to justify a submission of the question of his authority to the jury.
3. Where the owner of property sold for taxes redeems before the county commissioners direct the execution of a deed to the purchaser, the deed is ineffectual.

Appeal from superior court, Buncombe county; Hoke, Judge.

Action by J. H. Merrimon and others against A. H. Lyman and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Davidson & Jones and Shepherd & Busbee, for appellants. Merrimon & Merrimon and W. B. Gwyn, for appellees.

MONTGOMERY, J. This action was brought for the recovery of the possession of certain real estate situated in the city of Asheville, N. C.; the right of the plaintiffs to recover being resisted by the defendants, who claim the property under a certain deed executed by J. H. Weaver, once a tax collector of Buncombe county,—the deed bearing date the 17th of April, 1895.

In making out their title to the property, the plaintiffs introduced as one of the evidences a deed of trust, dated May 30, 1892, from Nat Atkinson and wife and P. F. Patton and wife to C. E. Graham. One of the exceptions of the defendants is to the ruling of his honor in receiving this deed in evidence. The exception is that the deed was not properly registered, because the probate failed to direct its registration. A copy of the deed is not in the case on appeal, nor is the language of the probate set out so that we can see whether the same embraced an order for registration in sufficient form. The exception is not in such a shape that we can take notice of it. However, there is no reference to the exception in the brief of the defendants, and it may be presumed that it was abandoned. The deed

was in fact registered, and there is nothing before us upon which we could say that it was registered improperly. That was the only objection made to the plaintiffs' evidences of title; and, unless the deed from the tax collector to the defendants is such a one as to convey the property to the defendants, the plaintiffs have made out their title, and are entitled to the possession of the property.

It appeared in the case that the property was sold by D. L. Reynolds in 1898, and bid off by the county commissioners of Buncombe; that some time after the time in which the law allows the redemption of real estate which has been sold for taxes, by the owners, the commissioners ordered Weaver to make a deed for the property; and that the same was done, the deed bearing date the 17th of April, 1895. The jury, however, found, in response to the fourth issue, that the property had been redeemed at the time the defendants took their deed for the same. The defendants contended that the instructions of his honor upon the fourth issue were erroneous; alleging that there was no evidence tending to show that Weaver, the tax collector, had any authority from the commissioners to receive from the plaintiffs the taxes, interest, and costs in redemption of the property. The evidence was not as direct and as clear as it might have been on the point, but we are of the opinion that it was sufficient to be submitted to the jury. Weaver himself testified that he did not have the tax books for 1892 in his hands when he received from the plaintiffs the taxes of 1892, but he said he received redemption money; and, throughout his testimony, he constantly referred to the redemption book, and to his receiving money upon it.

The property having been redeemed by the plaintiffs before the order of the county commissioners was made, directing the tax collector, Weaver, to make a deed to the property to the defendants (even if the order was of any validity), the deed was of no effect; and his honor's instruction to the jury to answer the fifth issue ("Are the plaintiffs owners of the land sued for, and described in the complaint?"), "Yes," if they believed all the evidence, was correct.

There was no error. Affirmed.

KORNEGAY v. MORRIS.

(Supreme Court of North Carolina. April 11, 1899.)

On rehearing. Dismissed.

For prior report, see 29 S. E. 875.

FURCHES, J. This case was before us at spring term, 1898, when it was considered and decided by the court (122 N. C. 199, 29 S. E. 875), and is now before us upon a petition to rehear. Since it was here before (and at the suggestion of the court), Frances E. Kornegay has been made a party defendant; but, as she files no separate answer, and adopts

the answer heretofore filed by the defendant Morris, the situation is not changed, and the facts of the case are the same as they were when considered by the court at spring term, 1898. Upon the rehearing, no facts have been called to our attention which had been overlooked by the court, nor has any new phase of the law bearing on the case been presented to the court; but the learned counsel for the petitioner put their case squarely upon the ground of error in the opinion heretofore rendered; and in their brief they base their grounds of error upon *Hilliard v. Kearney*, 45 N. C. 229. They say that the opinion of the court in this case when here before is in conflict with *Hilliard v. Kearney*; that *Hilliard v. Kearney* is a correct exposition of the law; and that, as the former opinion is in conflict with *Hilliard v. Kearney*, it is erroneous. If the former opinion is erroneous, it ought to be corrected at the first opportunity, which is now. The case of *Hilliard v. Kearney* was discussed by counsel for plaintiff (petitioner) on the former hearing, and was fully considered by the court, and discussed in the opinion then delivered; and this case (*Hilliard v. Kearney*) was fully discussed by the learned chief justice in his dissenting opinion. The case of *Hilliard v. Kearney* is not disputed as being good law, and was a correct exposition of the law of the case then before the court; but the court, when considering this case on the former hearing, was of the opinion that it was distinguishable from *Hilliard v. Kearney*, and that it was not controlled by that case, but by section 1327 of the Code and the opinion in *Buchanan v. Buchanan*, 99 N. C. 308, 5 S. E. 430. Upon a careful consideration of the former opinion and the brief of plaintiff's counsel, we find no error in the former opinion of the court, and the petition to rehear is dismissed.

ROSS v. NEW YORK LIFE INS. CO.

(Supreme Court of North Carolina. April 11, 1899.)

CONTRACT OF INSURANCE—RETENTION OF APPLICATION.

An application for a policy, providing that the insurer should incur no liability thereon until its receipt and approval at the home office and the issuance of a policy thereon, and until the actual payment of the premium during the applicant's lifetime and while he was in good health, was forwarded by the insurer's agent to the home office, with a note for the first premium; and, without either accepting the application or issuing a policy thereon, the company retained the application and note for over two months, when the applicant died, the premium note not being due at the time. *Held*, that there was no contract of insurance.

Appeal from superior court, Randolph county; Allen, Judge.

Action by R. R. Ross, administrator, against the New York Life Insurance Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Jones & Tillett, for appellee.

FAIRCLOTH, C. J. Plaintiff's intestate, on September 27, 1895, made application for life insurance with defendant's agent, and gave his note for the first payment. The application and note, which was accepted as cash, were forwarded to the home office. The application contained this statement: "That the company shall incur no liability under this application until it has been received, approved, the policy issued thereon by the company at the home office, and the premium has been actually paid to and accepted by the company or its authorized agent during my lifetime and good health." Plaintiff's intestate became sick with fever in November, and died on December 15, 1895. The application was not accepted, no policy issued, nor was the first payment made. On the next January, the defendant tendered the note to plaintiff, who refused to receive it, and, after its maturity, demanded the payment of the policy. When plaintiff rested, his honor, on motion, held that plaintiff could not recover, and ordered a nonsuit. There was no error. As the facts do not show a contract, and as the facts were undisputed, there was nothing for the jury. The minds of the intestate and defendant never met. *Ormond v. Association*, 96 N. C. 158, 1 S. E. 796; *Whitley v. Insurance Co.*, 71 N. C. 490. Even long delay by the defendant could not presume an acceptance. The natural and legal inference is to the contrary. *More v. Insurance Co.*, 130 N. Y. 537, 29 N. E. 757. The student may read on this question *Jacobs v. Insurance Co.*, 71 Miss. 656, 658, 15 South. 689; *Paine v. Insurance Co.*, 2 C. C. A. 459, 51 Fed. 689; *Eliason v. Henshaw*, 4 Wheat. 227; *Carr v. Duval*, 14 Pet. 81; *Steinle v. Insurance Co.*, 26 C. C. A. 491, 81 Fed. 489; and *McCully's Adm'r v. Insurance Co.*, 18 W. Va. 782.

Affirmed.

SPRINKLE v. KNIGHTS TEMPLAR & MASONS' INDEMNITY CO.

(Supreme Court of North Carolina. April 11, 1899.)

INSURANCE—KNOWLEDGE OF AGENT—FRAUD.

An insurance company is not bound by the knowledge of its agent, who, in drawing the application for assured, fraudulently falsified assured's answers concerning his health, with concurrence of assured, to prevent rejection of the application.

Appeal from superior court, Madison county; Greene, Judge.

Action by J. B. Sprinkle against the Knights Templar & Masons' Indemnity Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

W. W. Zachary and Geo. A. Shuford, for appellant. J. M. Gudger, Jr., and J. H. Merimon, for appellee.

MONTGOMERY, J. On the 15th of October, 1896, a policy of insurance was issued by defendant company to George R. Sprinkle; the beneficiary named being the father of the

insured, and the plaintiff in this action. On the 24th of February, 1897, a little more than four months after the date of the policy, the insured died. This action was brought by the plaintiff, the beneficiary, to recover the amount specified in the policy. It is not denied that the statements and representations embraced in the answers of the insured, as they appear in the writing called the "application," concerning his health prior to and at the time when the application was made, were material to the risk to be assumed by the company, and that the insurance was issued upon them, and upon his agreement, at the end of the application and answers, that, if the same are in any respect false, the policy to be issued upon them to be void. The defendant, in its answer, averred that the policy was void because the insured, in his application, made and signed false and fraudulent answers and representations to questions put to him concerning his health prior to and at the time of the application, and particularly as follows: In answer to the question: "Have you had, or been afflicted, since your childhood, with, any of the following complaints: Disease of the lungs or pulmonary complaints, spitting or raising of blood, bronchitis, asthma, rheumatism, general debility, or any serious disease?" he answered "No," when in truth and in fact he had had serious pulmonary complaints, with hemorrhage, and also pleurisy. In his replication, the plaintiff alleged that the insured made truthful answers to the questions in the application, stating at the time to Parker, the defendant's agent, that he had had the measles, spitting or raising of blood, pleurisy, and grippe, and that he had had a serious illness, but that, in the face of that statement, Parker, the agent, wrote in the application the answer to the question, "No"; that is, that the insured had had no such diseases. On the trial the plaintiff testified that he was with his son, the insured, when the application was made and signed by the insured, and that he knew the insured had had measles, pleurisy, and grippe, and that the insured had told him that he had had hemorrhages. The physician who made the physical examination (a Dr. Jay) was present when the application was made, and testified on the trial that he heard the insured say, in the hearing and presence of the agent who was filling up the application for the insured to sign, that he (the insured) had had hemorrhages, had coughed, and spit up blood, and that he had had measles, and also pleurisy; that he (Dr. Jay), in the course of the examination of the insured, when he came across the question, "Has the person had any serious illness," stopped to discuss the question with the agent, he knowing that the applicant had had serious diseases, when he was told by Parker not to write down the true answer, because the policy would be rejected by the company if he did, but to write down a false answer,—the answer that the

insured had had no serious disease; that the insured heard all that Parker said; that he wrote down the falsified answer, and knew that it was false when he wrote it.

Now, upon the pleadings, and that evidence, and a great deal more, on the condition of the health of the insured at and before the time when the application was made, his honor instructed the jury, in substance, that if they should find that, at the time the insured made application, he informed Parker, the agent of the defendant, that he had had before that time a serious case of measles, grippe, pleurisy, and spitting of blood, and that Parker, instead of writing truthful answers to the questions concerning the health of the insured, falsified the answers of the insured, then there would be no fraud on the part of the insured; that the knowledge of Parker became the knowledge of the company; and that, if the company received the premiums, it waived all objections with regard to those matters of which it had implied knowledge. That instruction, as a whole, was misleading and erroneous. The testimony of Dr. Jay tended to prove that the agent, Parker, practiced a fraud—originated it—on the defendant, in his procurement of the policy. Parker testified that he wrote the answers in the application truthfully, and as they were made by the insured, and evidence of his good moral character was introduced. The testimony of Dr. Jay, though, however suspicious it might appear, was evidence in the cause; and it tended to prove fraud and deceit on the part of Parker. The evidence of Jay tended to prove that himself, the examining physician, Parker, the agent, and the insured, all engaged in the plan to cheat and defraud the defendant. Parker professed to be acting as the agent of defendant, and the law required of him that he should be faithful to his trust, and do no act that would result designedly to the injury of his principal. If Jay's evidence was to be believed, Parker was acting directly and purposely against his principal's interest. He must have known that, if the company could have knowledge of his conduct, it would have repudiated the entire transaction; for, according to Jay's evidence, the whole scheme was based on fraud, and intended from the start to deceive and to defraud the defendant. Parker was acting entirely against the interest of the company, and for himself, or some one else; and by no rule of law could he be the agent of the defendant in such a transaction. The evidence of Jay tended to prove that Parker, the professed agent of the defendant, set deliberately to work to have his principal issue a policy of insurance upon the life of a man who he knew had had diseases which debarred him from the benefits of insurance in the defendant company.

The plaintiff's counsel cited here, and relied on, the cases of *Bergeron v. Banking Co.*, 111 N. C. 45, 15 S. E. 863, and *Follette v. Asso-*

ciation, 110 N. C. 377, 14 S. E. 923; but we think that there is a substantial difference in the nature of the facts in those cases and the facts of this case. In those cases there was no actual fraud charged by the company upon either the insured or the agent. In the first-cited case it was stipulated in the policy that the insurance should be void, if the building stood on leased ground; and it appeared that that fact was known to both the agent and the insured, but that the agent said it made no difference. Although the company itself had no actual notice of the facts, it was held that in such a case the company had implied knowledge of the acts of the agent, and that it had waived the condition in the policy, or was estopped by the act of its agency. No bad faith was charged, and the irregularity was treated in the opinion of the court as a mistake or blunder of the agent, and for which the insured should not be made to suffer. In the other case the local agent, who had knowledge of the deafness of the applicant, sent on to the company the application, in which the applicant had stated that he had never had any bodily or mental infirmity, except an attack of rheumatism. The knowledge of the agent of the deafness of the insured was held to be impliedly known to the principal, and that the company had waived the condition. In the case before the court, the evidence—a part of it—went to show a conspiracy to cheat and to defraud the company, and that the leader of the conspiracy was the professed agent of the company. This case does not fall within any of our decisions in reference to the largely-increased powers of local agents of insurance companies, growing out of changed business conditions on their part. The view of the law which the plaintiff's counsel contend that we should take in this case would result in the destruction of all business which is conducted through the means of agency, and in the overturning of one of the chief purposes for which all agencies are allowed to be constituted,—the faithful performance of duty by the agent, and the protection of the interests of the principal committed to his charge. We stand by the decisions in *Bergeron v. Banking Co.* and *Follette v. Association*, *supra*, but we can go no further in that direction.

This view of the case makes it unnecessary to consider the other questions involved. There was error, and there must be a new trial. The defendant must return the premium before it will be allowed to enter upon the new trial.

MITCHELL v. SIMS.

(Supreme Court of North Carolina. April 11, 1899.)

REPLEVIN—PROPERTY IN CUSTODIA LEGIS— EVIDENCE.

1. In an action against a sheriff to recover property taken by him under execution against

plaintiff's husband, evidence that the husband, while in possession of the property, requested others to sell it, and send the proceeds to his wife, or, if unable to make a sale, to send her the property, is admissible.

2. Property held under execution against a third person is subject to replevin, under Code, § 322, requiring the plaintiff in replevin to file an affidavit showing his ownership, and that it has not been taken for a tax or fine, or seized under execution or other process against him.

Appeal from superior court, Person county; Timberlake, Judge.

Action by Eliza Mitchell against J. R. Sims. There was a judgment for defendant, and plaintiff appeals. Reversed.

Kitchin & Kitchin and J. W. Graham, for appellant. Boone & Bryant, for appellee.

MONTGOMERY, J. The husband of the plaintiff, after he had left his home and was on the eve of leaving the state, exchanged a horse and some other personal property, admitted to be his own, with Satterfield and Lunsford, for a mule and \$40 to boot. The mule was levied on by the defendant, as sheriff of Person county, under attachment proceedings sued out by the creditors of the husband. Afterwards this action was begun by the plaintiff against the defendant for the recovery of the mule, she alleging that the same was her property. On the trial she testified that the horse was her property, and that, when she had heard of the trade by the husband with Satterfield and Lunsford, she notified them and claimed the mule. She offered to prove, by both Satterfield and Lunsford, that at the time of the exchange the husband directed them to send the mule to the plaintiff, unless it could be sold for \$60, and in that case to send the \$60 to the plaintiff. His honor refused to admit the evidence. We think it competent, and that it should have been received. The husband was in possession of the property, and what he said at the time of the exchange was some evidence that the plaintiff had some right or interest in the property, and was entitled to the possession of it. The defendant in his answer averred that he had held the mule under the levy of the attachment until it was taken from him by the plaintiff under proceedings in this action, and he insisted that this action could not be maintained by the plaintiff, for the reason that at the time when it was seized by the plaintiff it was in custodia legis. This case, then, presents again for consideration the construction of the chapter of the Code ("Claim and Delivery of Personal Property") in respect to the cases that come within its operation.

In the case of *Jones v. Ward*, 77 N. C. 337, this court held that the words of the statute (Code, § 322) were as broad as they well could be, and included any case that could be imagined, with the specified exceptions in subdivision 4 of that section. In that case there had been a levy upon personal property by a constable, and he had taken the same under

an execution properly issued to him. The plaintiff, not the judgment debtor in the execution, instituted against the constable an action for the possession of the property levied upon, and sought and had the immediate delivery of it to him. This court held that the action could be maintained; that the statute would be a prohibition against a debtor in an execution, whose property had been seized under execution, from claiming the same by a suit for its recovery against the officer who had made the levy, but that a third person would have the right to do so. In the case of creditor and debtor, the court said in that case: "The creditor has established his right to the debt by judgment, and the defendant is not allowed to obstruct the execution by writ of replevin." In the case of a third person, the court said: "The right to the property is an open question, and there can be no reason why a third party, alleging ownership, should not have the same remedy against one wrongdoer as against another." The court further said on this point, in that case, that that part of the affidavit which the plaintiff was required to make, viz. "that the property was not seized under an execution or attachment against the property of the plaintiff, or, if so seized, that it is exempt by statute," applies to an action by the defendant in an execution, and leaves the case of a third person to come under its broad terms.

The case of *McLeod v. Oates*, 30 N. C. 387, seems to be at variance with the case of *Jones v. Ward*, supra, but, when carefully examined, it will be found not to be so. In *McLeod v. Oates*, the action was brought under chapter 111 of the Revised Statutes, having been for the replevy of a slave levied on by a constable under execution, and the court said that "the old authorities all agree that goods taken in execution from a court of record are not repleviable," and held to that view of the law. But the court said, in *Jones v. Ward*, that the case of *McLeod v. Oates* was not an authority on the construction of the Code of Civil Procedure, "which professed to establish a new order of things, and must be judged of by its own language." The language of the Revised Statutes (chapter 101), in reference to the scope of the remedy therein provided, was "that writs of replevin for slaves shall be held and deemed to be sustainable against persons in possession of such slaves in all cases where actions of detinue or trover were now proper." The remedy there was restricted to cases where the action of detinue or trover was proper, and, as the law was then understood, those actions did not apply where the property was in the hands of an officer under the process of the courts. But, under section 322 of the Code, there is no limitation or restriction put upon the plaintiff who seeks to recover personal property, and have the same immediately delivered to him, except that the same has not been taken for tax, assessment, or fines pursuant to a statute, or seized under an execution or at-

tachment against the property of the plaintiff, or, if so seized, that it is by statute exempt from such seizure. The language of the Code is immensely broader in its scope than the language of the Revised Statutes on the subject in hand.

The case before the court does not conflict with what was decided in *Williamson v. Neely*, 119 N. C. 339, 25 S. E. 953. In that case the sheriff, who already held the property under an order made in claim and delivery proceedings, undertook to levy upon it under a warrant of attachment in favor of a creditor against the defendant in the claim and delivery proceedings. The court held that the levy under the attachment was invalid, because by such a proceeding the process, in the claim and delivery proceeding, could not be interfered with, and that the property had to be delivered to the claimant under the order of the court to that effect. In other words, in actions for the recovery of personal property when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the bond required by law, to take the property from the possession of any person, even from an officer of the law, unless it has been taken for tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, even though such a course results in the obstruction of the process of the courts to the extent of having tried the title to personal property claimed by a third person, where the same has been levied upon or seized under execution or attachment not against the property of the plaintiff. But, in the law regulating attachments under the Code, the creditor has no right or privilege given to him to seize property in the hands of an officer under the process of the courts, or to take it out of the hands of such officer, as is given to claimants for the recovery of personal property under the provisions of the Code. There was error in the trial below for which there must be a new trial.

WEBB v. ATKINSON et al.

(Supreme Court of North Carolina. April 11, 1899.)

ADMINISTRATORS — FRAUDULENT CONVEYANCES — CONSIDERATION — INSTRUCTIONS — RESULTING TRUST — PRESUMPTIONS — INSOLVENCY — EVIDENCE — REPUTATION — DECLARATIONS IN PRESENCE OF PARTY.

1. An administrator may, in behalf of his intestate's creditors, sue the widow and children to reach property conveyed by the intestate to them in fraud of creditors, the estate being insufficient to pay the debts.

2. Agreement of an insolvent grantee to remove incumbrances not incurred by the grantor is not a consideration for the conveyance.

3. An insolvent owing three times his assets, and pressed by creditors, conveyed to two of his sons, without consideration, land constituting his chief property; and, soon after, one son conveyed to the other, without consider-

ation. The land was afterwards sold, and the father received the proceeds, treating them as his own. *Held* that, the facts not being controverted, a charge that the conveyance to the sons was fraudulent was not error.

4. The insolvent having purchased land in his wife's name, and paid off mortgages on her property with the proceeds, and given her the balance, with which she purchased other land, she became, as to all the land, a trustee for the creditors.

5. The law raises a presumption of fraud in a conveyance to relatives without consideration, by one greatly embarrassed by debt.

6. Insolvency may be proved by general reputation.

7. Declarations made in the presence and hearing of a party, and not denied by him, are admissible against him.

Appeal from superior court, Buncombe county; Hoke, Judge.

Action by Charles A. Webb, administrator of Natt Atkinson, deceased, against Harriet Atkinson and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

The first issue was whether the deed to the sons was fraudulent, or made to hinder and delay creditors; the second issue was whether, if so, the sons were purchasers in good faith, for a valuable consideration, without notice of fraud.

Merrimon & Merrimon, for appellants. J. C. Martin and Moore & Moore, for appellee.

FURCHES, J. This case was before us at spring term, 1898, upon a judgment of nonsuit, treated as a demurrer *ore tenus* to the complaint. 122 N. C. 683, 29 S. E. 949. Since that time the case has been tried upon the facts elicited, and is here again upon exceptions taken at the trial.

It is not the practice of this court to review its opinion rendered on a former hearing, upon a second appeal in the same case; and we do not propose to do so now. But, as the brief of the learned counsel for defendants has called in question the correctness of our former opinion, we propose to notice it so far as to say that we consider it our duty to correct errors in our opinions when found, let them be presented as they may. But, after a year's reflection, we see no error in our former opinion. It seems to us to be based upon principles of justice and sound reasoning. If the legal title to the Graham land and the Von Ruck land had been in Natt Atkinson, and he had conveyed them in fraud of his creditors to his wife, there could be no doubt that section 1446 of the Code would apply, and that the plaintiff, administrator, could maintain his action at law, and have them sold and converted into assets. If Natt Atkinson were living, his creditors could not proceed to sell these lands under execution, and acquire title to them in that way, for the reason that the legal title was not in Natt, and the statute of 13 Eliz. would not apply. *Gowing v. Rich*, 23 N. C. 553. But the fact that he bought, and had others to convey to his wife, is as much a

fraud upon his creditors as if he had owned the lands, and conveyed them himself; and while, for technical reasons, a court of law would not reach this fraud, a court of equity would. *Gowing v. Rich*, supra. The only difficulty, then, is the technical one that the fraud in one case is reached at law, under the statute of 13 Eliz., while in the other case it is reached in a court of equity, or a court exercising equitable jurisdiction. The fraud upon the creditors is the same as if he had conveyed the land himself; the right of the creditors to have it subjected to the payment of their debts is the same; and the defendant has no more right to hold this property, so fraudulently conveyed to her, from the creditors of her insolvent husband, than if he had conveyed it to her. The plaintiff is so far the representative of the creditors of his insolvent's estate, under our laws as they now stand, as to authorize him to follow these lands, in a court of equity, into the hands of the fraudulent donee, and to have them converted into assets for the payment of intestate's debts. The principles are the same,—fraud on creditors; the object to be attained is the same,—the appropriation of the property to the payment of the debts of the insolvent intestate; and such refinements as may have stood in the way of such actions as this have been removed, and have given place to the demands of common sense and justice. The facts disclosed on the trial show that Natt Atkinson, plaintiff's intestate, was hopelessly insolvent in 1893; that he was indebted in a large amount, ranging from \$75,000 to \$90,000, with available property for the payment of debts not exceeding one-third of his indebtedness; that his creditors were pressing him on all sides; that, among other debts, he owed C. H. Belvin, cashier of a Raleigh bank, a large debt, which was being pressed, and which, at March term, 1894, of Buncombe court, was reduced to judgment, amounting to \$14,022.52. The largest property the intestate owned was a three-eighths interest in a large tract of land lying in Swain county, known as the "Whittier lands," and said to contain 75,000 acres. This tract of land he conveyed to two of his sons, C. B. and E. B. Atkinson, in 1893, while so insolvent, and while being pressed by his creditors. These sons paid him nothing for the Whittier land, nor did they promise to pay him anything, nor were they able to pay him anything, though the consideration named in the deed, which had no witness to it, was \$40,667. This land was incumbered to some extent when it was conveyed by Natt Atkinson to his sons, and defendants offered evidence to show that they promised to remove these incumbrances, and it is argued by defendants that this was a consideration. But we see no consideration in this evidence, if true. It was simply taking these lands subject to the incumbrances upon them. It is not shown that the incumbrances upon the lands were put there by Natt Atkinson, or

that he was bound for them. As they were incumbrances, they had to be paid before a clear title could be made to a purchaser; and it is shown that C. B. and E. B. Atkinson had nothing with which to discharge these incumbrances, except the Whittier lands. Soon after the conveyance of the Whittier lands to C. B. and E. B. Atkinson by their father, Natt, C. B. Atkinson conveyed his interest to E. B. Atkinson, his brother and co-grantee from Natt. This conveyance was without consideration. About the 1st of August, 1894, this Whittier land was sold to a corporation, engaged in the lumber business, for the sum of \$144,000, out of which the Atkinsons realized the sum of \$15,000 over and above the liens upon the property, and, in addition to this, the sum of \$6,000 as commissions, of which last sum it seems that Natt was entitled to two-thirds and E. B. Atkinson to one-third. This \$15,000 was paid to Natt, or paid into bank and placed to his credit. On the 14th of August, 1894, he paid the Cartmell mortgage of about \$4,000 out of the Whittier land money. This debt was a part of the price of the land when bought of Graham and deed made to Mrs. Atkinson,—was her debt and her mortgage that was discharged, leaving the legal title in her. On the 15th of August, 1894, the intestate, Natt, bought what is called the "McGrew tract" from Von Ruck, for which he paid out of the Whittier land money \$5,097, and had the deed made to Mrs. Atkinson; and on the 28th of August, 1894, the intestate died, and soon thereafter the plaintiff was appointed and qualified as his administrator. The balance of the Whittier land money, not paid out on the Cartmell debt and to Von Ruck for the McGrew place, was left in the hands of the defendant Harriet Atkinson; and on the 15th of September, 1894, she bought what is called the "Ballard lot," in the city of Asheville, for which she paid \$1,175, out of the Whittier land money, and took title to herself. On or about the 1st of November, 1894, she bought a lot, or an interest in a lot, from M. E. Carter, in the city of Asheville, for which she paid him \$2,000, out of the Whittier land money, and took the title to herself; and the balance of the Whittier land money the jury find she still has in her hands, amounting to \$5,000.

Taking these facts to be true,—and the jury have found them to be true,—they develop and uncover a most palpable fraud. But defendants complain of the charge of the court, and file many exceptions, in which it is contended that the charge contains erroneous propositions of law; that it expresses opinion upon questions of fact; and that it decides issues of fact, which should have been left to the jury, and have been decided by them. While the charge was heroic, we are of the opinion that it was fair to the defendants. It was given in a trial demanding heroic treatment, and should not be condemned on that account, if it was fair to the defendants. The court directed the

jury, if they believed the evidence, to find the first issue "Yes," and the second issue "No." The defendants complain of this charge. But, if it be true, as the jury found it to be, that Natt Atkinson, being notoriously insolvent, with his creditors pressing him, conveyed the principal part of his estate to two insolvent sons, without consideration; that one of these sons soon thereafter conveyed to the other, without consideration; and that, soon thereafter, a sale of this property was effected, by which \$15,000 or \$20,000 was realized, and this money, soon after its receipt, was paid over to Natt Atkinson, or placed in bank to his credit, and that he used and dealt with it as his own,—we can see no ground for complaint. There was no evidence—none that could have been submitted to a jury—controversing these facts. *Wittkowsky v. Wasson*, 71 N. C. 451; *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39; *Cable v. Railroad Co.*, 122 N. C. 892, 29 S. E. 377; *State v. Gragg*, 122 N. C. 1082, 30 S. E. 306. Had E. B. Atkinson, the fraudulent grantee, held on to the Whittier land money, the fraudulent grantor, Natt, could not have recovered it out of him. But the creditors of Natt, who were thereby defrauded, might have done so. But this question is not involved in this action, as the fraudulent grantee, recognizing the fact that the money was not his, but that it was the money of the fraudulent grantor (his father), turned it over to him. It seems to us that the plaintiff's case might have rested here. The money being back in the hands of Natt, the insolvent debtor, and recognized as his by the fraudulent grantee, it then became a question as to whether he could give it to his wife or not. As the payment of the Cartmell debt was in fact a gift to her of that amount, the purchase of the Von Ruck or McGrew place by him, and having the title made to his wife, was a gift to her. The balance of this Whittier land money, left in her hands, belonged to her insolvent husband, and she has no right to hold it from his creditors. She had no right to invest this money in the Bland lot or the Carter lot; and, as the money with which she paid for them belongs to her husband's estate, the equitable title vested in his heirs, for the benefit of his creditors, and made her a trustee. But the judge told the jury that if Natt Atkinson, being insolvent or greatly embarrassed with debt, made a conveyance of the Whittier lands to these two sons, without consideration, the law would presume fraud. Defendants complain of this instruction, but we think it sound law. *Redmond v. Chandley*, 119 N. C. 575, 26 S. E. 253.

The court allowed the plaintiff to offer evidence of the general reputation of Natt Atkinson's insolvency, and the defendants excepted. But the ruling of the court in allowing this evidence seems to be well supported by authority. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241, and many other cases. The court allowed declarations of the daughters (who are also parties defendant), made in the presence

and hearing of their mother, to be offered in evidence, and the defendants excepted. But the court seems to be sustained by *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 8; *State v. Suggs*, 89 N. C. 527; *Tobacco Co. v. McElwee*, 96 N. C. 71, 1 S. E. 676. The court allowed in evidence declarations of Natt Atkinson, made in the presence of E. B. and C. B. Atkinson, and the defendants excepted. But the court seems to be supported in this ruling by *Ward v. Saunders*, 28 N. C. 382, and by the authorities cited above. It does not seem to us that any of this evidence objected to did or could have affected the merits of the case, but we have considered it as if it could. The whole defense has been made upon technical grounds, and we are sure that the defendants have no reason to complain of the manner in which this defense has been made; and this is intended, not as a reflection upon, but as a compliment to, the able management of the defense. But, when the case is stripped of these technical objections, it leaves exposed to view a most palpable fraud. The judgment must be affirmed.

SLINGLUFF et al. v. HALL et al.

(Supreme Court of North Carolina. April 11, 1899.)

TRIAL — INSTRUCTIONS — CONTINUANCE — FRAUDULENT CONVEYANCES — BILL OF SALE — MORTGAGE.

1. Refusal of a request fully covered by charges given is not error.

2. Refusal of a continuance, on a defendant filing, on the day of trial, an answer substantially like that of other defendants, and raising no additional issue, is not an abuse of discretion.

3. The fact that a mortgage and bill of sale of the same property to the same creditor were filed on the same day does not establish that the bill was given as further security.

Appeal from superior court, Duplin county; Robinson, Judge.

Action by Slingluff, Johns & Co. against Hall & Pearsall and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Stevens & Beasley and Armistead Jones, for appellants. Simmons, Pou & Ward, for appellees.

FAIRCLOTH, C. J. The plaintiffs attached certain property in the hands of defendants, which had been conveyed to them by W. A. Houston, intestate of defendant Sandlin. On December 6, 1895, said Houston executed a mortgage to defendants Hall & Pearsall, to secure \$500 cash and \$923.86 of prior indebtedness, conveying certain property therein mentioned, and on December 19, 1895, sold and conveyed, by a bill of sale, a part of the same property to said Hall & Pearsall, in payment of said \$923.86. Both of said instruments were recorded on December 19, 1895. The attachment was levied on some of said property. On February 18, 1896, the plaintiffs filed their

complaint, alleging, among other things, that said Houston was insolvent, and that said conveyances were made with intent to cheat and defraud the plaintiffs and other creditors of said Houston. Hall & Pearsall, on February 12, 1897, filed an answer, denying the allegations of fraud, etc. On December 18, 1897, the defendant Sandlin filed his answer, substantially the same as the answer of Hall & Pearsall, denying the allegation of fraudulent intent in said conveyances. Sandlin's answer was filed on the first day of court at December term, 1897, and the trial was had on the same day. Plaintiffs' counsel moved for a continuance of the cause, on the ground that Sandlin's answer was just then filed, and for time to answer the same. The court refused the motion, and proceeded with the trial, and the plaintiffs excepted.

Issues: "(1) Was the bill of sale executed to secure a pre-existing debt of \$500? Answer. No. (2) Was the bill of sale intended as a further or continuous security for the debt secured in the mortgage of 6th of December, 1895? Answer. No. (3) Was the effect of the bill of sale and the mortgage executed by Houston to Hall & Pearsall on December 19th and 6th, respectively, an assignment of defendant Houston's property? Answer. No. (4) Did the defendant Houston assign, dispose of, and secrete his property with the intent to defraud the plaintiffs and other creditors? Answer. No. (5) Did the defendants Hall & Pearsall participate in the intent of Houston to defraud his creditors? Answer. No. (6) Was the bill of sale to Hall & Pearsall on December 19, 1895, an absolute sale of the property to pay the pre-existing debt of Hall & Pearsall of \$923.86? Answer. Yes."

Plaintiffs requested his honor to charge the jury as follows: "That if the jury shall believe, from the evidence, that the bill of sale was given to secure the amount, or any part, of the original debt intended to be secured by the mortgage, the relation between the parties would not be changed, and the bill of sale is void,—or, rather, in effect it was a security for the debt, and void." In lieu of the above prayer for instructions, the court charged the jury that if they should find that the bill of sale of 19th of December was not a bona fide sale of the property therein described, in payment of the \$923.86, but was intended by the parties as a further security to any of the debts mentioned in the mortgage of the 6th of December, they should answer the first issue, "Yes."

The plaintiffs, in their sixth prayer, requested the court to charge that, if the bill of sale was intended for further security, the relation of mortgagor and mortgagee was not changed, and that the bill of sale was void, under the nonpreference act of 1895. This was fully given in the fifth prayer, and other parts of the charge, and there was no error in failing to give the sixth prayer.

Judgment was entered for the defendants, and the plaintiffs excepted.

Granting or refusing a continuance is a matter of discretion, and not reviewable (*Banks v. Manufacturing Co.*, 108 N. C. 282, 12 S. E. 741) unless the discretion is palpably abused (*McCurry v. McCurry*, 82 N. C. 296). In the case before us, the answer of Sandlin was, in substance, the same as that of Hall & Pearsall, which had been on file for several months; and Sandlin's answer raised no additional and material issue. The plaintiffs must be presumed to have come prepared to meet that issue, and it seems that a continuance was unnecessary, and his honor so held. That exception is not well taken.

The sixth instruction was given, not in words, but in substance. The plaintiffs' contention is that the mortgage was void under the act of 1895, and that the bill of sale was of the same character, and likewise void, as they were recorded on the same day, and made with the same intent. Whether the bill of sale, December 19, 1895, was an absolute sale of the property, to pay the pre-existing debt, was submitted to the jury, and the answer was, "Yes." That finding determined, against the plaintiffs, the substance of their contention. Whatever might have been the result if nothing but the mortgage had appeared, the verdict on the sixth issue establishes the defendants' right to the property. *McKay v. Gilliam*, 65 N. C. 130.

The registration of these instruments on the same day—i. e. December 19, 1895—was an incident, and does not affect the character of the contracts set out, and so registered. The attachment issued December 27, 1895. On the above we see no error, and a discussion of other exceptions would not change the result. Affirmed.

WYMAN v. TAYLOR et al.

(Supreme Court of North Carolina. April 11, 1899.)

PUBLIC LANDS—ENTRY—FAILURE TO SURVEY—EXTENT OF ENTRY—IRREGULARITIES—RESERVATIONS IN GRANT—EXCESS IN ACREAGE—ACTION TO VACATE GRANT—REGISTRATION OF GRANTS.

1. A statute law with regard to entries and grants of public lands in 1852 provided that, if an entry was not surveyed and grant taken out before the 31st of December of the second year thereafter, it should be null and void. *Held*, that one who had entered land under such law, and failed to make a survey and take out a grant within the time specified, did not acquire even an equitable claim under the entry.

2. Acts 1854-55, relating to the entry and grant of public lands, provided that no more than 640 acres should be included in one entry. A number of entries were made adjoining each other, by the same person, none of them exceeding 640 acres. They were all surveyed together, and but one general boundary line made, which included the several entries. The state accepted the survey, took its pay, and granted the lands to the person making entries. *Held*, that the irregularities did not avoid the grant.

3. Where the boundary of a grant includes other lands theretofore granted, and by the terms of the grant such lands are reserved, and the reservations are located, or the data

given by which they may be located, the reservation and the grant are good, and that part of the boundary not embraced in the reservation is alone conveyed.

4. Where a grant is general, the burden is on a person claiming under reservations therein to locate the same.

5. Though the amount of acres contained in a grant by the state are much greater than the amount called for in the grant, that fact does not make the grant void.

6. Where the state is no longer interested in lands covered by grants from it, persons claiming under one grant have a right to bring an action to vacate and set aside a grant to another to the same land by direct proceedings.

7. Where a grant by the state is not void, though it may be voidable, it is good, as against a subsequent grant, until it is declared void by a court having jurisdiction.

8. Certain lands granted by the state were in M. county until the creation of S. county, in 1871, when it was provided that the county government of M. county should extend over the new county until its officers were elected. Entries, surveys, and plats under a certain grant to lands in M. county were all made before the time fixed for the organization of S. county. *Held*, that the making of the entries in M. county, and surveys by the surveyors of M. county, were proper, though the grant was not issued until 1872 on entry, surveys, and plats in M. county.

9. The registration of the grant in M. county, in 1873, was sufficient, though the grant was not registered in the new county of S. until 1879.

10. The act of 1885, relating to registration, repealing Code, § 1245, does not apply to registration of grants from the state, and the fact that the prior grant was not registered in S. county until after the subsequent grant was registered in such county did not give the grantees under the junior grant title.

Appeal from superior court, Swain county; Robinson, Judge.

Action by H. P. Wyman against F. W. Taylor and others. Judgment for plaintiff. Defendants appeal. Affirmed.

F. A. Sondley, Ferguson & Ferguson, and J. W. Cooper, for appellants. Davidson & Jones, for appellee.

FURCHES, J. This is an action of trespass *quare clausum fregit*, and, the plaintiff not being in possession of the lands trespassed upon, the question of title is involved. After much skirmishing between the parties as to the location of lines, and as to whether defendants could be held liable for trespasses committed by their servants, the contest became one of title. Upon this field each side marshaled its forces, and the battle proceeded with great fierceness and for many days. The plaintiff claimed under a grant to W. L. Love issued in 1872, while defendants claimed under several grants issued to Cooper and Goodhue in 1885. The plaintiff's grant (the Love grant) is shown to cover the locus in quo, while defendants' grants (Cooper and Goodhue) also cover the locus in quo; and plaintiff contends that, as his is the oldest grant, he is entitled to recover. But defendants contend that he is not entitled to recover, for that the plaintiff's grant is void for many reasons, which they assign; and for the further reason that their grants are found-

ed upon entries made by one Davis in 1852, and are entitled to a priority to the Love grant, which was not entered until 1871. But it is so manifest that the entries of Davis in 1852 have no bearing on the question that we dispose of that contention first. The Revised Code, which contained the statute law with regard to entries and grants in 1852, provides that if an entry is not surveyed, and a grant taken out thereon, before the 31st of December of the second year thereafter, it shall be null and void. Rev. Code, c. 42, §§ 8, 9. It is the policy of the state to bring its public lands into market, and it will not allow an enterer to hold even an equitable claim upon them, by reason of an entry, beyond the time limited by law for the perfection of title. *Stanly v. Biddle*, 57 N. C. 383; *Plemmons v. Fore*, 37 N. C. 312. The defendants can therefore derive no benefit or relief, at law or in equity, from the Davis entries. This being so, the plaintiff's right to recover depends upon the validity of the Love grant.

Defendants claim that the Love grant is void for the reason that the lands embraced therein are "Cherokee lands," and were not the subject of entry and grant; while they claim to derive title to a part of the same lands based upon entries made by Davis in 1852. While this may seem to be inconsistent, it will not benefit the plaintiff if it were true that said lands were not open to entry and grant until after 1871, when the entries in the Love grant were made. If this were true, it would avoid the Love grant, and would also avoid the grants under which defendants claim. *Stannire v. Powell*, 35 N. C. 312. But it seems that these lands were open to entry and grant by the Acts of 1854-55, which had been done to a limited extent by the Acts of 1852. It is true that the Acts of 1854-55 provided that not more than 640 acres should be included in one entry. The entries upon which the Love grant is based seem to have observed the requirements of this statute by not including more than 640 acres in any one entry. But a number of entries were made adjoining each other, and, in making the survey and plat for the purpose of taking out the grant, they were all surveyed together, and but one general boundary line made, which included the several entries. The defendants contend that this was a violation of the statute, and that the grant is void on this account. But it does not seem to us that this is so. The lands belonged to the state, and it had the right to grant them. It was to its interest to do so. It was the policy of the state to grant these lands to bona fide citizens, who would reside upon, clear, and improve them, and to keep them out of the hands of speculators as much as possible. This policy, it seems to us, was a good one, and should have been observed, if it was not. But, if Love did not observe the rule prescribed by the legislature in its spirit, he seemed to have done so in the letter, as to making the entries. And the state has ac-

cepted his survey made upon these several entries, taken its pay, and granted him the lands. It must therefore be supposed that the state considered his entries, and his survey and plat, a substantial compliance with the statute, or it must have considered this provision of the statute as only directory, and the entries, survey, and plat a substantial compliance with the statute. However this may be, they seem to us to be but irregularities that do not vitiate and avoid the grant. Such irregularities seem to be expressly provided for in section 2761 of the Code, and the grantee's title validated, if they were defects, as contended by defendants.

It is also contended by defendants that the Love grant is invalid—void—for the reason that it appears from the grant that the boundary includes other lands theretofore granted, and which are excepted from the operation of that grant. We do not think so. If the reservations had been general in their terms, without pointing their location or referring to something by which they could be located, the reservations would have been void, and the grant would have been operative as to the whole territory included within its boundaries. *Waugh v. Richardson*, 30 N. C. 470; *McCormick v. Monroe*, 46 N. C. 13. But where the reservations are located, or the data is given by which they may be located, the reservation is good, and the grant is also good, and conveys that part of the boundary not embraced in the reservations. *McCormick v. Monroe*, supra. The fact that it is stated in the grant that the part reserved has heretofore been granted affords the data by which the reservations may be located, and, this being so, both the grant and the reservations are good. But, the grant being general, the burden is on the party claiming the benefit of the exception (the reservation) to locate the same; he being supposed to be in possession of the prior grant, if he is the owner. *Bernhardt v. Brown*, 122 N. C. 557, 29 S. E. 894; *Iron Co. v. Edwards*, 110 N. C. 353, 14 S. E. 861; *Gudger v. Hensley*, 82 N. C. 481. So, if defendants claimed that their grants covered territory within the reservations contained in the Love grant, the burden would be on them to show this. But defendants do not claim under grants, or titles derived from grants, for the reserved lands mentioned in the Love grant. They claim under a grant to Cooper and Goodhue, issued since the Love grant. They claim that the grant contains more land than is called for in the entries, that this is a fraud upon the state, and that the Love grant is void on that account. But, when the parts reserved are deducted from the amount named in the grant, it is found that the acreage conveyed by the grant is but little more than the amount stated to have been granted. But, if the amount of acres contained in the grant were very much greater than the amount called for in the grant, this fact would not make the grant void. *Bernhardt v. Brown*, *Iron Co. v. Edwards*, and *Gudger v. Hensley*, supra.

The defendants, being interested in the lands covered by their grants, and the state no longer being interested in them, have a right to bring an action to vacate and set aside plaintiff's grant. *State v. Bland*, 123 N. C. 739, 31 S. E. 475. But this must be done by a direct proceeding, and not by a collateral attack upon the grant. *Stannire v. Powell*, supra; *Dugger v. McKesson*, 100 N. C. 1, 6 S. E. 746. This, it seems to us, might be done under the Code, by way of equitable counterclaim, if all the necessary parties were before the court. But, if they could do this, they have not done so in this case. The whole effort of the defendants has been to show that the grant to Love is void, and not that it is voidable. If it is void, it conveys no title, and plaintiff has no cause of action against defendants. But if it is not void, though it may be voidable, it is good, as against defendants, until it is declared void by a court having jurisdiction to do so. While defendants have the right to bring an action to set aside the grant under which plaintiff claims title, it would do them no good to bring such a suit, unless they have grounds that would enable them to maintain their action and to have the grant set aside.

The only remaining questions necessary to be noticed are those connected with the entries upon which the Love grant was taken out, and the registration of this grant. The entries were made in Macon county, and the lands are in Swain county. The grant was registered in Macon county in 1873, but was not registered in Swain county until 1889. The defendants' grant was registered in Swain county in 1885. The defendants contend that, leaving out of consideration all other questions, they are the owners of the land covered by their grants, under chapter 147 of the Acts of 1885, as their grants were registered first in Swain county, and without notice of plaintiff's title. This question seems not to have been developed on the trial, and, if the case hinged upon the Connor act of 1885, it may be that we would have to send it back, that the point might be developed, and the question of notice presented and tried by the jury. But, as it does not seem to depend on the act of 1885, it was not necessary to have that issue submitted and passed upon at the trial. These lands were all in Macon county until the erection of the county of Swain. This was done by the general assembly in February, 1871, but it was provided that the county government of Macon county should extend over the territory of the new county, until it should elect its county officers, and they should be qualified and inducted into office, in June, 1871. The entries, surveys, and plats for the Love grant were all made before the time fixed for the organization of Swain county. Therefore the entries were made in Macon county, and the surveys and plats made by the surveyor of Macon county. This seems to have been proper, and the only place the entries could have been made, and the surveyor of Macon

county was the proper officer to make the surveys and plats. The grant was not issued until the 2d of May, 1872, but it was issued upon the entries, surveys, and plats in Macon county. This grant was registered in Macon county in 1873, but was not registered in the new county of Swain until 1879. It was not void, but good. *McMillan v. Gambill*, 106 N. C. 359, 11 S. E. 273.

Upon examination, it is found that the act of 1885 repealed section 1245 of the Code, and is substituted in its place, while the statute providing for the registration of grants is section 2779 of the Code; thus showing that the act of 1885 had nothing to do with the registration of grants from the state. The act of 1885 does not use language applicable to a grant. It uses the term "conveyance of land" from the "donor, bargainor, or lessor"; showing that grants from the state were not in the mind of the draftsman or the minds of the legislature when the act was passed. This being so, the law with regard to the registration of grants remained as it was before the passage of the act of 1885, and the fact that defendants' grants were registered in Swain county before the grant to Love was registered in that county did not give them the title; and, as the registration of defendants' grants did not give them the title, whenever the Love grant was registered it gave the grantee, Love, the title. *McMillan v. Gambill*, 106 N. C. 359, 11 S. E. 273. But it was registered in Swain county in 1879, and it seems that, if there was any doubt as to the right to transfer this registration from Macon to Swain county, any such doubt must be removed by Act 1897, c. 37. The plaintiff, having shown title in himself to the lands trespassed upon, is entitled to recover damages out of defendants for the trespass. The judgment must be affirmed.

BROWN & CO. v. NIMOCKS et al.

(Supreme Court of North Carolina. April 11, 1899.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES—SCHEDULE.

1. Under Laws 1893, c. 453, § 1, requiring the assignor, on making an assignment for the benefit of creditors, to file a sworn schedule of preferred debts, stating the amount of each debt, the name of the creditor, the circumstances of contracting it, and the date thereof, a schedule of preferences must state the date and the consideration for the debt, whether it be on account or for notes.

2. Where the debt is a long account, of many items, it is sufficient to give the date of the first and the last items, and state the consideration.

3. The failure of the debtor, in filing his schedule of assets, to comply with Laws 1893, c. 453, § 1, in respect to some of the preferred items, does not vitiate the assignment as a whole, but merely destroys the preferences as to the debts with respect to which the statute was not complied with.

Appeal from superior court, Cumberland County; Bynum, Judge.

Action by Brown & Co., a corporation, against R. M. Nimocks and another. There

was a judgment for plaintiff, and defendants appeal. Reversed.

H. L. Cook, for appellants. H. McD. Robinson, for appellee.

DOUGLAS, J. The main object of this action is to set aside an assignment made by the defendant Nimocks to the defendant Cook, on account of an alleged defective schedule of preferred debts; and, in the present status of the case, this seems the only question necessary for our consideration. The issues were submitted and answered as follows: "(1) Is the defendant Nimocks indebted to the plaintiff, Brown & Co. (incorporated), by virtue of the deposit made in trust with him by it; and, if so, in what sum? Ans. Yes; \$1,242.08, and interest on \$1,225 from August 8, 1897. (2) Was a sworn schedule of preferences filed by defendant Nimocks in the office of the clerk of the superior court of Cumberland county, and is such schedule in compliance with the laws of North Carolina regulating assignments? Ans. No." By the consent of the parties, the court answered the first issue as above; and the court instructed the jury to answer the second issue "No," if they believed the evidence. There are two distinct questions in the second issue,—one of fact, as to the actual filing of the schedule, and the other of law, as to its sufficiency when filed,—which might have tended to confuse the jury, if left to their determination. As the issue was answered by the court, and the schedule is admitted to have been filed, his honor evidently intended to pass only upon its sufficiency. It is well settled in this state that the failure to file with the clerk of the superior court, within five days after the filing for registration of the deed of assignment, of the verified schedule of preferred debts required by the act of 1893, renders the assignment absolutely null and void. *Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2; *Id.*, 117 N. C. 416, 426, 23 S. E. 333; *Frank v. Helner*, 117 N. C. 79, 83, 23 S. E. 42; *Glantou v. Jacobs*, 117 N. C. 427, 23 S. E. 335; *Cooper v. McKinnon*, 122 N. C. 447, 449, 29 S. E. 417. The questions now before us are: (1) Does the schedule, as filed, comply with the terms of the statute, by sufficiently stating the nature of each preferred debt? And (2) does the failure to sufficiently specify some of the debts vitiate the entire assignment, or only destroy the preference as to those particular debts?

Section 1, c. 453, Laws 1893, is as follows: "That upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once; a schedule of all preferred debts shall be filed under oath by the assignor in the office of the clerk of the superior court of the county in which such assignment is made, stating the names of the preferred creditors, the amount due each, when the debt was made, and the circumstances under which said debt was

contracted, and said schedule shall be filed within five days of the registration of such deed of assignment." That part italicized by us explains itself, except the last clause, which we think refers to the nature of the debt, and its consideration,—as, for example, taxes, money borrowed, medical attendance, or merchandise, as the case may be. We have, then, as essential requisites, the name of the creditor, and the amount, date, and nature of the debt. In their absence, the debt remains a debt, but has no preference. If the debtor is bound only as surety, it should be so stated, as his creditors might have some rights of subrogation or contribution. The object of the act was to give the creditors a convenient opportunity of ascertaining the nature of the preferences, and to put such information, verified by the oath of the assignor, in such form and place as to be equally accessible to all. While it is entitled "An act to prevent fraudulent assignments," it had no purpose to prevent honest assignments, nor, indeed, to throw around them any unnecessary restriction, but simply to give those most deeply interested a reasonable opportunity of ascertaining the truth. If a creditor is prevented from making his just debt, in the presence of sufficient property of the debtor, he should be told the reason. The assignor is not required to file his schedule during the preparation of his assignment, when every minute may count in the race with creditors, but is given five days thereafter, during which he can prepare it at leisure and in safety. We do not think that such provisions are unreasonable, and we feel it to be our duty to give them such a reasonable construction as will effectually carry out their beneficial purpose. The schedule gives the names of all the preferred creditors, and the amount of each debt; but in many instances it gives neither the date nor the consideration of the debt, both of which are essential. Thus, we think that the first preference, as follows, "George A. Overbaugh, cash borrowed on my note of April 26, 1897, for benefit of Thornton Dry-Goods Co., \$5,000," is sufficient, as it gives the name, amount, date, and consideration, as well as the name of the beneficiary. It is true that in cases of renewal the date of the original debt should also be given, but, in the absence of any further explanation, the date of the note is presumed to be the date of the creation of the debt. On the contrary, the second preference, to "M. D. Geddle, amount to his credit on open ledger account, \$1,200," is not sufficient, as it gives neither date nor consideration. If it involved a long account, the items need not be given; but the assignor could at least state the date and character of the items in general terms, such as "amount or balance due on open ledger account for dry goods [or groceries or both] bought on the 1st day of May, 1876 [or between the 1st day of May and the 1st day of July]," as the case might be. This would give the creditor sufficient

information as to the character of the transaction to enable him to investigate it, if he saw fit. It may be said that the creditor could apply to the assignee to examine the ledger, and thus obtain such additional particulars as he wished; but he might have done that without the schedule, and before the passage of the act. Surely the statute means something, and that meaning we must take from its plain and unequivocal words. Where the debt is represented by a note, its consideration should be given, the same as an open account, such as borrowed money, merchandise, or whatever it may be. The mere statement that a party holds a note of a given date and amount does not "state the circumstances under which said debt was contracted." The defect is so much greater when the date, also, is omitted, as in the preference to "H. W. Howard, balance due on my note of \$5,000, \$3,500." The mere form of words is immaterial, but there must be a substantial compliance with the statute. It is needless to go through the entire schedule, as the debts are easily distinguishable under the above rules; but it is just to the plaintiff to say that, in our opinion, its debts are sufficiently stated, although, perhaps, it would have been more fully in accordance with the spirit of the statute if the title of the attachment proceedings had been given.

The only remaining question is whether those preferences insufficiently stated vitiate the entire schedule. We think not. Those failing to comply with the law are simply eliminated from the schedule, leaving it in full force as to the others, and therefore of sufficient validity to support the assignment.

While enforcing the statute in its letter and spirit, we do not intend to place the ban of judicial construction upon honest assignments, which are fully recognized, if not favored, by our laws, nor to base their invalidity upon mere technicalities. The right to convey in trust is a part of the *jus disponendi*, more or less inseparable from the nature of property, while the right to prefer is simply an extension of the right to pay. Debts are not all of equal dignity, either legal or moral; and this fact is recognized, not only by common consent, but by the law itself, as instanced in statutes prescribing the order of payment in administrations and bankruptcy. Frequently the moral dignity of the debt is greater than its legal status, and can be given its effect only by the assignor. Under such circumstances, we do not think that an honest and perhaps meritorious creditor should be made to suffer from the bad faith or mere carelessness of the assignor, in not sufficiently describing a debt with which his own has no connection whatever. The principle is so clearly stated by Chief Justice Pearson in *Brannock v. Brannock*, 32 N. C. 428, that our own views can best be given by a full citation. The court says: "The operation of the deed was to pass the legal estate, with a separate declaration of trust for each of the debts

therein enumerated. There can be no reason why the declaration of trust in reference to one debt may not stand, and the declaration of trust in reference to another be held void. So, if a deed contains a declaration of trust in favor of several debts, one of which is feigned, and there be no connection or combination between the creditors to whom the true debts are due and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust in favor of the true debts may not stand, and the feigned debt be treated as a nullity. * * * Here the consideration which raised the use, for the purpose of the conveyance, is merely nominal. The debts secured are distinct, due to different individuals, and in no way connected with or dependent on one another. The deed is valid so far as respects the good debts. It would be unreasonable, and defeat the object of deeds of trust, if they are to be declared void, and honest creditors deprived of their security for debts, because the debtor, without their knowledge or concurrence, may insert a usurious or feigned debt."

This disposes of the attachment proceedings, all of which were begun after the assignment. As the assignment conveyed to the assignee all of Nimocks' interest in the property, there was nothing left for the plaintiff to attach. For error in the instruction of the court on the second issue, a new trial is ordered. New trial.

HALL et al. v. COTTINGHAM et al.
(Supreme Court of North Carolina. April 11, 1899.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY—SCHEDULE OF PREFERENCES.

1. A schedule of preferred debts, properly verified and filed by the assignor within the five days limited by statute, is good as to all preferences therein sufficiently described; and, if any are valid, the schedule itself is sufficient to support the assignment.

2. A preference of taxes in the schedule of an assignment is valid, since any creditor can ascertain their amount from the public records.

3. A preference in the schedule of a note, the date of which is given, is a sufficient statement of the date of the transaction, since the date of the note is presumed to be the date of the indebtedness.

Appeal from superior court, Robeson county; Robinson, Judge.

Action by Hall & Pearsall against A. J. Cottingham and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

McLean & McLean, for appellants. Patterson & McLean, for appellees.

DOUGLAS, J. This is an action brought to set aside a deed of assignment executed on the 1st day of November, 1897, by the defendant Cottingham to his co-defendant Patterson as trustee, and for injunction and receiver. The assignment provided for certain preferences,

which were set out in the schedule filed by the assignor in the office of the clerk of the superior court on the 5th day of November, 1897, within the five days prescribed by the statute. On January 18, 1899, a temporary injunction or restraining order was issued by his honor, Judge Robinson; but, on the hearing at February term of Robeson superior court, judgment was rendered dissolving the temporary restraining order theretofore granted, and refusing the motion for receiver and injunction. There appears to be no dispute as to the facts, and the only questions argued by counsel were as to the sufficiency of the schedule of preferred debts, and the effect thereon of the invalidity of certain preferences. These questions have been fully considered in the case of Brown & Co. v. Nimocks (at this term) 32 S. E. 743, and the principles therein laid down govern the case at bar. We are of the opinion that a schedule of preferred debts, properly verified and filed within the five days limited by law, is good as to all preferences therein sufficiently described, and that, if any of such preferences are valid, the schedule itself is sufficient to support the assignment. Those debts invalid for want of proper description are simply eliminated from the schedule, and fall back into the class of unpreferred debts. They lose nothing of their previous character as debts, but acquire no preference whatever under the assignment. It remains for us only to classify the preferences in the schedule before us. Such a preference, to be valid, must set forth the name of the creditor, with the amount, date, and consideration of his debt. All of these requirements are mandatory, but they will be reasonably construed in carrying out the true intent and spirit of the law.

We think that the preference as to taxes is valid, as it does not come within the intent of the law. Any creditor can easily ascertain their amount, and all particulars connected therewith, by reference to a public record, and it would be difficult ever to bring public taxes under the head of feigned or collusive debts.

We think that the second preference is also good, which is as follows: "J. A. Eddie, \$206. Note dated June 16, 1897, due and payable Dec. 16, 1897; being amount due for material for dry kiln." We hold that, in the absence of any statement to the contrary, the date of the note is presumed to be the date of the transaction, not as an arbitrary rule of law, but because we think the ordinary business man would so regard it, and would feel that he had complied with the law by giving the date of the note when the entire transaction took place at the same time. The object of the statute is not to defeat preferences, but to regulate them, by requiring the assignor to file in a public office, accessible to all, under the sanctity of his oath, a statement giving such a description of the preferred debt as will enable any creditor to conveniently ascertain its bona fides. Neither the schedule nor the deed itself adds anything to the inherent honesty or dishonesty of a debt, but affects only its or-

der of payment. Neither is conclusive of its validity, which can be attacked by any interested party, and, if shown to be feigned or illegal, it would have neither preference nor existence. If properly set out in the schedule, it has only a prima facie right of preference, subject to attack; but if excluded from the schedule, either in fact or by implication of law, its preference is forever lost. There are several preferences which appear to us sufficiently described, but we have shown enough to sustain the schedule, and therefore the assignment.

As the judgment of the court below simply dissolved the restraining order theretofore granted, and taxed the plaintiffs with the costs of the action, the question of the validity or invalidity of each particular item of the schedule is not properly before us. As the schedule is good, at least in part, it is sufficient to support the assignment, and his honor properly refused to interfere in its execution. The judgment is affirmed.

CASHION v. WESTERN UNION TEL. CO.
(Supreme Court of North Carolina. April 11, 1899.)

TELEGRAPH COMPANIES—MESSAGES FOR BENEFIT OF ANOTHER—RELATIONSHIP OF PARTIES—NOTICE—FAILURE TO DELIVER—DAMAGES.

Where an agent sends a telegram, in his own name, announcing a death, and requesting the addressee to come, his failure to notify the company of the relation of the addressee and his principal, and that it is sent for the latter's benefit, will not preclude a recovery by his principal for mental suffering occasioned by a failure to deliver.

Appeal from superior court, Iredell county; Shaw, Judge.

Action by Anna Cashion against the Western Union Telegraph Company to recover damages for failure to promptly deliver a message. From a judgment for plaintiff for the amount paid for its transmission, she appeals. Reversed.

L. C. Caldwell and J. F. Gamble, for appellant. Jones & Tillett, for appellee.

DOUGLAS, J. This case was here before, and is reported in 123 N. C. 269, 31 S. E. 493. It is now before us on an exception to the charge of the court below, which is stated in the record as follows: "The following is the charge of the court pertinent to the determination of the contention of the parties: 'The plaintiff contends that, by reason of the delay in the delivery of this telegram, her brother-in-law was prevented from being present with her, and that by reason of the absence of her brother-in-law upon this occasion she suffered mental anguish; that she suffered more than she would have suffered, under the circumstances, on account of the death of her husband. Now, to determine this question, the court charges you that there is no presumption of law that plaintiff suffered mental anguish on account of the ab-

sence of J. W. Mock; that the fact that she stood in relation to him as a sister-in-law, and the further fact of his being prevented from being with her, would not have raised the presumption that she suffered mental anguish on account of his not being there, but the burden is on the plaintiff to show by the preponderance of the evidence that there was existing between plaintiff and J. W. Mock such tender ties of love and affection as that his presence, advice, and sympathy with her in Morganton, and on the journey to Statesville, would have given her comfort and consolation in her distress, and would have prevented her from suffering to the extent she says that she actually suffered. But if you should find that such a relation existed between plaintiff and J. W. Mock, yet, as the plaintiff admits that she did not sign the telegram, and that her name is not mentioned in the telegram, and that Payne signed and sent the same as the agent of the plaintiff, before she can recover damages for mental anguish occasioned by the failure of J. W. Mock to be present with her upon this occasion the burden is upon the plaintiff to show, by a preponderance of the evidence, that at the time the message was delivered to the defendant company the said company was notified of the fact that the telegram was sent for the benefit of the plaintiff, and also of the relations existing between her and J. W. Mock. And the court charges you that there is no evidence that the defendant telegraph company had any notice that the telegram was sent for the benefit of the plaintiff, or that it had any notice of the relationship existing between the plaintiff and the said J. W. Mock; and your answer to the second issue cannot be more than twenty-five cents,—the cost of the telegram. The plaintiff does not contend that there was any physical injury to herself resulting from the alleged negligence, but the allegation in the complaint is for mental anguish suffered by her; and as the plaintiff has failed to show that the defendant company had notice that the telegram was sent for her benefit, or had notice of the relationship existing between her and J. W. Mock, she cannot recover in this action, except the twenty-five cents paid for the telegram. If you should answer the first issue "Yes,"—that the defendant company was guilty of negligence,—your answer as to the second issue can, under no circumstances, be more than twenty-five cents." There was a verdict, and the following is the judgment of the court: "This cause coming on to be heard at this term of the court before Shaw, Judge, and a jury, and being heard upon the whole record, and the following issues submitted: (1) 'Was the defendant guilty of negligence as alleged in the complaint?' to which the jury answered, 'Yes.' And (2) 'What damage has plaintiff sustained by reason of the negligence of the defendant?' to which issue the court ordered the jury to respond, '25 cents,' the amount paid for the transmission of the mes-

sage,—it is therefore adjudged that the plaintiff recover of the defendant the sum of 25 cents, and the costs of the action." The plaintiff appealed.

This directly presents the question whether the plaintiff can recover damages for mental anguish caused by the negligence of the defendant in failing to promptly deliver a telegram sent through an agent, when the name of the plaintiff was not signed to the telegram, and when the fact that it was sent for her was not disclosed to the defendant at the time the message was sent, nor were her relations with the addressee then communicated to the company. We intended to decide this question at the first hearing, and thought we had done so, at least by direct inference, but, it seems, not explicitly enough to be understood. To prevent any further misconstruction, we say, plainly, she can recover, if otherwise entitled. In other words, the failure to give such information was no bar to the action, or to the recovery of substantial damages. In *Lyne v. Telegraph Co.*, 123 N. C. 129, 31 S. E. 350, it was held that, where a telegram relates to sickness or death, it is not necessary to disclose to the company the relation of the parties, as there is a common-sense suggestion that it is important. The same rule applies here. The telegram in question stated that Mr. Cashion had been killed while at work, and on its face suggested that it was of unusual importance to somebody. The defendant knew that somewhere there was a vacant chair; that some one the lonely deathwatch was keeping. Who or where, it mattered not to the defendant, as it had no more right to wrong one person than another.

The able counsel for the defendant relies upon *Hadley v. Baxendale*, 9 Exch. 341; quoting as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered, either arising naturally (i. e. according to the usual course of things) from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow a breach of contract under these special circumstances, as known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a

breach of contract." This rule is almost universally followed as to all ordinary business transactions, but can it have any possible application to the case at bar? We think not. What probable damages could Mrs. Cashion possibly have had in contemplation, when, in the first hour of her bereavement, she sent a telegram announcing the sudden and violent death of her husband? Surely she could not be expected to dictate such a telegram with the cool deliberation with which a man would contract for the shipment of a mill shaft; nor can her mental anguish be measured by the rule laid down in determining the lost profits of *Hadley's mill*. We must admit that damages for mental anguish are somewhat anomalous, and the extreme difficulty of their admeasurement by any ordinary rule of law has led many jurisdictions to reject the doctrine. We have found it established in this state, and feel compelled to uphold it, on the highest principles of public policy and of private right, and must give it such a reasonable construction as will enforce its legitimate results.

One other principle must be kept in view: A telegraph company is in the nature of a common carrier. Claiming and exercising the right of condemnation, which can be done only for a public purpose, it is thereby affected with a public use. It owes certain duties to the public, which are not dependent upon a personal contract, but which are imposed by operation of law. A simple contract is an agreement between two parties,—a drawing together of two minds to a common intent,—and must be voluntary as well as mutual. Whenever a man, at a proper time and place, presents a telegram to the company for transmittal, and at the same time tenders the proper fee, the company is bound to receive, transmit, and deliver it with reasonable care and diligence; it cannot refuse to receive it; and, while it may protect itself by reasonable regulations, it cannot insist upon a personal contract contrary to its usual custom or to public policy. As was said in *Reese v. Telegraph Co.*, 123 Ind. 294, 24 N. E. 163, the failure of the telegraph company to promptly deliver a telegram "is not a mere breach of contract, but a failure to perform a duty which rests upon it as the servant of the people." While reaffirming the doctrine, we must again earnestly caution juries against its abuse. The defendant is in no way responsible for the anguish suffered by the plaintiff for the loss of her husband. All that can possibly be charged to it is the injury resulting from a negligent failure to deliver the telegram; and the jury, in considering this matter, should carefully guard against the sympathy they would naturally feel for the widow and orphan child. However creditable to them as men, it must be ignored by them as jurors. If the defendant has been negligent, it is their duty to give to the plaintiff a fair recompense for the anguish she has suffered from such negligence, but from that alone; and, in determining the amount, they should render to each party ex-

act and equal justice, without the shadow of generosity, which is not a virtue when dealing with the property of others.

The counsel for defendant argued before us other questions, not presented by the record, which we cannot properly consider. For error in the charge of the court, a new trial must be ordered. New trial.

STATE'S PRISON OF NORTH CAROLINA et al. v. DAY.

(Supreme Court of North Carolina. April 11, 1899.)

STATE'S PRISON SUPERINTENDENT—OFFICE—CREATION—ABOLITION—APPOINTMENTS—CONFIRMATION BY SENATE.

1. The office of the superintendent of the state's prison is created by the general assembly, and not by the constitution, in view of Const. art. 11, § 3, directing the general assembly to provide for the erection and conduct of the prison. Hence the legislature may abolish it.

2. Act 1890, purporting to abolish the office of superintendent of the state's prison, does not abolish it, since it also requires a performance of all the duties previously performed by the superintendent, though it requires the duties to be performed by three persons, and incorporated the prison, and increased the number of directors, and gave them power to sell or lease lands of the prison; a public office being an agency from the state to perform certain duties.

3. An appointment by the governor of a state's prison superintendent to fill a vacancy caused by a resignation need not be confirmed by the senate.

Clark, J., dissenting.

Appeal from superior court, Wake county; Brown, Judge.

Action by the state's prison of North Carolina and others against W. H. Day. Judgment for plaintiffs, and defendant appeals. Reversed.

Jas. C. MacRae, C. F. MacRae, Argo & Snow, and Thos. N. Hill, for appellant. R. O. Burton and Shepherd & Busbee, for appellees.

MONTGOMERY, J. This action was brought under section 1 of an act of the general assembly ratified on the 15th of February, 1890. The language of that section is as follows: "That in addition to the remedy prescribed by the Code, sections 603 to 621 inclusive, the board of directors of the state's prison of North Carolina, or the executive board thereof, or both, with or without the joinder of the state, shall have the right, in an action for injunction or mandamus, to test in the courts the claims of any claimant or claimants to the possession, custody and control of the property of the state's prison, and of the convicts therein confined."

The object of the statute, then, was simply to have a decision by the courts of this question: Who of the conflicting claimants is or are entitled, by law, to the possession and custody of the property of the state's prison and of the convicts therein confined? The claim-

ants, so far as this record shows, are the plaintiffs on the one side, and the defendant on the other. The rights of any other person or persons that may be connected with the conduct and management of the state's prison are not now before us for consideration. This court will not anticipate litigation between rival claimants for office, and, if such litigation should occur, each case must be heard and decided on its merits, on cases properly constituted in the courts.

The governor of the state, under the provisions of chapter 219 of the Acts of 1897, appointed John R. Smith superintendent of the state's prison for the term of four years, and his nomination was consented to by the senate. The compensation attached to the office was a salary of \$2,500. After the adjournment of the general assembly of 1897, Smith resigned the superintendency, and J. M. Mewborne was appointed by the governor in Smith's place. On the 1st day of January, 1899, a few days before the general assembly of that year convened, Mewborne resigned, and the defendant, W. H. Day, was appointed superintendent to fill the vacancy. Day's nomination by the governor was never sent to the senate, nor did that body confirm the appointment. Day, under his appointment, took possession of all the property of the state's prison and the control of the convicts.

This action was brought by the plaintiffs to recover of the defendant the property in his possession belonging to the state and appertaining to the state's prison, and to get the control of the convicts and to have the rights of the parties declared. In that way the plaintiffs seek to get a decision by the court on the matter which it was desired to have settled by the act of February, 1890.

The plaintiffs' alleged right of recovery is founded on the provisions of an act of the general assembly ratified on the 26th day of January, 1890, to go into effect on the 10th day of February, 1890, as to its requirement for the delivery of the state's prison and the convicts therein, by the persons then in charge of the state's prison, to the board of directors provided for in the act. As to the other provisions, they went into effect from the date of ratification of the act. Under the provisions of the last-mentioned act, the plaintiffs, claiming to be a board of directors duly elected and appointed by the general assembly, allege that the office of superintendent has been abolished: that the property of the state prison, the control of the convicts, and the conduct of the prison were vested in them by the act of January, 1890; and that, therefore, they are entitled to the possession of the property, and the control of the convicts, to the end that they may properly execute their trust. And again, the plaintiffs allege that if it be so that the office of superintendent was not abolished by the act of 1890, yet the defendant's (Day's) tenure ceased upon the ratification of the act, because he was not nominated by the governor nor his appointment confirmed by the sen-

ate. The defendant avers that the act of January, 1899, though on its face it purports to abolish the office of superintendent of the state's prison, does not in law have that effect; that it simply transfers the duties and functions of the office of superintendent to the three plaintiffs, who allege that they compose an executive board, to be performed by them; and that such an attempt to deprive the defendant of his office on the part of the general assembly is contrary to the provisions of our state constitution (article 1, § 17, Bill of Rights), and to those of the constitution of the United States (Amend. art. 14, § 1). The defendants further aver that the whole act of 1899 is void.

The great public importance of the matter involved, and the appearance on both sides of counsel eminent in the profession and learned in the philosophy, as well as in the details, of the law, naturally prepared the court for elaborate and discursive argument (oral and by brief), and we were not disappointed in our anticipations. A great deal of the learning which was displayed, however, was not new. Many of the questions discussed had been so often and so consistently decided by the adjudications of this court that they could not be held to be open questions; as, for instance: That such a place as that of superintendent of the state's prison, with its attendant duties, is a public office. *Clark v. Stanley*, 66 N. C. 59; *Hoke v. Henderson*, 15 N. C. 1; *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113. That an office is property, and the incumbent has the same right in it as he has to any other property, except that he cannot sell or assign it. *Hoke v. Henderson*, supra; *King v. Hunter*, 65 N. C. 603; *Cotten v. Ellis*, 52 N. C. 545; *Wood v. Bellamy*, supra. That the general assembly has the power to abolish an office created by legislative authority. *Cotten v. Ellis*, 52 N. C. 545; *State v. Smith*, 65 N. C. 369; *Wood v. Bellamy*, supra; *Ward v. City of Elizabeth City*, 121 N. C. 1, 27 S. E. 993. That the legislature can, except in those instances prohibited by the constitution, take away some parts of the duties of an officer, and make a not inequitable reduction of the officer's salary. *Cotten v. Ellis*, 52 N. C. 545; *State v. Gales*, 77 N. C. 283; *King v. Hunter*, 65 N. C. 603. But in those cases it is also held that the officer's entire salary cannot be taken from him, and thereby starve him, nor could the legislature select a particular officer, and, by a special law applicable to him alone, deprive him of any material part of his duties and emoluments; that the words, in section 10, art. 3, of the constitution of 1868, viz. "that the governor shall nominate * * * and appoint all officers whose offices are established by this constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the general assembly," meant appointments not otherwise provided for in that constitution; and therefore the governor had, under that constitution,

the general power of appointing to office (the exceptions being in cases where the appointments were otherwise provided for in that constitution), to the exclusion of the legislature (*People v. McKee*, 68 N. C. 429); but that the words which we have quoted from article 3, § 10, of the constitution, and which appear in italics in the quotation, being omitted in the present constitution, it is clear that the convention of 1875 intended to alter the constitution as interpreted in *People v. McKee*, supra, on that point, and to confer upon the general assembly the power to fill offices created by statute. *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787. Having disposed of all the above-mentioned collateral questions which were the subject of argument in the case, interesting more as matter of constitutional and judicial history than as strictly applicable to the controversy before the court, by the citations of repeated decisions of this court, we can now come down to the discussion of the point the real controversy in the case; that is, was the office of superintendent of the state's prison abolished by the act of assembly ratified January, 1899? We may say, in limine, that we have had no trouble in arriving at the conclusion that the office of superintendent is not an office created by the constitution. Section 3 of article 11 of the constitution ordained "that the general assembly shall at its first meeting make provision for the erection and conduct of a state's prison or penitentiary"; and that provision, in our opinion, imposes upon the legislature the duty of attending to the details as to the erection of the necessary buildings, the purchase of such property, real and personal, as may be necessary for the uses of the prison, and also to form such regulations for the government and conduct of the prison as may seem proper. The officers or place-men, their salaries, and the distribution of their duties, are all left with the general assembly.

On the real question in controversy, the contention of the plaintiffs is that the office of superintendent of the prison was abolished by the act of 1899 (1) because the act declared, in so many words, that the office was abolished; (2) because the responsibility and actual management of the prison are placed upon the board of directors, and taken from the one-man power,—that of the superintendent,—and that the incumbent had an implied notice that the general assembly might, when it saw fit, take that course; (3) because the act incorporated the state prison; (4) because it increased the number of directors; (5) because it transferred the duties attendant upon the office to the board of directors for performance.

To aid us in arriving at a correct conclusion in this case, a recurrence to the true idea of the nature and character of a public office has been useful to us. In the text-books it is taught that the word "office," in its primary signification, implies a duty or duties; and, secondarily, the charge of such duties,—

the agency from the state to perform the duties. The duties of the office are of the first consequence, and the agency from the state to perform those duties is the next step in the creation of an office. It is the union of the two factors, duty and agency, which makes the office. In *Clark v. Stanley*, 66 N. C. 59, the court said that "a public office is an agency from the state, and the person whose duty it is to perform this agency is a public officer. * * * The oath, the salary, or fees are mere incidents, and they constitute no part of the office." With that idea, then, of what an office is, has the office of superintendent been taken from the defendant and given to others by the act of assembly? If the duties of the office were necessary and useful to the public, and they have been transferred to others, who are exercising them as still necessary and useful to the public, and the state's prison, in behalf of which those duties are performed, is substantially the same institution as it was before the act of assembly of January, 1899, was ratified, then, under all the decisions we have cited in this case bearing upon the point, the office of superintendent (defendant's property) has been taken from the defendant contrary to the law of the land,—contrary to the provisions of the constitution of North Carolina (article 1, § 17). If the institution, the state's prison, is the same substantially that it was before the passage of the act, if the purposes for which it was established are the same now as then, and if the subject-matters over which the management and conduct extend be the same, then there is existing a contract between the state and the defendant as to his office, and it cannot be violated during his term. The state, through the general assembly, might be satisfied that the management under the executive board created by the directors under the act is the better plan and the safer one for the public, yet that is only a matter of method of management,—a choice between two modes (that is, whether it is better for three to control than for one), and such a choice cannot be made until the defendant's term has expired. A new method of distributing the powers and duties of the government and conduct of the state's prison may be desirable, and the method undertaken to be adopted in the act of 1899 may be the best, and yet such changes cannot be made until the expiration of the contract with the incumbent. It has been suggested that if the state has not the power when it sees fit to abolish an office, and transfer its duties to others, an incumbent might get into an office for a very long term of years (a term not amounting to a perpetuity, however, which would be illegal), and indifferently execute the duties of the office, but not so poorly as might amount to incapacity, and thereby inflict great injury on the interest of the public. The answer to that is that, if such should be the case, it would be the fault of the legislative branch of the government in fixing an unusual term

of office, and not a matter reviewable by this court.

Then, the conclusion of the case turns upon whether the state's prison is substantially the same institution that it was before the act of 1899, whether the purposes for which it was established are the same now as then, and whether the duties performed by the defendant were the same duties, substantially, which were transferred to the board of directors, and now being performed by the executive board, under the act of 1899.

It is ordained in the constitution that the state's prison is to be used for the purposes of reformation and of punishment, and that is the object of the institution now. The incorporation of the institution, if it be conceded that it was incorporated by the act of 1899, can in no sense affect the defendant's office, if it has not otherwise abolished it. The bare incorporation of the institution would not affect or alter in any way the duties of the superintendent or any other of the officers or placemen or employés. With the exception of the power given in the act of 1899 to the directors to sell or lease the lands or other property of the state's prison, the duties and the powers in all respects of the board of directors, acting through the executive board as their head, are in all respects the same as the duties required of, and the powers conferred upon, the superintendent under the act of 1897, as the following analysis and comparison will show. Under the various subsections of section 5 of the act of 1897, the duties of the superintendent are specified in detail, as follows: (1) Under this subsection he is to receive and to have the custody of the convicts. That responsibility and duty are put upon the new board of directors, and their agents, under section 7 of the act of 1899. (2) Under this subsection it was made the duty of the superintendent to keep employed the convicts in the prison and on the farms, and to hire them to others. Under section 7 of the act of 1899 that duty was devolved on the board and their agents. (3, 4, 5) Under these subsections, the superintendent was authorized and required to purchase necessary articles of food and clothing for the convicts, and to employ and take care of them, to sell the products and manufactured articles, to receive and account for the proceeds of the sale of articles produced and manufactured, and to make a deposit of the same, and to check it out. Those duties are transferred to the board of directors and their agents by section 6 of the act of 1899. (6) This subsection makes it the duty of the superintendent to take custody of the property of the state's prison, and to protect the same. This duty is transferred to the board and their agents by sections 6 and 8 of the act of 1899. (7) The superintendent is authorized, under this subsection, to appoint the subordinates, such as wardens, physicians, supervisors, overseers, guards, and employés. These subordinates, designated under the act of 1899

as wardens, physicians, managers, supervisors, or overseers, are to be appointed by the board of directors, through the executive board, by sections 5 and 9 of the act of 1899. (8) Under this subdivision there is imposed upon the superintendent the duty of rendering, at the end of each year, to the board of directors, a statement of all financial transactions of the state's prison for the preceding year, together with an inventory of all property on hand and its value. Those duties are required to be performed by the agents of the directors, the executive board, under sections 5 and 6 of the act of 1899. Under chapter 219 of the Acts of 1897, the board of directors were a general supervisory power. By the act of 1899, the board of directors, through the executive board, are clothed, not only with a general supervisory authority, but with all the functions, and with all the duties, of the superintendent, and with the power to distribute those functions and duties among themselves or others.

If we have not fallen into error in the above analysis and comparison,—and we feel confident that we have not,—then no new duties for the government of the state's prison have been imposed, nor have any new powers been granted to any persons, except the power granted to the board of directors to sell or lease the lands of the state's prison, and which additional power, we think, does not alter the nature or the character of the institution. No function or duty that was formerly performed or imposed upon the superintendent is abolished. The functions and duties of that office are still necessary to the public welfare. They have not been abolished; they have been simply transferred to others. That cannot be done, according to the law of the land. *Wood v. Bellamy* and *Hoke v. Henderson*, supra; *Cotten v. Ellis*, 52 N. C. 545. That three of the directors have been made the governing head of the institution, under the name of "executive board," and that to them the duties and functions of the office of superintendent have been transferred, does not change the application of the law. It is the same as if the duties of the office had been transferred to one person. It is not a valid argument to contend that the executive board can conduct the state's prison in a better and more satisfactory manner than can one man. It may be true in point of fact, and that plan can be tried at the end of defendant's term of office. The contract of the state with the superintendent must be kept. In *Throop*, Pub. Off. § 21, it is said: "Nor can the legislature take from the officer the substance of the office, and transfer it to another, to be appointed in a different manner, and to hold by a different tenure, although the name of the office is changed, or the office divided, and the duties assigned to two or more officers under different names." That principle of law was announced in *Warner v. People*, 2 Denio, 272, and also in *People v. Albertson*, 55 N. Y. 60. The section in *Throop*, and the

decisions in *Warner v. People* and *People v. Albertson*, supra, are in connection with offices created by constitutional provision. But that makes no difference in North Carolina. Under our decisions, you cannot oust an incumbent of an office, and continue the office afterwards, and this rule applies to offices created by the constitution as well as to those created by the legislature.

It was not necessary for the appointment and nomination of the defendant to have been confirmed by the senate. There was a vacancy, due to the resignation of Mewborne. The governor never makes a nomination to fill vacancies in office. He does that alone, in all cases, as was decided in *People v. McIver*, 68 N. C. 467. The defendant is entitled to the possession of the property of the state's prison; to the control of the convicts, as under the act of 1897; and to the right to execute the duties of the office of superintendent of the state's prison. Reversed.

FURCHES, J. (concurring). While I fully concur in the opinion of the court, I hope I will be pardoned for briefly expressing my views upon this important question.

It is too plain for argument that the position the defendant held was a public office. I do not think this is denied by plaintiffs. This being so, he had a property in this office that could not be transferred to another or to others. This is the law of this state, and it has been so held by this court, in every case involving this question, from *Hoke v. Henderson*, 15 N. C. 1, to the present time, without a single exception. It is true that it is argued for plaintiffs that *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132, and *Ward v. City of Elizabeth City*, 121 N. C. 1, 27 S. E. 908, are not in accord with *Hoke v. Henderson*; but, upon examination, it will be found that this is not so. *Hoke v. Henderson* is cited with approval in both these cases. The act under discussion in *McDonald v. Morrow* was the election law of 1895, and in that act it was provided that such appointments as those under consideration were void, and the court, in considering the case, stated that, as they claimed to hold under that act, it must be held that they took subject to the terms of the act they claimed to hold under. There was no question presented in that case as to the repeal of the statute or the abolition of the offices claimed by the defendants. In *Ward v. City of Elizabeth City*, supra, the plaintiff failed in his action upon two grounds: That the corporation under which he claimed to hold office had been abolished, and a new corporation created, out of new territory, and new population, to a very great extent; and for the further reason that he had abandoned his claim to the office. Justice Clark wrote the opinion of the court in *Ward v. City of Elizabeth City*, in which he cited with approval both *Hoke v. Henderson* and *McDonald v. Morrow*, and distinguished that case from *Wood v. Bellamy*. So, I repeat that there is not a case to be found in our Re-

ports that does not recognize the doctrine laid down in *Hoke v. Henderson* to be the law in this state. It has been held, ever since it was delivered in 1833, to be the leading case on this subject, and is styled by Chief Justice Pearson as "that great mine of learning." That case, and every case since that case, discussing the right of an incumbent to hold his office, recognizes the right of the legislature to abolish a legislative office, and that when the office is abolished the right of the incumbent to hold it is gone, because there is no office to hold. But all the reported cases, from *Hoke v. Henderson* down to and including *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113, hold that, to have the effect of ousting the incumbent before his term expires, the office must be abolished; that it is not sufficient to declare that it is abolished when it is not abolished; that the office is intangible, and consists in the duties of the office, and while these duties are continued the office is continued. The discussion then comes down to this: Are the duties of the office the defendant held abolished, or are they transferred to others?

In discussing this question, I do not expect to enter into a discussion of policies that might influence me if I were acting as a legislator; nor do I expect to count the number of lawyers in the legislature that passed this act, nor do I expect to impugn their motives, as it seems to be thought I will if I am of the opinion that the act is unconstitutional. This kind of argument should have no weight with an independent judiciary. If this suggestion is true, it convicts every judge that has ever occupied a seat on this court of being guilty of impugning the motives of the legislature,—Taylor, Henderson, Ruffin, Pearson, and all their associates. If this were so, I suppose there would never be another act of the legislature declared unconstitutional. I hope that I may never be influenced in the discharge of what I consider my duty by such considerations. I propose to regard this legislature just as I would any other legislature, and to deal with its legislation just as I would any other legislature,—just as I did the legislature of 1895,—and I agreed with the court in an opinion declaring a similar act passed by that legislature unconstitutional. And in doing so I did not impugn their motives, nor do I suppose any other member of the court did. I suppose that legislature thought the act of 1895, reviewed by this court in *Wood v. Bellamy*, constitutional, and I suppose the legislature of 1899 thought this act constitutional; but, when it comes before us for review, I cannot be governed in my opinion of the law by what they may have thought.

It is contended that, if we sustain the defense and restore the defendant to his office, there is danger ahead of us; that we might get a legislature that would extend the terms of office to 10, and even to 25, years. I do not think we are likely to have a legislature that would be so revolutionary as that. But what if we should, is this the forum to be

appealed to for relief? The leading case of *Hoke v. Henderson*, in which Chief Justice Ruffin delivered his great opinion, was a case in which Henderson, the defendant, claimed to have an office for life, and the court sustained his claim.

It seems to me that defendant's claim is looked upon with disfavor, as resting upon an act passed by the legislature of 1897. I do not know that it should be discredited on that account. But when it appears that the act of 1897 was but the re-enactment of the act of 1893, under which the party in possession of the penitentiary in 1895 (the same party that passed the act of 1893) held over in violation of the act of 1895, it does not seem to me that it should be discredited because it was passed by the legislature of 1897. If the object of the act of 1899 was simply to get rid of the office of superintendent, as contended, why was it that the legislature did not simply abolish that office, and leave the institution to the management of the board of directors? They were there, and were substantially the same as they were before the passage of the act of 1893, which created the office of superintendent. If the object was simply to abolish the office of superintendent, why did they not do this, and let the matter stand there? Why did they appoint twelve new directors, and establish an executive board of three, to do the same thing the superintendent had to do?

Great stress is laid on the fact that three are to do what one did, and the "one-man power" is appealed to. Is this one-man power the question before us? It seems almost to be conceded that, if the duties of the superintendent had been transferred to one man, the act would have been unconstitutional. What difference does it make to the defendant whether his office is given to one or to three? While we do not propose to discuss policies, this kind of legislation has a history in this state, to be learned from the records of this court and its reported cases. In 1871-72 the legislative power and the executive power of the state were in the hands of different political parties. The legislative power undertook to take charge of the penal, charitable, and beneficent institutions of the state before the terms of those in office had expired. But they failed, as may be learned from *People v. McIver*, 68 N. C. 467; *People v. Johnson*, Id. 471; *People v. McKee*, Id. 429; *People v. Bledsoe*, Id. 457. In 1895 the legislative power of the state was in the hands of one political party, and the executive power in the hands of another political party, and the legislative power undertook to take charge of the institutions before the terms of the officers in charge had expired, and they failed. *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113. In 1899 the legislative power of the state is in the hands of one of the political parties, and the executive power is in the hands of another political party, and the legislature has again undertaken to take charge of this institution before the terms of the officers have expired.

and they must fall. The act considered in *Wood v. Bellamy* in express terms abolished the office of superintendent, the board of directors, created a new corporation, provided for the reception of patients from Durham and Robeson counties, established an insane division in the penitentiary, and repealed all laws in conflict with that act. In fact, every substantial question involved in this case was involved and considered by the court in that case. The court, constituted then as it is now, declared that the act was unconstitutional by a full bench and without a dissenting voice. I must hold now as I did then, and I do this without impugning the motives of any one, as I suppose they thought the act constitutional.

CLARK, J. (dissenting). The management and control of the state's prison is essentially a governmental function. It is an indispensable part of the administration of the criminal laws of the state. No legislature can denude the state of that power by giving it away or bargaining it away. It is a startling contention of the defendant that, because the legislature of 1897 placed the control of the state's prison in a superintendent, with vast powers and privileges, accompanied by a salary of \$2,500, therefore a subsequent legislature is powerless to resume control, and change the management, because that would deprive him of his pay. This is to make the incident of greater importance than the subject, and the inalienable right of the state to control its own institutions subordinate to an office holder's demand for a salary. If the legislature could, by creating a four-years term of office, put it out of the power of the next legislature to assert state control of its most important institution, and a branch of its administration of the criminal laws, it could, by making the term ten years, twenty-five years, or fifty years, have forbidden the people of North Carolina from touching the institution during those periods. If the legislature of 1897 could confer the great powers they did upon the superintendent, without power of repeal, they could have conferred greater powers,—the sole and absolute control in every respect. To change this would necessarily continue the same duties in the hands of other parties, and the defendant's contention is that that would be to substantially continue his office in other hands, and illegal. That is the proposition before us. The defendant claims control of more than 1,000 of the state's convicts, possession of \$200,000 of the state's property, and to receive \$100,000 annually from sale of the products of the state's farms, with the appointment of 169 place holders in the state's service, and to fix their salaries and other large powers, with no security to the state but a bond of \$5,000; and it is gravely argued to us that the legislature could not, in discharge of its governmental functions, change that system of government, because, under the new act, necessarily the same du-

ties would be discharged by the directors and executive board and others, and the defendant would lose profitable employment. But governments are established for the benefit of the people, and not that office holders may receive compensation. The last is purely incidental, and only to be rendered when the state desires and receives the services. The office of superintendent of the state's prison or penitentiary was created by legislative enactment (Acts 1897, c. 219, § 4), and therefore it can be abolished in the same mode and at the will of the legislature. "The legislature [of 1899] had the same power to abolish it that the legislature [of 1897] had to create it." *State v. Walker*, 65 N. C. 461. The only question before us should be, has the office been abolished? The act of January 26, 1899, "to provide for the government of the state's prison," provides (section 12): "The office of superintendent of the penitentiary is hereby abolished and all laws and clauses of laws, providing for the appointment of or imposing any duties upon, or providing for, any compensation for such officer are hereby expressly repealed." As the legislature had power to abolish the office, the above would seem a clear-cut, unmistakable expression of their will that the office has been abolished. Two late decisions of this court are decisive of the point. In *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113, after a careful review of our authorities, it is said by Montgomery, J.: "It is undoubtedly the law in North Carolina that an office, not created by the constitution, can be abolished, and that as a result the officer loses his office and the property in it. This is no breach of the contract on the part of the state. The holder accepted the office subject to this contingency. No one would contend that because an office was, in the estimation of the legislature, useful and necessary at the time of its creation, such an office would continue to be forever a public necessity. If an office once useful should become useless and an unnecessary charge upon the people, it is not only a right of the legislature to abolish it, but it is its duty to do so. And, as we have said, every man elected or appointed to an office created by the legislature takes it with the implied understanding that the continuance of the office is a matter of legislative discretion, the office depending upon the public necessity for it. In *Hoke v. Henderson*, 15 N. C. 1, it is said that it may be quite competent to abolish an office, and true that the property of the office is thereby of necessity lost. Yet it is quite a different proposition that, although the office be continued, the officer may be discharged at pleasure, and his office given to another. The office may be abolished, because the legislature deems it necessary." The latest case (*Ward v. City of Elizabeth City*, 121 N. C. 1, 27 S. E. 993) says: "The city attorney authorized for the new corporation is an entirely distinct office from, and is not a continuation of the office of, city attorney of the

corporation which was extinguished by act of the legislature. This case differs from *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113, in that there the new charter was so nearly a repetition of the old one that it was held to be merely an amendment of the former one, not a destruction of it, and hence the offices, under such charter, were not vacated. Every one who accepts an office created by legislative enactment takes it with notice that the legislature has power to abolish his office, and is fixed with acceptance of all provisions in the act creating the office." *Furches, J.*, in *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132 (top of page 677, 119 N. C., and page 135, 26 S. E.): "The only restriction upon the legislative power is that, after the officer has accepted office upon the terms specified in the act creating the office, this being a contract between him and the state, the legislature cannot turn him out by an act purporting to abolish the office, but which, in effect, continues the same office in existence." *McDonald v. Morrow*, supra, and other cases to like purport, are cited in *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554, at page 469, 121 N. C., and page 560, 28 S. E., by *Douglas, J.*

So that the only question is whether the office of superintendent has been actually abolished, as the lawmaking power unequivocally has said; or shall we hold that it has been guilty of subterfuge, and has really continued the office in another name, and, in fact and in truth, merely transferred its duties and emoluments to another? Is the office of superintendent to-day in existence under another name? If not, judgment must go against the defendant. In *Wood v. Bellamy*, supra, there was no radical change in the method of management; no destroying and repeal of previous acts, as in the present case; but the new legislation, on its face, purported to be, and was in fact, a mere amendment to previous legislation. The names of the institution and of the offices were somewhat changed, but it was clear that there was the same system of management, and the same offices, with the same functions, the labels being changed. This being so, the court held, following *Hoke v. Henderson*, that, the office being in truth continued in existence, the officer could not be dispossessed. In *Ward v. City of Elizabeth City*, supra, a still later case (September term, 1897), it was held that where a city charter was abolished, and a new corporation created, with enlarged territory, it was such a change that the city attorney, under the old charter, could not claim his salary under the new. The change made by the act before us is far more searching and complete than that sustained in *Ward's Case*. The entire government of the penitentiary, as provided by the act of 1897, is abolished, root and branch. Not only the "one-man power," which dominated under the act of 1897, is swept away, but a new system of government thereof is established by a board of 21 directors, in which the old office of superintendent not only does not exist, but such of-

fice is totally incompatible in every particular with the new form of government provided by the legislative will.

A review of the methods of government provided for the penitentiary will be instructive. Under Acts 1879, c. 333, and Acts 1881, c. 289, the penitentiary was governed by a board of five directors. In Acts 1885, c. 119, the number was increased to nine. In Acts 1889, c. 524, the number was again reduced to five, and this continued until 1893. So that from 1879 to 1893 the office of superintendent was not a *sine qua non* in penitentiary management. It simply did not exist. Just as the legislature of 1899 has declared, it does not exist to-day. In Acts 1893, c. 223, a new system was inaugurated. The office of "superintendent of the state's prison" was created. In Acts 1895, c. 417, this system was abolished, and a return had to the old system, but it failed to take effect, because the board of nine directors therein provided for were elected by the legislature when no quorum was present; and in consequence of the decision in *Stanford v. Ellington*, 117 N. C. 158, 23 S. E. 250, there was no contest over the matter, and the superintendent held on for the lack of any one to succeed him. In Acts 1897, c. 219, there was a return to the "one-man power" provided by the act of 1893. In 1899, this system not having worked satisfactorily, the legislature returned to the old system which had obtained from 1879 to 1893, and abolished, by express enactment, root and branch, the opposite method of government, which had been attempted by only two legislatures (1893 and 1897); the other nine legislatures, from 1879 to 1899, inclusive, having approved the system of government by a board.

The argument for the defendant is that the penitentiary must be governed by the discharge of substantially the same duties by some person or persons, and therefore, though the office of superintendent is abolished, and not re-established, either in form or in any other name, yet as those duties must be performed by the board itself, and agents appointed by it, therefore the office of superintendent is still in existence, no matter how it is divided up; that, as the duties exist, therefore the office exists, and the defendant must have it and its emoluments. This is the fallacy of his argument. The office does not exist, either potentially or colorably. No one exercises it or draws its emoluments. The legislature had power to abolish it, and it has done so in unmistakable language, and we must take it that it have done so in good faith. *Wood v. Bellamy* says the officer is entitled "so long as the office exists," not so long as the same duties must be performed by some one in some way. The duties of management remain, and the legislature has apportioned those duties as it thought best. If the office of superintendent is necessarily beyond annihilation unless the penitentiary itself is annihilated, where was it in hiding from 1879 to 1893? There is a wide distinction between the office of superintend-

ent, with certain fixed duties prescribed by the legislature, which cannot be taken from the incumbent as long as the office is continued (or if it is only colorably not truly abolished), and the duties of managing the penitentiary, which remain substantially the same, under every form of government, however much the legislature, as representatives of the sovereign people, may change the method of its government. The functions of government remain substantially the same under an absolute monarchy in Russia as in a free country like ours, but, should Russia come to be administered by the elected representatives of its people, the office of czar would cease to exist. The powers and duties of absolute sovereignty would remain.

By Acts 1897, c. 219, creating the office of superintendent of the state's prison, under which the defendant claims, there was a board of nine directors, who had (section 3) "general supervision of the state's prison or penitentiary, and of the employment of all convicts sentenced to imprisonment therein by the courts of the state." Then, by section 4, there was created a middleman,—a superintendent,—with large powers, which he was to exercise under the general supervision of the directors, as provided by section 2, including the power to appoint all subordinates (160 in number, it seems), and fix their salaries; but his appointments and adjustment of salaries were subject to approval or rejection by the board (section 7), and he was required to make itemized reports, which were subject to their approval, and he was allowed a salary of \$2,500. The experience of this system of government not having made it acceptable to the legislature, the act of 1899 abolished the middleman and his salary of \$2,500, and required the board of directors to govern the penitentiary by direct contact with the subordinates, and not, as under the act of 1897, through the medium of a superintendent, with powers prescribed by the legislature, not to be changed by the board, and he himself not removable by them. No such office or powers now exist. The board of directors are to appoint all subordinates themselves, and fix their salaries in the first place, and discharge all other duties of general supervision directly, instead of at second hand, by approving or rejecting the appointments, actions, and reports of a superintendent, as under the act of 1897. The office of middleman or superintendent having proved expensive and unnecessary (*Wood v. Bellamy*, supra), the legislature, in its wisdom, abolished it, and no vestige of it remains. It is true the penitentiary must be governed, but not necessarily by a superintendent. It is none the less abolished because the board shall discharge its duties hereafter directly, instead of supervising the discharge of them through a superintendent. To provide for the increased burden of direct supervision, the board was increased from 9 to 21, and an executive committee of three was provided, to be selected by the board among its own members, who

are to meet twice a month, to act for and in behalf of the full board between its sessions, with its acts subject to approval by the full board. In all this there is surely no indication that there has been any subterfuge practiced by the legislature, or that the office of superintendent is still in existence. If we were disposed to charge a co-ordinate department with subterfuge, we must recall that there sat in that body 55 lawyers, among them many of the most eminent members of the profession, thoroughly acquainted with the decisions of the courts, and that, if there had been subterfuge, it was not unintentional, but deliberate. Certainly, it does not appear upon the face of the statute, and we cannot presume bad intentions in the legislature. *Angle v. Railway Co.*, 151 U. S. 18, 14 Sup. Ct. 240. In *Wood v. Bellamy* the act on its face was an amendatory act, and there was no subterfuge, but simply a naive attempt to vacate offices by merely changing their titles. The court held that would not do, and the legislature of 1899 had knowledge that nothing less than an actual abolition of an office would vacate it. The office of superintendent is not only expressly abolished, but, as above said, its very existence is incompatible with the very essence of the new government prescribed, which is by the board itself without any intermediate, as heretofore, to make contracts, appointments, and regulations. It is not the case of "the same old horse under a new blanket." Admittedly, the legislature had power to abolish this office. It could not possibly have done so more completely, unless it had abolished the penitentiary itself.

If, because the penitentiary must continue to be managed, the office of one who formerly discharged some of the functions of management cannot be abolished, then, if he had been charged with the full and entire management, he could not be touched during his term, however long, since those functions would necessarily be performed by those placed in charge, and the unbroken line of decisions, that all offices created by the legislature can be abolished by the legislature, is misleading, except as to those minor places which are held in institutions which can themselves be abolished. This is to make an office which is purely an incident in carrying out the legislative will in managing state institutions the chief thing to be protected at all hazards, and makes the legislative judgment as to the best interests of the institution a secondary consideration. As to the state's prison, the asylums, the university, schools, and the like, which the constitution or the public necessities require to be continued in existence, an officer once in, no matter how unsatisfactory the system or the officer himself, would be protected as fully as if appointed under, and his term fixed by, the constitution. The rat can only be gotten out by burning down the barn.

We know not, from the record, what mismanagement, if any, caused the legislature to

abolish the system of governing the penitentiary through a superintendent, nor is it necessary there should have been any. The legislature, representing the sovereignty, could change the method of governing any state institution at will. It does appear upon the face of the complaint that the defendant has in possession \$200,000 of state's property; that he will (if still in office) handle \$100,000 of state funds annually; that he is insolvent, and has given only a \$5,000 bond. None of these allegations are denied in the answer, and some of them are expressly admitted. While there is no charge of maladministration against the defendant (who came in less than a month before the act abolishing the office), the legislature may well have thought that a system which admitted of that method was not businesslike or safe, and, if they did, it was in their power to abolish it, and it is not for the courts to forbid it, and take the responsibility of restoring that state of things.

If the defendant is protected in a 4-years term, unless the penitentiary itself is abolished, then, as has already been pointed out, a legislature, which is elected to sit 60 days, may fill all the institutions of the state, which from their nature cannot be abolished, with officers holding, not 4 years, but 10 years, or 25 years, or 50 years, or for life, and thus tie the hands of future generations, and prevent any betterment, as is attempted by this act, in the mode of administering our great state institutions. Nay more, it may elect boards for life, and provide that they may themselves, from time to time, fill vacancies in their own body,—a right which would be a part of their offices,—and thus take the government of the state institutions entirely out of the hands of the people, who will be powerless to free themselves "from the body of this death," through future legislatures. It is true, it may be said that, if the legislature acts thus unadvisedly and extremely, the courts cannot correct its faults. That is true. If the legislature acts unadvisedly, its errors must be corrected, not by the courts, but by the people in the election of subsequent legislatures, and it is not for the courts to limit the corrective process in the hands of subsequent legislatures. If the act of 1897 seemed evil to the people, it was for them to send a legislature here in 1899 to correct it, and if this act of 1899 is not approved by popular opinion a legislature will be sent here in 1901 to change it. The courts have no supervisory power nor veto upon legislation.

The theory of all free government is that the people are to administer their own affairs in their own way. No legislature elected for two years can pass any act whatever which is not revocable by a future legislature, and this is as true when it creates an office as in any other case. When the supreme court of the United States, in an unfortunate hour, held, in the Dartmouth College Case, that a charter of a corporation was not a privilege, but a contract, and therefore irrevocable, the immense, the overshadowing, danger that one

weak or corrupt legislature could bankrupt a commonwealth for all time, and tie the hands of unborn generations, caused every state, including our own, to revert to first principles, by placing in their constitutions the provision that all charters should be revocable at the will of any future legislature. When the decision by the same tribunal of the case of *Chisholm v. Georgia* showed the danger of a state being sued by reason of contracts made by its legislature through unwisdom or corruption, Judge Iredell, of North Carolina, then on the supreme court of the United States, gave the alarm, through his dissenting opinion; and there was forced through, with great promptness, the eleventh amendment to the United States constitution, whereby any future legislature could say whether it would be bound by the acts of its predecessor, by forbidding any suit against a state to enforce rights accruing under any legislation by the state,—an amendment which alone saved North Carolina from the terrible oppression of an indebtedness of \$36,000,000 incurred without consideration in 1868. When the legislature of 1833, without deep foresight into the future, attempted to give immunity from taxation for all time to the Wilmington & Weldon Railroad Company, and the company claimed that thereunder it could build lines into every county in the state, and be everywhere, and forever exempt from contributing, by taxation, to the support of the state, it was this court, in *Railroad Co. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652 (at pages 145-148, 110 N. C., and pages 652, 653, 14 S. E.), which protected the public from a great and lasting injustice by declaring the incompetence of one legislature thus to bind future generations, and thus placed the vast property of that corporation on the tax list,—a decision which was affirmed by the supreme court at Washington. In all our sister states it is held that legislative offices are not contracts, but mere agencies of the state, and revocable by the legislature, without any restrictions. *Mechem*, Pub. Off. § 463; 19 Am. & Eng. Enc. Law, 562c; *Black. Const. Law*, 530; *Cooley, Const. Lim.* (6th Ed.) p. 31; and numerous cases cited by each. Our state alone, of the 45, modifies this (*Hoke v. Henderson*, supra); but only to the extent that, while the legislature can at will abolish such offices, or reduce the salary or increase the duties, it cannot remove the incumbent while the office is continued,—a modification which has entailed upon this state a large class of litigation which is unknown everywhere else. That case, however, also distinctly holds (bottom of page 21) that "property" in the office is the right to its compensation, and hence in offices without pay the incumbent can be removed, and a new officer installed, though the office be not abolished. It logically follows that, if the incumbent of a paying office is removed while the office is unrepealed, his remedy is not reinstatement in the office, but damages for the loss of his property rights,—“the transfer of the emoluments” of the office, as it is there

styled. As to offices not placed under the protection of the constitution, as to their terms and compensation, the organic law has purposely left them to be made, modified, or unmade, as the people, through their legislature, may deem best for the public interest. Neither *Hoke v. Henderson*, nor any subsequent case, has come within sight or hailing distance of the defendant's contention that an office created by one legislature can, in no exigency, whatever the urgency or the manifest wisdom of the step, be abolished by another, unless the institution to which it is attached is abolished; for this is his naked contention, stripped of its superfluities, if it is true that, inasmuch as essentially the same duties in carrying on the institution must be performed, therefore the office is still in existence. If this be sound doctrine, it is an absolutely new doctrine, and there is a paradise ahead for legislative office holders, who, like Milton's fallen angels, "Can only by annihilating die." If the office is abolished, of course the defendant is entitled to no salary; but, even if the court could hold that the defendant is still in office after the legislature has decreed its abolition, "no money can be drawn out of the state treasury except by authority of law." There is no law allowing the defendant any salary. It is expressly repealed. In *Hoke v. Henderson* it is said that, unless it could be seen that the object was to starve the officer out, the act could not be held unconstitutional; and no such intent is here shown, for if it is true, as defendant contends, that his office has been divided among 21 directors, who are discharging, as he says, the functions he formerly discharged, and he must reassume it from them, then he is only entitled to the salary allowed them as his substitutes; and it would take an expert accountant to state how much of the salary allowed them is for the duties devolved upon them before the abolition of the middleman, and how much is added by reason of dispensing with his services, for it is unquestionable law that the legislature can at will reduce the salary of any officer the reduction of whose compensation is not forbidden by the constitution. In *Hoke v. Henderson* it is further said (15 N. C., at bottom of page 27) that, if the legislature should refuse salaries to officers elected by it, the office remaining still in force, "while such act would be unconstitutional, the courts could give no remedy, but it must be left to the action of the citizens to change unfaithful for more faithful representatives." Even if the court could hold that the removal of the defendant was unconstitutional, it is expressly held in the late case of *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364, that no court could enforce the payment of any salary to him, most especially when, as here, the sovereign, acting through the legislature, has forbidden it. This is true as to an admittedly valid state bond, under the great seal, which is certainly of as high dignity as a salary which the legislature has expressly forbidden to be paid, and which, therefore, the treasurer

can have no power to pay, and the courts can give him none. He holds the people's money, to be paid out only when the legislature directs. The courts can only issue a mandamus to the treasurer when the statute directs payment, never when the statute is silent, and certainly not when it forbids payment. In *Cotten v. Ellis*, 52 N. C. 545, the court puts its decision expressly on the ground that the office was created by the United States government, and therefore, unlike a legislative office, the state could not abolish it, and added that, if they were to give a mandamus to pay the salary, they were not sure they could enforce it. In *Garner v. Worth*, supra, it is held the court cannot, except where the salary is prescribed by the constitution. In *Bailey v. Caldwell*, 68 N. C. 472, also, the decision rested upon the ground that, the office having been created by the constitutional convention, the legislature could not abolish it.

If the defendant is entitled to any salary, it is an equitable part of that allowed those he asserts are the incumbents placed in his office. It is the new salary, not the old one, to which he is entitled. Besides, if the defendant had been superintendent of a private corporation under a four-years contract, and he was without cause discharged therefrom, no court would reinstate him in office; his remedy would be to recover as damages the salary for the unexpired time, reduced by whatever he made, or ought to have made, at his regular vocation during that time. There is no decision holding that this is not the remedy of a legislative office holder who is evicted illegally. It must be so, for the ground of his right is placed by *Hoke v. Henderson* expressly on contract, and the contract in his favor is only as to the emoluments, and for breach of contract the measure of damages is the same as to an individual and the state; the difference being solely in the procedure, which, in the latter case, must be by petition in the supreme court. The state cannot be at a greater disadvantage than a private corporation or an individual. It is different as to an office created by the constitution, for that does not rest on contract (*Coolley*, Const. Lim., and *Black*, Const. Law, supra), and the legislature is prohibited from meddling with it. But, except where restrained by the constitution, the legislature is all-powerful, as the representative of the people. As was well said by Faircloth, C. J., in *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787 (since cited with approval by Douglas, J., in *Caldwell v. Wilson*, 121 N. C. 470, 28 S. E. 561): "Under our form of government, the sovereign power resides with the people, and is exercised by their representatives in the general assembly. The only limitation upon this power is found in the organic law as declared by the delegates of the people in convention assembled." There is no constitutional inhibition upon one legislature's abolishing an office created by the legislature, except the restraint read into the constitution

by *Hoke v. Henderson*, that, while the legislature can abolish, it cannot give the emoluments of the office to another if it is continued in existence. This rests solely upon the ground that to do so would be a breach of contract. As such, there can logically be no remedy by reinstatement, but simply a proceeding for damages, the measure thereof to be ascertained as in the case of any private individual or corporation. The line of decisions, like *People v. McKee*, 68 N. C. 429, that all appointments to office must be by the governor, was rendered null, and is now obsolete, as to offices created by statute, by virtue of the amendment to the constitution in 1875. *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787. In making laws, the legislature is acting within their exclusive province, and discharging a duty for which they have been elected. It is a cardinal principle that the courts cannot enter the legislative department, and set aside a law they have made, unless it is clearly in conflict with the constitution. "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968. To do more than this would be usurpation by the courts.

On a careful review, it would seem that the ruling of his honor below was in every particular a just and true declaration of the law, under all our previous decisions, to wit: "That the office of the superintendent of the penitentiary created by the act of 1897 has been abolished by the act of January 26, 1899; that said office has not been substantially re-established in another form, nor has its emoluments, powers, and duties been conferred on others, for the purpose of ousting the defendant; that by the act of January 26, 1899, the general assembly has made a radical change in the method of managing and conducting the penal institutions of the state, which it was clearly within the scope and power of the legislative department to do; and that said act creates a corporation, with all necessary and sufficient powers to carry into effect the purpose of the act"; and should be affirmed.

**EFIRD et al. v. PIEDMONT LAND-IMP.
& INV. CO. et al.¹**

(Supreme Court of South Carolina. April 22, 1899.)

INSOLVENT CORPORATIONS — STOCKHOLDERS — LIABILITY FOR UNPAID SUBSCRIPTION — TRANSFER OF STOCK — SET-OFF.

1. In the exercise of its equitable jurisdiction, a court may compel the stockholders of an insolvent corporation to pay assessments on unpaid subscriptions after the appointment of a receiver, though the directors have not refused to enforce such payment.

2. A stockholder of a corporation organized under the general act of incorporation is not liable for unpaid subscriptions after a bona fide transfer of his stock, authorized by 1 Rev. St.

§ 1522, and entered on the corporation's books as required by section 1529.

3. A stockholder of an insolvent corporation cannot set off his claims against the corporation in extinguishment of the amount due from him on his original subscription.

Appeal from common pleas circuit court of Richland county; D. A. Townsend, Judge.

Action by C. M. Efford and another, executors of the will of George W. Lorick, deceased, against C. J. Iredell and the Piedmont Land-Improvement & Investment Company and others, to compel the investment company's stockholders to pay to its receiver a dividend on their unpaid subscription. Judgment for plaintiffs, and defendants appeal. Modified.

The following is a copy of the master's report:

"Hon. W. C. Benet, Presiding Judge Fifth Circuit, Summer Term, 1897: I, John S. Verner, master for Richland county, pursuant to an order of reference, dated November 2, 1895, made by the Hon. I. D. Witherspoon, presiding judge, in which it is ordered that 'the issues, both of law and fact, arising in the above-stated action, be, and the same are hereby, referred to John S. Verner, master of said county, to hear and determine the same.' make the following report:

"This is an action brought by the plaintiffs, as executors of the estate of G. W. Lorick, deceased, for the purpose of having the stockholders of the Piedmont Land-Improvement & Investment Company pay into the hands of a receiver to be appointed by the court the thirty per cent. dividend due by them as subscription to the capital stock of said corporation, which was duly chartered under and by the laws of this state, for the purpose of meeting the liabilities of said corporation to the plaintiffs, as executors, and others who might establish their demands before the court. To this complaint the resident stockholders file their answers, none admitting their liability, while others set up counterclaims, and some denying any liability whatever. All of which will clearly appear by their answers filed in this case. The absent and nonresident stockholders, B. B. Ford, Charles C. Wilson, Charles Ellis, Jr., and Walter M. Graham, were duly served by publication, none of whom answered, except Charles Ellis, Jr., who filed an answer during the reference, in which he set up a counterclaim, which will be hereafter more clearly set forth. On the 2d November, 1895, his honor, Judge I. D. Witherspoon, passed an order referring all the issues of law and fact to me; and under said order I have held several references at my office, in the city of Columbia, S. C., on the 1st day of April and 2d and 8th days of June, 1897, at which the testimony in the case was taken, and is herewith submitted as a part of this report, marked 'Y.' At the hearing of said case, attorneys for several of the defendants filed their stated grounds of demurrer to the complaint, in that it did not state facts sufficient to constitute a cause of action. After a

¹ For opinions on petitions for rehearing, see 32 S. E. 897.

careful consideration of the grounds upon which they are based, I consider them untenable, in view of the allegations of the complaint, and therefore hold the complaint sufficient, and overrule the said motion.

"My findings of fact are as follows: (1) That the defendant corporation was duly incorporated, under the general incorporation law of 1886, by a charter from the secretary of state. (2) That books of subscription to the capital stock of said corporation were regularly opened in the city of Columbia on the 19th day of March, 1888, and that the amounts subscribed by the persons indicated in paragraph 3 of the complaint are correct. (3) That the subscribers and stockholders of said corporation met and organized the same by the adoption of a constitution and by-laws, and the election of a president, directors, and all other necessary officers, in the city of Columbia, on the 20th day of March, 1888. (4) That the subscription to the capital stock was made upon the condition that twenty per cent. should be paid in at once, and that the directors should call for the balance in such installments as would be necessary. (5) That the directors of said corporation from time to time levied assessments upon the stockholders, until seventy per cent. thereof had been levied and paid in. (6) That on the 30th day of December, 1892, the board of directors of said corporation issued a call for the remaining thirty per cent. due upon said subscription, a portion of which was paid in by several subscribers, but, upon failure of others to pay, the amount so paid in was returned to them, and that the directors have failed and neglected to collect the same. (7) On the 19th day of May, 1888, the defendant corporation executed its bond to the said George W. Lorick, obligating itself to pay to him the sum of \$4,786.25 on or before the 19th May, 1889, with interest from date, and a like sum on or before the 19th day of May, 1890, with interest from date, and a like sum on or before the 19th day of May, 1891, with interest from date, and, to secure payment of the same, executed and delivered a mortgage on a tract of land in Lexington county. (8) In May, 1892, said G. W. Lorick brought an action in foreclosure against the defendant corporation, in Lexington county, for the sum of \$8,772.59 and costs, upon which he obtained a judgment at the September court for said county, on the 24th day of September, 1892. (9) That in November, 1893, G. W. Lorick died, and the plaintiffs in this action duly qualified as his executors a short time thereafter, and are such now. (10) That the lands covered by the said mortgage were duly sold under said order of foreclosure, and the proceeds credited upon said mortgage, and the report of sales confirmed on the 29th September, 1894, which order embraced permission to the plaintiffs, as executors, to enter up judgment against the defendant corporation for the balance,—the sum of \$3,804.94. (11) That the said judgment was duly entered up on the

26th January, 1895, execution duly lodged, and the sheriff of Lexington returned the same nulla bona May 15, 1895. (12) I find that B. B. Ford originally subscribed five shares to the capital stock of said corporation, paid in \$350, afterwards surrendered his certificate of stock, which was canceled by the corporation on the — day of —, and a new certificate of stock was issued to F. H. Hyatt on the — day of —, who surrendered his certificate on the 28th day of May, 1894, and which was canceled by the said corporation, and a certificate issued to W. J. May on the 28th of May, 1894, who now holds the same. (13) That R. S. Des Portes originally subscribed for twenty shares of the capital stock of said corporation. On the 2d day of May, 1889, he surrendered his certificate for the said twenty shares, which was canceled by the said corporation, and upon the same day a certificate was issued to R. S. Des Portes for fifteen shares, and to W. H. Lyles a certificate for five shares, which was sold to him by R. S. Des Portes, and said Lyles now holds the same; that on the 20th day of June, 1889, R. S. Des Portes surrendered his certificate for fifteen shares to said corporation, which was canceled by said corporation, and a certificate for ten shares was issued to R. S. Des Portes, and five shares to John T. Sloan, Jr., sold to him by R. S. Des Portes, and said Sloan now holds the same; that on September —, 1890, R. S. Des Portes, through T. J. Gibson, a broker, sold to C. J. Iredell his ten shares of stock, which stock was surrendered to the company and canceled, and ten shares were issued to C. J. Iredell on October 3, 1890. (14) That Godfrey Lenphart subscribed five shares to the capital stock of said company; that his executors sold the same at public auction, in the city of Columbia, on the 4th day of December, 1893, to John T. Sloan, Jr., to whom the same was on that day transferred, and who is now the owner and holder of the same, but which has never been transferred on the books of the said company to said Sloan. (15) That Dr. A. N. Talley originally subscribed ten shares to the capital stock of said corporation, and on October 3, 1890, he surrendered the same, which was canceled by the corporation, and a certificate for ten shares issued to C. J. Iredell. (16) That W. G. Childs originally subscribed for six shares, and on October 17, 1890, he surrendered his certificate for the said six shares, which was canceled by the corporation, and a certificate for six shares was issued to Martin Stork. (17) That W. A. Clark originally subscribed for six shares of the capital stock, and on July 27, 1892, he surrendered his certificate for six shares, which was canceled by the said corporation, and a certificate issued for six shares to G. W. Lester. (18) Certificates for all other stock subscribed, as set forth in paragraph 3 of the complaint, were duly issued to the subscribers thereof, who are now the owners and holders thereof, except that E. W. Screven subscribed for ten

shares, which subscription was assumed by James Woodrow, and to whom the stock was issued for ten shares, who now holds the same. (19) The following claims have been offered in evidence and proven before me as existing valid claims against said defendant corporation: (a) Judgment of C. M. Efrid and H. A. Lorick, as executors of G. W. Lorick, against the Piedmont Land-Improvement & Investment Company for \$8,604.94, with interest from 26th January, 1895. (b) Judgment of the Commercial Bank against the Piedmont Land-Improvement & Investment Company for \$3,111.96, with interest from August 1, 1892, less the following payments: \$900, which judgment was assigned by the Commercial Bank to the Central National Bank, and by it to George S. Mower, who holds the same, for the benefit of J. H. Counts, $\frac{5}{95}$; M. A. Carlisle, $\frac{10}{95}$; John T. Sloan, Jr., $\frac{15}{95}$; James Woodrow, $\frac{10}{95}$; Thomas T. Moore, $\frac{10}{95}$; H. C. Moseley, $\frac{10}{95}$; W. A. Moseley, $\frac{10}{95}$; J. M. Wheeler, $\frac{10}{95}$; W. H. Lyles, $\frac{5}{95}$; George S. Mower, $\frac{10}{95}$. (c) George S. Mower, \$100 for services, and \$2 paid for dower of Mrs. Dominick, for benefit of defendant corporation. (d) \$146.75, with interest from the 15th November, 1895, as follows: J. H. Counts, $\frac{5}{95}$; M. A. Carlisle, $\frac{10}{95}$; John T. Sloan, Jr., $\frac{15}{95}$; James Woodrow, $\frac{10}{95}$; Thomas T. Moore, $\frac{10}{95}$; H. C. Moseley, $\frac{10}{95}$; W. A. Moseley, $\frac{10}{95}$; J. M. Wheeler, $\frac{10}{95}$; W. H. Lyles, $\frac{5}{95}$; George S. Mower, $\frac{10}{95}$. (e) Note of defendant corporation for \$749.18, with interest from the 2d day of June, 1894, to Brown & Moseley, and by them assigned to J. M. Wheeler, H. C. Moseley, and W. A. Moseley, in equal proportions, who are now the owners and holders thereof. (f) Open account of M. A. Carlisle against the defendant corporation for \$655.64, services. (g) Open account of John T. Sloan, Jr., against the defendant corporation, for services, in the sum of \$155.33%. (h) Open account of Charles Ellis, Jr., against the defendant corporation, for services rendered, \$325. (20) That the defendant corporation is insolvent, and that there are no funds out of which the debts of the said corporation can be paid, except the balance of the thirty per cent. due by the stockholders upon their original subscription to the capital stock of said corporation. (21) The sale of the certificates of stock by B. B. Ford, R. S. Des Portes, A. N. Talley, W. G. Childs, and W. A. Clark were made in the mode prescribed by the by-laws of the company, under the authority of its charter, was bona fide and in the usual course of business trade, and not collusive, and the transferrors retain no interest whatever in the stock then transferred by them.

"My conclusions of law are: (1) That B. B. Ford, R. S. Des Portes, Dr. A. N. Talley, W. G. Childs, and W. A. Clark are not due the corporation or the creditors anything further upon their original subscription; and I recommend that the complaint be dismissed,

as to them, with costs. (2) That F. H. Hyatt, the purchaser of the Ford stock, having transferred his stock to W. J. May after the call by the directors for the thirty per cent. still due, and notice to him thereof, he is liable for the thirty per cent. (3) That the certificate held by the executor of Godfrey Leaphart was sold to John T. Sloan, Jr., after the call was made by the directors, and notice to them thereof, and his estate is therefore liable for the thirty per cent. This said stock was never transferred to said Sloan on said books. (4) That Martin Stork, who bought the stock of W. G. Childs before the call of the directors, and also G. W. Lester, who before said call bought the stock of W. A. Clark, and W. H. Lyles and John T. Sloan, Jr., both of whom bought each five shares of R. S. Des Portes before the call, and Mrs. Emma J. Anderson, who bought the R. M. Anderson stock before the call, are liable for the thirty per cent. (5) That the following original subscribers are liable for the thirty per cent. upon the amounts of their subscription: Milton A. Carlisle, 10 shares, \$1,000; Martin Stork, 5 shares, \$500; George S. Mower, 10 shares, \$1,000; Charles Ellis, Jr., 10 shares, \$1,000; Thomas T. Moore, 10 shares, \$1,000; J. L. Mimnaugh, 10 shares, \$1,000; G. Leaphart, estate, 5 shares, \$500; John S. Houghson, 10 shares, \$1,000; John T. Sloan, Jr., 10 shares, \$1,000; John A. Crawford, trustee, 5 shares, \$500; D. Crawford & Sons, 5 shares, \$500; O. O. Wilson, 5 shares, \$500; Mrs. Susan E. Porcher, 10 shares, \$1,000; J. H. Counts, 5 shares, \$500; H. C. Moseley, 10 shares, \$1,000; J. M. Wheeler, 10 shares, \$1,000; W. A. Moseley, 10 shares, \$1,000; James Woodrow, 10 shares, \$1,000. The following purchasers of stock are liable for the thirty per cent. upon their stock: F. H. Hyatt, 5 shares, \$500; Martin Stork, 6 shares, \$600; G. W. Lester, 6 shares, \$600; W. H. Lyles, 5 shares, \$500; John T. Sloan, Jr., 5 shares, \$500; Mrs. Emma J. Anderson, 1 share, \$100. (6) The defendants George S. Mower, J. H. Counts, M. A. Carlisle, John T. Sloan, Jr., James Woodrow, Thos. T. Moore, H. C. Moseley, W. A. Moseley, J. M. Wheeler, W. H. Lyles, and Charles Ellis, Jr., set up in their answer various claims against the defendant corporation in which they are stockholders; and they ask that they be allowed as counterclaims against any amount that may be found due by them to said corporation, or creditors thereof. After a careful consideration of the law in reference thereto, I have concluded, and so find, that these creditor stockholders are not entitled to set up these demands held by them as a counterclaim against any liability due by them to the said corporation or its creditor, and find that they are merely creditors of the corporation, and that they must pay in full the thirty per cent. due upon their subscription, and must then set up their claim against the corporation as any ordinary creditor. I therefore recommend that a receiver be appointed to collect the balance due

upon the stock, as hereinbefore indicated, of such of the stockholders as are not parties to this action, and to do and perform such acts as he may by this court be directed, and that there be judgment herein against the defendant stockholders who have been held liable for the amounts as hereinbefore indicated, and that they be required to pay the same to the master for distribution, and that the master be instructed to call in, in the usual way, all of the creditors of the said corporation, and that he hear and determine all questions as to the priority of the claims established before him. J. S. Verner."

John T. Sloan, Wm. H. Lyles, R. W. Shand, W. H. Lyles, J. S. Muller, and Abney & Thomas, for appellants. Meetze & Muller, for respondents.

GARY, A. J. The facts of this case are fully set forth in the report of the master, which will be set out by the reporter. The said report was confirmed by the circuit court, except in the following particulars, to wit: (1) The first, second, fourth, and latter part of the fifth conclusions of law were reversed; and (2) it was ordered that the report be "amended by including in said finding of original subscribers liable for the thirty per cent. upon the amounts of their subscription the following: C. J. Iredell, 20 shares, \$2,000; W. H. Gibbes, 10 shares, \$1,000; Walter M. Gorham, 10 shares, \$1,000." The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, inasmuch as it alleges that an assessment for the unpaid installment of subscription to the capital stock of said company was made, and does not allege that the board of directors of said company had refused to enforce the same, or were derelict in that regard, and that said payment could only be enforced by the corporation itself, or by a receiver duly appointed. Some of the defendants withdrew the demurrer, but others insisted upon it.

The first question that will be considered is whether there was error in overruling the demurrer. The return of nulla bona on the execution shows that the corporation was insolvent. *Parker v. Bank*, 53 S. C. 583, 31 S. E. 673. It is not necessary to cite authorities to sustain the principle that under such circumstances the court, in the exercise of its equitable jurisdiction, will take control for the purpose of winding up the affairs of the insolvent corporation.

The next question that will be considered is whether there was error in deciding that the original subscribers who transferred their shares of stock are liable for the unpaid subscription. This corporation was organized under the general act of incorporation. In prescribing the powers of such corporations, section 1522, 1 Rev. St., provides as follows: "Among the powers of such bodies corporate

shall be the following: * * * To render the share or shares of the stockholders transferable, and to prescribe the mode of making such transfers." Section 1529, 1 Rev. St., provides that "no transfers of stock shall be valid, except as between the parties thereto, until the same shall have been regularly entered upon the books of the company so as to show the name of the person, by whom and to whom the transfer is made, the number and other designation of the shares and the date of the transfer." The twenty-first finding of fact by the master was not reversed by his honor, the circuit judge, although the conclusion of law based thereon was reversed. The plain intent of the law was that in the absence of fraud or collusion, and upon compliance with the requirements as to transfers of shares of stock, the subscriber would not thereafter be liable for his unpaid subscription. This liability devolved upon the transferee of the shares of stock. The circuit judge was therefore in error when he decided otherwise.

The next question that will be considered is whether there was error in refusing to allow certain stockholders to set off their claims against the corporation in extinguishment of the amounts due by them upon their original subscription. There is no statute conferring such right, and it is only necessary to cite an illustration to show how inequitable this rule would be: Suppose every stockholder of an insolvent corporation had a claim against it equal to the amount of his unpaid subscription, and that there were other creditors holding claims to a much larger amount than those held by all the stockholders. If the stockholders could set off their claims against the amounts due by them upon their unpaid subscription, no other creditor would get a cent upon his claim. This would give a preference to those whose acts caused the insolvency of the corporation, over those who had no control in its management, and were in no respect chargeable with its failure. The case of *Nettles v. Marco*, 33 S. C. 47, 11 S. E. 595, is relied upon as authority for the proposition that the right of set-off should be allowed. The facts of that case were quite different from those in this case. In that case the advances were made by Marco, a stockholder, with the knowledge and approval, and for the benefit, of the corporation; but the principal reason why he was not compelled to pay the amount he subscribed was because the directors, who were clothed with authority for that purpose, in good faith released him from any further payments on his subscription.

These views practically dispose of all the exceptions. It is the judgment of this court that the judgment of the circuit court be modified in the manner hereinbefore indicated, and that the case be remanded to the circuit court for further proceedings.

KINGMAN et al. v. LANCASHIRE INS. CO.
(Supreme Court of South Carolina. April 18, 1899.)

INSURANCE — ACTION ON POLICY — FORFEITURE — WAIVER — ESTOPPEL — INSTRUCTIONS — APPEAL.

1. The production of the inventory of a stock of goods, taken before the issuance of a policy of insurance thereon, is not a condition precedent to recovery under the policy, and need not be affirmed in plaintiff's pleading in an action to recover for a loss.

2. A forfeiture does not make a policy of insurance void ipso facto, but is ground for avoidance, at the option of the insurer.

3. A waiver of a forfeiture under a policy of insurance need not be pleaded in an action to recover for a loss; but, if defendant pleads a forfeiture, evidence of waiver is admissible.

4. A waiver of a forfeiture under a policy of insurance does not need a separate consideration for its support.

5. An insurance company can waive a breach of condition of the insurance contract by its acts, after knowledge of the breach.

6. An insurance company is estopped to deny an intention to waive a breach of a condition of its policy by such conduct, after knowledge of the breach, as puts the insured to trouble and expense, under the belief that the company regards its policy as still valid.

7. In an action on a policy of insurance a request to charge that "the jury are instructed that, unless they find that the insurance company intentionally recognized the validity of the policy, after its knowledge of the fact that the plaintiff had failed to perform the warranties contained in the iron-safe clause, the plaintiff cannot recover," is faulty, in assuming that plaintiff had failed to perform the warranties in the iron-safe clause.

8. A request to charge may be refused, where it has been substantially complied with in the charge already made.

9. Where defendant in an action on an insurance policy to recover for a loss assumes that there is evidence of a waiver of a forfeiture, it cannot object on appeal to a charge which assumes that there is such evidence. Its remedy, if there is no such evidence, is by motion for nonsuit or new trial, and appeal from a refusal to grant such motion.

10. In an action on an insurance policy to recover for a loss, the court charged: "The plaintiffs contend that by certain acts of the insurance company when the fire occurred they waived their rights to insist upon a forfeiture. It is for you to say whether those acts are sufficient to amount to a waiver. It is for you to say whether the defendant did anything by which you can conclude that they intended to waive their right to insist on the forfeiture clause of that contract." *Held*, that the charge was not obnoxious to Const. art. 5, § 28, forbidding a charge in respect to matters of fact.

Appeal from common pleas circuit court of Sumter county; Ernest Gary, Judge.

Action by Eva C. Kingman and others against the Lancashire Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. B. Stuckey and C. M. Hurst, Jr., for appellant. Purdy & Reynolds, for respondents.

JONES, J. This is an action on a fire insurance policy on a stock of merchandise, and is here on appeal from a judgment in favor of the plaintiff. The special defense set up by the defendant company was forfeiture un-

der the iron-safe clause of the policy. Under the evidence, this defense was narrowed down to the question of forfeiture for failure to produce for examination the inventory of the stock taken previous to the inventory which was made within a month from the issuance of the policy. This last-mentioned inventory and also the books of the store were all produced for examination before the adjuster; but the preceding inventory taken about a year before, not being in the safe at the time of the fire, was burned, and so could not be produced. Plaintiff sought to overcome this defense by proof of waiver or estoppel. The grounds of appeal relate almost exclusively to the matter of waiver.

1. The first four exceptions relate to the admissibility of evidence to show waiver. Appellant's contention being that plaintiff, having failed to allege waiver, could not be allowed to prove it. The particular evidence admitted over appellant's objection was to the effect that the adjuster of the defendant company, after the loss, caused the insured to take an inventory of the goods that were saved from the fire, and that the "proofs of loss" sent to the company were retained by it until produced on the trial. The appellant in this branch of the case assumes that this evidence tended to establish waiver, and we will so consider it, since otherwise it would be useless to discuss these exceptions. This question is practically settled against appellant by the following cases: *Sample v. Insurance Co.*, 42 S. C. 14, 19 S. E. 1020; *Copeland v. Assurance Co.*, 43 S. C. 26, 20 S. E. 754; *Carpenter v. Accident Co.*, 46 S. C. 546, 24 S. E. 500. These cases show that forfeiture is matter of defense, and that plaintiff may show waiver in rebuttal of evidence of forfeiture, although in these cases waiver has not been pleaded. Appellant contends, however, that section 183 of the Code leads to a different conclusion. That section reads: "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance." In this case the complaint alleged the performance of all conditions of the policy in the general terms of section 183, and the answer contained a denial of such allegation. In the first place, we do not think the production of the inventory, taken previous to the issuance of the policy, after a loss, is a condition precedent, which is some act or event necessary to make the contract take effect. It is rather a condition subsequent, which is intended to defeat a contract, which, being matter of defense, need not be noticed in plaintiff's pleading. A forfeiture does not make a policy of insurance void ipso facto. It is merely a ground upon which the policy is voidable at the option of the insurer. Fur-

thermore, if forfeiture is matter of defense, as the cases cited establish, then, under section 174 of the Code, such defense, not constituting a counterclaim, and being matter in avoidance, need not be replied to by plaintiff, unless required so to do by the court, on defendant's motion. *Davis v. Schmidt*, 22 S. C. 123. Then, in reason, evidence of waiver or estoppel ought to be allowed in reply to evidence to show forfeiture; for to show one estopped to assert forfeiture for nonperformance is, in effect, to show performance.

2. The fifth exception alleges error in overruling the motion for nonsuit, which was made upon the grounds that, no waiver having been alleged by the plaintiff, it was error to admit, over defendant's objection, any evidence tending to show waiver, and that the plaintiff had failed to prove compliance with the terms of the policy, particularly the iron-safe clause. This exception is disposed of by what has already been said, to the effect that the testimony was competent. Here, again, it will be noticed appellant in its exception concedes that there was evidence tending to establish waiver. Besides, the cases cited above show that nonsuit would have been improper. *Gandy v. Insurance Co.*, 52 S. C. 227, 29 S. E. 655.

3. The sixth exception alleges error in refusing defendant's first request to charge as follows: "The jury is instructed that the plaintiffs, having alleged that they have fulfilled all the conditions of the insurance on their part, cannot recover by proving, or attempting to prove, a waiver of the performance of such conditions, or one of them, by the insurance company." This exception cannot be sustained for reasons already stated.

4. The seventh ground of appeal alleges error in refusing defendant's third request to charge as follows: "The jury is instructed that the plaintiffs cannot recover by reason of a waiver of the warranties contained in the iron-safe clause, unless the jury finds that the conduct relied upon as constituting such waiver is supported by a valuable consideration, such waiver being itself a new contract." This request to charge was properly refused. Waiver of a forfeiture does not rest upon a new contract upon consideration. The contrary has been asserted, but is not now recognized as sound. In the case of *Titus v. Insurance Co.*, 81 N. Y. 410, overruling *Ripley v. Insurance Co.*, 30 N. Y. 136, the court said: "It may be asserted broadly that, if in any negotiation or transaction with the assured, after knowledge of the forfeiture, it (the insurer) recognizes the continued validity of the policy, or does acts based thereon, or requires the assured by virtue thereof to do some act, or incur some trouble or expense, the forfeiture is, as matter of law, waived; and it is now settled in this court, after some difference of opinion, that such waiver need not be based upon any new agreement or an estoppel." This statement of the rule in *New York* was indorsed in a later case (*Roby v.*

Insurance Co., 24 N. E. 808), wherein it was held that an insurance company cannot claim a forfeiture for breach of condition known to it, if, after such knowledge, it puts the insured to the expense and inconvenience of furnishing additional proofs. To the same effect is *Grubbs v. Insurance Co.* (N. C.) 13 S. E. 236, and other authorities that might be cited. Provisions for forfeiture in an insurance contract are for the benefit of the insurer, and may be waived at the insurer's option. As stated before, the policy is not void for breach of condition, but merely voidable. If the insurer does not choose to assert a forfeiture, the policy stands by virtue of the original consideration. Waiver does involve the assent of the insurer, since it is "the intentional relinquishment of a known right"; but this intent to relinquish the right to avoid a policy for breach of condition may be evidenced by acts or conduct of the insurer, after knowledge of a breach, recognizing the policy as a valid existing contract, or the insurer may be estopped to deny intent to relinquish its known right by such conduct, after knowledge of the breach, as puts the insured to trouble and expense on the reasonable belief that the insurer regards the policy as valid.

5. The eighth ground of appeal is as follows: "(8) The judge erred in refusing defendant's fifth request to charge, which was as follows: 'The jury is instructed that, unless they find that the insurance company intentionally recognized the validity of the policy, after its knowledge of the fact that the plaintiffs had failed to perform the warranties contained in the iron-safe clause, the plaintiffs cannot recover.'" This request to charge had been fully covered by the circuit judge when he charged as requested in appellant's second and fourth requests to charge, as follows: "(2) The jury are instructed that, if they find that the plaintiffs have failed to fulfill the requirements contained in the iron-safe clause of the policy, then the plaintiffs cannot recover, unless the jury further find that said requirements have been waived by the insurance company." "(4) The jury are instructed that the defendant cannot be held to have waived any requirements in the iron-safe clause, unless the conduct or acts relied upon as constituting such waiver were done after full knowledge on its part of the failure of the plaintiffs to comply with such requirements." The judge had also charged as follows: "Now, I charge you that it is not your province nor mine to make contracts. We [they] litigate what they make, or they contract and we enforce them. That is a part of the contract that they agreed upon, and shall be binding on the plaintiffs, unless you find from the evidence that the defendant company did some act which shows a determination or intention on its part to waive strict compliance with that part of the contract." It is not error to refuse a request to charge which had been substantially met in the charge already made. Besides, this request was faulty in assuming,

as a fact, that the plaintiffs had failed to perform the warranties contained in the iron-safe clause.

6. Omitting the ninth exception, which raises no question that has not already been considered, we will notice the tenth and last exception, as follows: "(10) When the jury, after considerable deliberation, returned to the court room, and announced that it was impossible for them to agree, the presiding judge erred in charging them as follows: 'The plaintiffs contend that by certain acts of the insurance company, when the fire occurred, they waived their right to insist upon a forfeiture. It is for you to say whether those acts are sufficient to amount to a waiver. The question is for you. It is for you to say whether the defendants did anything by which you can conclude that they intended to waive their right to insist on the forfeiture clause of that contract. I hope that you can reach a conclusion in this matter; so retire to your room, and see if you cannot come to a conclusion.' The effect of which charge was to impress upon the minds of the jury that there was evidence from which they could find that there had been a waiver. Whereas the defendant contends that there was no evidence of waiver, and, if there had been, the charge here made was in contravention of section 26 of article 5 of the constitution of South Carolina." This exception must be overruled. Up to this point, appellant has assumed that there was evidence tending to show waiver. If there was no such evidence, appellant's remedy was by motion for nonsuit, after all the evidence was in, or by motion for new trial in the circuit court, and appeal from the refusal of such motion for error of law. There being no such appeal before us, we cannot in a case at law examine the record to ascertain whether there was in fact any evidence tending to show waiver. We find nothing in the charge complained of which is obnoxious to section 26 of article 5 of the constitution forbidding a charge to the jury in respect to matters of fact.

The judgment of the circuit court is affirmed.

BROWN v. ORANGEBURG COUNTY.

(Supreme Court of South Carolina. April 20, 1899.)

CONSTITUTIONAL LAW—OFFICERS—COUNTIES—LIABILITY FOR LYNCHING.

Const. art. 6, § 6, and Acts 1896, p. 213, § 1, providing that where a prisoner is taken from an officer, through his negligence or connivance, and lynched, the officer shall forfeit the office, etc., and that, in all cases of lynching, the county where it takes place, without regard to the conduct of the officer, shall be liable in damages to the estate of deceased, etc., authorizes a recovery against the county whether the one lynched was a prisoner or not.

Appeal from common pleas circuit court of Orangeburg county; James Aldrich, Judge.

Action by Isaac Brown, administrator of

the estate of Lawrence Brown, deceased, against Orangeburg county. There was a judgment for defendant, and plaintiff appeals. Reversed.

Raysor & Summers and J. B. McLauchlin, for appellant. Wm. C. Wolfe, Henry H. Brunson, and Chas. G. Dantzer, for respondent.

GARY, A. J. The principal question raised by the appeal is whether the presiding judge was in error in directing the jury to find a verdict in favor of the defendant on the ground that section 6, art. 6, of the constitution, and the act of the legislature entitled "An act to prevent lynching in this state" (Acts 1896, p. 213), conferred upon the plaintiff no right to recover damages against the defendant, as the person lynched was not a prisoner.

Section 6, art. 6, of the constitution is as follows: "In case of any prisoner lawfully in the charge, custody or control of any officer, state, county or municipal, being seized and taken from said officer through his negligence, permission or connivance, by a mob or other unlawful assemblage of persons, and at their hands suffering bodily violence or death, the said officer shall be deemed guilty of a misdemeanor, and upon true bill found, shall be deposed from his office pending his trial, and upon conviction shall forfeit his office, and shall, unless pardoned by the governor, be ineligible to hold any office of trust or profit within this state. It shall be the duty of the prosecuting attorney within whose circuit or county the offense may be committed to forthwith institute a prosecution against said officer, who shall be tried in such county in the same circuit, other than the one in which the offense was committed, as the attorney general may elect. The fees and mileage of all material witnesses both for the state and the defense, shall be paid by the state treasurer in such manner as may be provided by law: provided, in all cases of lynching when death ensues, the county where such lynching takes place shall, without regard to the conduct of the officers, be liable in exemplary damages of not less than two thousand dollars to the legal representatives of the person lynched: provided, further, that any county against which a judgment has been obtained for damages in any case of lynching shall have the right to recover the amount of said judgment from the parties engaged in said lynching in any court of competent jurisdiction." The act of the legislature is as follows:

"Section 1. That in the case of any prisoner lawfully in the charge, custody or control of any officer, state, county or municipal, being seized and taken from said officer through his negligence, permission or connivance, by a mob or other unlawful assemblage of persons, and at their hands suffering bodily violence or death, the said officer shall be deemed guilty of a misdemeanor, and upon true bill found

shall be deposed from his office pending his trial, and upon conviction shall forfeit his office, and shall, unless pardoned by the governor, be ineligible to hold any office of trust or profit within this state. It shall be the duty of the prosecuting attorney within whose circuit or county the offense may be committed to forthwith institute a prosecution against said officer, who shall be tried in such county in the same circuit, other than the one in which the offense was committed, as the attorney-general may elect. The fees and mileage of all material witnesses, both for the state and the defense, shall be paid by the state treasurer on a certificate issued by the clerk and signed by the presiding judge, showing the amount of said fee due the witness.

"Sec. 2. In all cases of lynching when death ensues the county where such lynching takes place shall, without regard to the conduct of the officers, be liable in exemplary damages of not less than two thousand dollars, to be recovered by action instituted in any court of competent jurisdiction by the legal representatives of the person lynched, and they are hereby authorized to institute such action for the recovery of such exemplary damages. A county against which a judgment has been obtained for damages in any case of lynching shall have the right to recover the amount of said judgment from the parties engaged in said lynching in any court of competent jurisdiction, and is hereby authorized to institute such action." Acts 1896, p. 213.

The intention of the constitution was to prevent the crime of lynching in two ways: (1) By visiting upon the officers of the law the penalties therein mentioned, when a prisoner lawfully in their custody was lynched by a mob through their negligence, permission, or connivance; and (2) to induce the co-operation of the taxpayers in preventing the lynching, in order that their county might not become liable to the penalty by way of exemplary damages, of not less than \$2,000, to the legal representatives of the person lynched. The lynching of a prisoner, and of one not in the custody of the law as such, is murder, in both cases. It would therefore at least seem strange if the framers of the constitution were careful to provide, in the organic law of the state, a remedy for preventing the lynching of a prisoner, and remained silent as to the remedy in all other cases of lynching. The constitutional provision, however, is not confined to the lynching of prisoners. The words, "without regard to the conduct of the officers," when considered in connection with the evil which the constitution intended to remedy, must be construed to mean, "without reference to what has been said in regard to the conduct of the officers," or, in other words, without reference to other provisions of the section. They were inserted for the purpose of showing that the proviso was to be construed independently, and without regard to what preceded it. The word "provided" is omitted in the act, and this

fact shows that the legislature gave to the words, "without regard to the conduct of the officers," the construction which this court has placed upon them. It must be remembered that many of those who were members of the constitutional convention were likewise members of the general assembly when said act was passed. While, of course, a construction placed upon the constitution by the legislative branch of the government would not be binding upon the courts, still in this case it is well worthy of consideration. The act intended to make the county liable for damages in those cases only which fall within the provisions of the constitution, and it has correctly construed the constitution to make a county liable for damages when the person lynched was not in the custody of the law as a prisoner. This renders unnecessary the consideration of the interesting question whether the legislature did not have the power, independently of the constitutional provision, to pass the act hereinbefore mentioned. It has been held that statutes making a community liable for damages in cases of lynching, and giving a right of recovery to the legal representatives of the person lynched, are valid, on the ground that the main purpose is to impose a penalty on the community, which is given to the legal representatives, not because they have been damaged, but because the legislature sees fit thus to dispose of the penalty. Such statutes are salutary, as their effect is to render protection to human life, and make communities law-abiding. But, as we have said, our conclusion renders unnecessary a consideration of this question.

It is not necessary to consider the exceptions in detail, as our views dispose of the main question in the case. It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

WILLIAMSON v. EASTERN BUILDING & LOAN ASS'N OF SYRACUSE, N. Y.

(Supreme Court of South Carolina. April 18, 1899.)

DISSOLUTION OF ATTACHMENT—BUILDING ASSOCIATION—CONTRACTS—CONSTRUCTION—TORT—LIABILITY OF ASSOCIATION—PROPERTY SUBJECT TO ATTACHMENT.

1. On a hearing of a motion to dissolve an attachment, the court may decide whether plaintiff has a cause of action, but the merits of the cause cannot be considered.

2. Where an agreement between a building and loan association and a member concerning the time for maturing shares of stock is in conflict with the association's by-laws, the agreement will prevail.

3. The construction of a circular issued by a building and loan association is for the court.

4. Where the construction of a contract is rendered doubtful by its language, the interpretation by the parties should be considered.

5. A circular issued by a building and loan association contained the statements that its certificates were "guaranteed to mature in 6½

years," and "stock matures in 78 months." *Held*, that the association represented through this circular that its shares matured at a fixed and definite time.

6. Whether a subscriber of the stock of a building and loan association waives his right to payment according to his contract by becoming a borrower cannot be considered on the hearing of a motion to dismiss an attachment in an action by the subscriber against the association, as it concerns the merits of the action.

7. Where a building and loan association knowingly enters into an ultra vires agreement with a subscriber, by which it agrees to mature his stock in a fixed time, and thereby induces him to part with his money in payment of his stock, the association commits a tort for which it will be liable.

8. The plea of ultra vires cannot be interposed by a building and loan association while it retains the benefits of the ultra vires contract.

9. Code Civ. Proc. § 253, authorizes the attachment of the debtor's "personal estate," and section 445 states that "the words 'personal property' as used in this Code of Procedure include money, goods, chattels, things in action and evidences of debt." *Held*, that debts evidenced by notes and bonds are subject to attachment.

10. After the passage of 1 Rev. St. c. 45, imposing conditions upon foreign corporations. Act 1897, p. 450, was passed, amending the law relating to attachment, which amendment retained the provisions relating to attachment against foreign corporations. *Held*, that the passage of the law relating to foreign corporations did not repeal the provisions of the Code subjecting to attachment the property of foreign corporations.

Appeal from common pleas circuit court of Darlington county; Ernest Gary, Judge.

Action by Bright Williamson against the Eastern Building & Loan Association of Syracuse, N. Y. From an order dissolving an attachment, plaintiff appeals. Reversed.

The following is the decree of the court below (Gary, J.):

"This was a motion made before me at chambers at Kingstree, on February 21, 1898, for the purpose of dissolving an attachment. The warrant of attachment was issued by the clerk of court in and for the county of Darlington, on January 12, 1898, and it directed the sheriff of said county to attach all the property of the defendant that was in said county, and especially certain debts therein specified, which were claimed to be owing the defendant by certain residents of the said county. The only property attached was the said debts, which were evidenced as follows: Three of them by promissory notes, and two of them by bonds; while all of them were secured by mortgages on real estate. The motion was made on the grounds that the attachment was irregularly and improvidently issued, in that: (1) The property of the defendant cannot be attached as that of a foreign corporation, as it appears from the complaint and affidavit that the defendant is located in this state, doing business therein and under its laws, and that the court could acquire jurisdiction of the defendant by serving process on its resident agent therein named. (2) It is not true that the plaintiff has an existing cause of action, as the debt is not due

and payable. (3) The debts attached are not the subject of attachment.

"The first ground makes the point that the property of the defendant cannot be attached as that of a foreign corporation, because it was located and doing business within this state by virtue of having complied with the terms and conditions of the statute. The warrant of attachment was issued on the facts set forth in the affidavit and the complaint. The latter alleges that the defendant had complied with the statute, and was doing business within the state, and that jurisdiction could be acquired of the defendant by the service of process on the resident agent therein named. Service was accepted by said agent on the 12th day of January, 1898. I do not think that the defendant stands on the same plane with residents of this state and the corporation chartered by its laws. The statute regulating the terms and conditions on which a foreign corporation can locate and carry on business within this state does not expressly or impliedly repeal the attachment act relative to attaching the property of a foreign corporation. As it was not expressly repealed, it could only be repealed by implication, and 'repeals by implication are not favored.' *Scurry v. Coleman*, 14 S. C. 169. Therefore I refuse to dissolve the attachment on the first ground.

"The second ground denies that the plaintiff has an existing cause of action. The right of the plaintiff to bring this action depends upon what is the contract, or, rather, what are the contracts, entered into by the parties. When the plaintiff became a member of the association, in February, 1891, his status was that of an investor; and when he borrowed from the association, in April, 1895, his status was changed to that of a borrower. At the commencement of this action he occupied 'dual positions, each separate and distinct,—(1) that of a member of the corporation, and (2) that of borrower from the corporation.' *Association v. Vance*, 49 S. C. 402, 27 S. E. 274, and 29 S. E. 204; *Endl. Bldg. Ass'n*, § 85. When the plaintiff became a member of the association, one of the by-laws was as follows: 'The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between this association and each shareholder therein.' Article 14, § 1. The plaintiff pledged himself in his application for membership as follows: 'I hereby agree to abide by all the terms, conditions, and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association.' To ascertain what the contract was, the by-laws, terms, and conditions of the certificates, with the application for membership and articles of incorporation, must be read together; but, independently of express agreement, 'the charter is also a contract between the stockholders and the corporation which neither party may violate.' 4 Am. & Eng. Enc. Law (2d Ed.) 1009. 'The law im-

poses upon him, as a duty springing from an implied but binding contract, obedience to the rules of the association.' Endl. Bldg. Ass'ns, § 62. It is expressly provided in the articles of incorporation in existence at the time the plaintiff became a member that 'shares which are not pledged may be withdrawn before maturity.' Charter 1890, par. 12. When the plaintiff borrowed from the association, in April, 1895, he was no longer an investor, but he entered into a separate and distinct contract with the association,—that of a borrower. Association v. Vance, supra; Endl. Bldg. Ass'ns, § 121. At that time the rules of the association were as follows: 'Installment shares which are not pledged may be withdrawn before maturity, and payments shall be made in the order of the applications for withdrawals, but the association shall not be required to pay out on withdrawing and maturing stock more than one-half of the amount received from dues and stock payments in any one month.' Charter 1894, par. 10. In law, the plaintiff's contract as a borrower contains, among other elements, the following: First. 'The member agrees to receive the advancement from the building association, and to allow it for the privilege of the preference a certain stipulated price, premium, or bonus.' Second. 'He undertakes and gives as security in support of the undertaking faithfully to perform to the termination of the society's existence, or the running of a series, all the requirements of the constitution and by-laws relative to stock payments upon and in respect of the shares held by him (which, as a rule, he pledged to the society as collateral security), and to be liable for and discharge all proper dues, assessments, contributions, and charges arising upon them in the same proportion and in the same manner as the rest of the members; and, in addition, to make a fixed periodical payment by way of interest on his loan.' Endl. Bldg. Ass'ns, § 124. The plaintiff pledged his stock to the association as collateral security for the loan. Therefore he cannot withdraw from the association, and consequently the amount borrowed has never been paid, as he has no right to have his stock payment applied to its cancellation. Id. §§ 120, 127, 129. In 1895, after the contract of loan had been made, the articles of incorporation were changed by making a provision for the payment of withdrawals 'in the order of the application for withdrawals.' The plaintiff would have no existing cause of action against the defendant, as there is no money in the treasury to pay him with, even if his stock was not pledged. The above amendment to the articles of incorporation was reasonable and intended for the protection of the association. The New York court of appeals, in construing the statutes of the state under which the defendant was incorporated, held that a like association had the right to make such a change, and it would be binding on all members alike. Engelhardt v. Association (N. Y. App.) 42 N. E. 710; Endl. Bldg. Ass'ns, §§ 141, 142. As the

plaintiff has no existing cause of action, the attachment cannot hold.

"The third ground makes the point that the debts are not the subject of attachment. These debts are evidenced by promissory notes and bonds, and, being so evidenced, they cannot be attached. Burrill v. Letson, 2 Speers, 318. This case follows the custom of London in drawing the distinction between debts that are so evidenced and those that are not. The case of McKelvey v. Railroad Co., 6 S. C. 446, held that a debt due a mechanic for wages could be attached. That case is authority under our Code, giving the right to attach a debt, but the debt in that case was not evidenced by a bond or note. In construing the Code, the court says: 'It is in accordance, too, with the custom of London, by reference to which the attachment laws which have heretofore prevailed in this state have always been construed.' It is ordered and adjudged that the attachment be, and the same is hereby, dissolved, with five dollars cost to the defendant's attorneys, and that the plaintiff pay all other costs incident to this motion."

Boyd & Brown, for appellant. T. H. Spain, for respondent.

GARY, A. J. The appeal herein is from an order dissolving an attachment, which had been issued on the following affidavit: "Bright Williamson, the plaintiff above named, being duly sworn, says: (1) That the defendant above named, the Eastern Building & Loan Association of Syracuse, N. Y., is a corporation duly organized and chartered under the laws of the state of New York, and that the said association is justly and truly indebted to the deponent in the sum of fifteen hundred and sixty-two and $\frac{50}{100}$ dollars, with interest from the 29th December, 1897, as follows: On the — day of February, 1891, deponent, having made application for membership in the Eastern Building & Loan Association of Syracuse, New York, subscribed for and received twenty-five shares under a contract by which he was to pay one dollar per share membership fee, and thereafter seventy-five cents per share, or eighteen and $\frac{50}{100}$ dollars monthly, for seventy-eight months, and upon his so doing the said association was to pay him one hundred dollars for each share sixty days after acceptance of satisfactory proof of such payments. That afterwards, on the 19th of April, 1895, deponent, in accordance with the by-laws, borrowed from the association the sum of nine hundred and thirty-seven and $\frac{50}{100}$ dollars with the understanding and agreement that he would pay as interest the sum of six and $\frac{25}{100}$ dollars each month until the expiration of the said seventy-eight months, when his said loan would be extinguished by deduction from \$2,500, the value of the shares. That deponent paid said membership fees, the aforesaid monthly dues on his stock, and the said monthly interest on his loan until the full expiration of the

said seventy-eight months, and then withdrew from said association, gave notice to the association, furnished the satisfactory proofs of his compliance with his part of said contracts, and made demand for the sum of fifteen hundred and sixty-two and $\frac{50}{100}$ dollars, the same being \$2,500, less \$927.50, the amount of his loan; but that, though sixty days have since elapsed, the said association has failed and refused to pay deponent the said sum of fifteen hundred and sixty-two and $\frac{50}{100}$ dollars. That deponent's said cause of action and its grounds will more fully appear by the sworn complaint in this action, hereto annexed, all of the statements contained in which are true to the knowledge of deponent. (2) That the said association is a foreign corporation. (3) That deponent has commenced an action in this court by issuing the summons hereto annexed against the said association upon the said cause of action." These allegations are substantially the same as those set forth in the complaint, except in the complaint it is alleged: "That by the said contract the time of maturity of the said shares was rendered definite, and the payment of the said one hundred dollars per share upon the said monthly payments being duly made was fixed, and contingent upon no circumstances. That this construction of the contract, before plaintiff made said application for said shares and received the same, was represented to plaintiff by said defendant through its agents and its literature as its true and proper construction, and upon this representation, relying upon the same, and induced by the same, plaintiff signed the said application, received the said certificates, and made payments as required. That plaintiff paid the membership fees aforesaid, and for the full term of seventy-eight months paid to the defendant each month the sum of eighteen and $\frac{75}{100}$ dollars." The plaintiff introduced in evidence a circular issued by the defendant, which, among other statements, contained the following: "For the Investor: This association issues three classes of certificates, designated as 'Installment,' 'Paid Up,' and 'Fully Paid Up,' all of which are guarantied to mature in $6\frac{1}{2}$ years. Amply secured by first mortgage on real estate. Paid-up stock doubles in $6\frac{1}{2}$ years. Fully paid up certificates guarantied quarterly dividends 7 per cent. per annum. For the Borrower: This association has no auction sales, no bidding for loans, and a definite time for repaying a loan. The only association making a contract definite in every particular. Withdrawal value clearly stated, and never less than the amount paid in installments. Stock matures in 78 months. Borrowers know the exact amount required to cancel their mortgage." The sheriff served a copy of the warrant on each of the debtors, with notice designating the debt garnished; and each of the garnishees furnished the sheriff with a certificate admitting the indebtedness claimed, and setting forth its particulars. The other facts

necessary to understand the issues raised are set out in the order of his honor, the circuit judge, which will be reported.

The plaintiff appealed upon exceptions, the first of which is as follows: "(1) The circuit judge erred, it is respectfully submitted, in adjudging that appellant had no existing cause of action when suit was commenced, and in dissolving the attachment on that ground, inasmuch as such judgment was, in effect, a trial and determination of the action on its merits, at chambers, on motion, and upon affidavits; was founded on mistakes and error in the ascertainment and construction of the contract between appellant and respondent, as presented in the affidavit and exhibits before him on the motion; took no notice of a distinct waiver by respondent of the conditions which his honor regarded as inhibiting action on the part of appellant; and was otherwise not sustained by the testimony before him, and the law applicable to the case."

The first question raised by this exception is whether there was error in determining upon motion, at chambers, and upon affidavits, that the plaintiff had an existing cause of action. Section 250 of the Code of Civil Procedure provides that a warrant of attachment may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim, and the grounds thereof, and that the defendant is a foreign corporation. The rule is thus stated in 3 Enc. Pl. & Prac. 79: "The merits of the cause cannot be questioned under an application to dissolve the attachment. The defendant may, however, advance pertinent facts to explain how the transaction out of which the suit originated arose." In a note on that page it is said: "Thus an attachment issued in an action to recover rent has been held subject to discharge on motion, which shows that the rent is not due and unpaid, as alleged in the affidavit, notwithstanding a claim by the plaintiff that such a decision is really upon the merits. *Clark v. Montfort*, 37 Kan. 756, 15 Pac. 899. 'For,' said the court in *Bundrem v. Denn*, 25 Kan. 430, 'while the court cannot inquire into the validity or justice of the cause of action, yet it may inquire into the truthfulness of the grounds of attachment set forth in the affidavit, and, if this inquiry incidentally refers to some of the allegations of the petition, this does not compel the court to refuse consideration of the motion, or suspend the decision until the final trial of the cause.'" It was necessary for the circuit judge to decide whether the plaintiff had a cause of action, and the appellant has failed to specify in what particulars his honor violated the rule in determining this question. We may say, however, that we do not understand that the circuit judge undertook to decide any questions of fact involving the merits of the case, but that he reached his conclusion solely from a construction of the contract and the statute as to attachments.

We will next consider whether there was er-

ror in determining that the plaintiff did not have a cause of action on the ground that his claim was not due and payable. If this question had to be decided solely upon the plaintiff's affidavit, it would undoubtedly appear therefrom that a cause of action exists in favor of the plaintiff against the defendant. The defendant, however, introduced in evidence the charter and by-laws, for the purpose of showing that the shares of stock are far below the value of \$100, and therefore that the said shares have not matured. The agreement alleged in the plaintiff's affidavit and the by-laws present schemes for maturing the shares of stock that are radically different. The provisions of the said agreement and of the by-laws for maturing the shares of stock are repugnant and in irreconcilable conflict. The question is thus presented for this court to decide which shall prevail. In determining this question we will not consider any of the facts in the case that might estop either the plaintiff or the defendant from insisting upon the one or the other of said provisions, as this would involve the merits of the case, but will base our construction on what appears upon the face of the contract and the circular. It is a well-known fact that comparatively few people who become shareholders in such associations are familiar with their by-laws. They rely upon the honesty, integrity, and fair dealing of those who manage the affairs of the association. It is also a well-known fact that the by-laws are frequently intricate, and almost unintelligible to the average shareholder, and that those in charge of the affairs of the association usually become exceedingly expert in the interpretation of them, thus giving the association a decided advantage in the way of information over the shareholders. Public policy, in order to prevent the perpetration of fraud, and to prevent just such a case as we now have before us, in which the plaintiff alleges that he was induced, by the express promises and the literature of the defendant, to part with his money in purchasing its shares of stock, demands that the defendant should not be allowed to elect whether it will be bound by its by-laws or its express agreement as to the time when the shares would mature. These views render unnecessary a consideration of the rule of interpretation discussed in the case of *Bank v. Wilkin* (Wis.) 60 Am. St. Rep. 86 (s. c. 69 N. W. 354), and in the extensive notes to that case, that, when two clauses of a contract are in conflict, the first governs, rather than the last.

The circular will next receive consideration. The construction of a written instrument is a question of law to be decided by the court. This court has the right, therefore, to construe the circular. It unquestionably shows that the defendant interpreted the contract to mean that the shares would mature at a fixed and definite period. It is a well-settled principle that when the construction to be given a contract is rendered doubtful by the language thereof, the interpretation of the con-

tract by the parties themselves is entitled to great weight. *City of Chicago v. Sheldon*, 9 Wall. 50; *Railroad Co. v. Trimble*, 10 Wall. 387; *Steinbach v. Stewart*, 11 Wall. 566; *Lowber v. Bangs*, 2 Wall. 728. Our conclusion as to the proper construction of the contract is in harmony with the interpretation placed upon it by the defendant, and this is an additional reason why the by-laws should not prevail against the express agreement fixing the time when the shares would mature.

The respondent also contends that, even if the shares have matured, the appellant has not a cause of action, because there is no money in the treasury applicable to his claim. At the time the appellant became a shareholder there was no by-law providing that the shares should not be paid at maturity unless there was money in the treasury.

The question whether the appellant waived his right to insist upon the original contract by becoming a borrower involves the merits, and will not be decided in this proceeding.

It is also argued that the agreement fixing a definite time for the maturity of the shares was ultra vires. In the case of *Railway Co. v. McDonald* (Ind. App.) 46 N. E. 1022, it is correctly said by the court: "The general rule is that, where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ultra vires. But, even if the contract was ultra vires, what are the plaintiff's rights? In the case of *Gaslight Co. v. Lansden*, 19 Sup. Ct. 300, the court says: "The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents, who were competent to employ the corporate powers actually exercised. There need be no written authority under seal, nor vote of the corporation, constituting the agency or authorizing the act." In 7 Am. & Eng. Enc. Law (2d Ed.) 837, it is said: "To exempt the corporation from liability in any case, three requisites must concur: The act must be (1) within the authority conferred, (2) without negligence, and (3) in good faith. If the corporation goes beyond or aside from the authority conferred upon it, it will be liable for resulting damage. And it will be equally liable if it fails to follow the mode and observe the essential formalities and restrictions as to time prescribed by the legislature for the exercise of the powers conferred." In 27 Am. & Eng. Enc. Law, 333, the law is thus stated: "It was at one time supposed that private corporations aggregate could not commit torts, and particularly those which involve the ele-

ment of malicious intent; that as the sovereign, in granting rights and powers for lawful purposes, had conferred no power to commit unlawful acts, such acts committed by the corporation's agents must of necessity be ultra vires the corporation, and the individual wrongs of the agents themselves. It is true that every tort committed by a corporation involves an unauthorized exercise of corporate power, but this is no reason why the corporation should not be held responsible for the consequences. However this may be, the doctrine stated above is entirely obsolete, and today corporations are held liable to the same extent and under the same circumstances for the consequences of their wrongful act as natural persons." If the agreement was ultra vires, and the association entered into it knowing it could not perform its part thereof, and thereby induced the plaintiff to part with his money in the purchase of stock, then it was a tort, and the defendant would be liable therefor. Furthermore, even if the agreement was ultra vires, and the defendant could interpose this plea, it would not be allowed to retain the benefits which it derived therefrom; and this would give the plaintiff a cause of action. *North Hudson Mut. Building & Loan Ass'n v. First Nat. Bank of Hudson (Wis.)* 47 N. W. 800. An interesting discussion of this subject will be found in the *Central Law Journal* of March 24, 1899, in which numerous authorities are cited. The exception upon the question just considered is sustained.

The second exception is as follows: "(2) The circuit judge erred in adjudging that the debts attached were not the subject of attachment in this state, because evidenced by notes and bonds, and were not attached, and in dissolving the attachment on that ground; it being respectfully submitted that under the statute law of this state and the construction thereof by our courts such debts were and are subject to attachment, and that those in question in this action, were duly attached." The circuit judge based his ruling upon the case of *Burrill v. Letson*, 2 Speers, 378. The law now of force is in some respects materially different from what it was when that case was decided. In *Tillinghast v. Lumber Co.*, 39 S. C. 497, 18 S. E. 125, the court says: "It must be remembered that an action cannot now, as formerly, be commenced by a writ of foreign attachment, but that now, under the Code, an attachment is merely a provisional remedy in aid of an action, and hence, to make it available, an action must be commenced in regular form." See, also, *Stevenson v. Dunlap*, 33 S. C. 350, 11 S. E. 1017, and *Campbell v. Insurance Co.*, 1 S. C. 158. When the case of *Burrill v. Letson* was decided, the attachment act (8 St. at Large, p. 617) authorized the attaching of moneys, goods, chattels, debts, and books of account of an absent debtor in the hands, power, or possession of any one; while under the present statute the sheriff is required to attach "all the property" of the defendant within the county. Section 253

of the Code of Civil Procedure is as follows: "The sheriff or constable to whom such warrant is directed and delivered shall immediately attach all the real estate of such debtor, and all his personal estate, including money and bank notes, except such real and personal estate as is exempt from attachment levy or sale by the constitution, and shall take into his custody all books of account, vouchers, and papers relating to the property debts, credits and effects of such debtor, together with all evidences of his title to real estate." There are other sections providing for the manner of attaching the different kinds of personal property, and showing that the intention was that all personal property should be subject to attachment, except such as is exempt by the constitution. Section 445 of the Code of Civil Procedure is as follows: "The words 'personal property' as used in this Code of Procedure include money, goods, chattels, things in action and evidences of debt." It is not denied that, if no bonds, notes, or mortgages had been given, the debts evidenced by them would be subject to attachment. The cases of *Nichols v. Briggs*, 18 S. C. 484, *Plyler v. Elliott*, 19 S. C. 257, and *Ballou v. Young*, 42 S. C. 170, 20 S. E. 84, show that the debt itself is something different from the note or mortgage, which are mere securities and evidences of the debt. In the case of *Nichols v. Briggs*, supra, the court says: "It must be kept in mind that there is a difference between the debt itself and the securities for it. The debt is one, but there may be a number of securities of different kinds, personal, real, pledge, mortgage, etc. The note given is only evidence of the debt, and one of the means of collecting; and, if there is a mortgage, that is only another security for the same debt." As the debt is separate and distinct from the evidence of it, and as it undoubtedly is "personal property," it necessarily follows that it is the subject of attachment, although it may be evidenced by securities which the sheriff cannot reduce to possession. The case of *Campbell v. Insurance Co.*, supra, supports this view. This exception is sustained.

The third exception is too general for consideration. The respondent gave notice that it would ask this court, if necessary, to sustain the order of the circuit judge on the following ground: "That the property of the defendant cannot be attached as that of a foreign corporation, as it appears from the complaint and affidavit that the defendant is located in this state, doing business therein, and under its laws; and that the court could acquire jurisdiction of the defendant by serving process on its resident agent therein named, and the circuit judge erred in not so holding." It is contended by the respondent that by implication the laws imposing conditions upon which foreign corporations are allowed to do business in this state repealed the provisions of the Code which subjected the property of foreign corporations to attachment. The laws imposing these conditions will be found in chapter

45, 1 Rev. St., and in Acts 1897, p. 484. The provisions of the Code relative to attachments are set forth in chapter 4 of the Code. After the provisions of chapter 45, 1 Rev. St., were enacted, the legislature passed an act amending sections 248 and 250 of the Code of Civil Procedure, and in said act provided how said sections should read as amended. Acts 1897, p. 450. The retention of the provisions as to attachments against foreign corporations shows conclusively that the legislature did not intend to repeal them. This conclusion is sustained by the case of *Savage v. Association* (W. Va.) 81 S. E. 991.

Respondent, in its argument, contended that the attachment act was in violation of article 14 of section 1 of the constitution of the United States, prohibiting a state from denying to any person the equal protection of the laws. The case of *Blake v. McClung*, 19 Sup. Ct. 165, shows that this would be a very interesting question if it had been passed upon by the circuit judge, but, as he made no ruling upon it, the question will not be considered by the court. It is the judgment of this court that the order of the circuit judge be reversed.

STATE v. SUMMER.

(Supreme Court of South Carolina. April 18, 1899.)

HOMICIDE—MANSLAUGHTER—SELF-DEFENSE—EVIDENCE—OBJECTIONS—WITNESSES—IMPEACHMENT—REASONABLE DOUBT—INSTRUCTIONS.

1. A charge that a reasonable doubt is a strong doubt, based on the testimony, is correct.

2. It is not error to charge that one cannot surround another with circumstances which he knows will be resented by the other, and then mention the fact to him to make him fight, for the purpose of getting an opportunity to kill him under circumstances which might appear sudden and unexpected.

3. The court charged that he is guilty of manslaughter who kills a human being in a sudden heat and passion, on a present provocation legally sufficient to create that sudden heat and passion, which must partially or entirely de-throne the reason, and before he cools or had time to cool. *Held*, that it was not error to say, also, that "some people don't cool, and some don't want to cool," the statement not tending to prejudice the jury.

4. Where the court charged that it is a man's duty to defend himself, and that he is not bound to endanger himself by retreating, nor turn out of his adversary's way, it is not error to charge that, if there is any reasonable, safe way to escape, he ought to do so, rather than take life.

5. Under the constitutional provision forbidding a recital of the evidence, it was harmless to charge, "You must consider the meeting of the parties," the court disavowing reference to the testimony, and expressly basing his remark on the indictment and the arguments.

6. It is not too late to object to the introduction of a witness after he has been offered, accepted by the court, sworn, and partially examined.

7. Defendant sought to justify the killing of deceased by evidence that he was a violent, dangerous man, and so known in the community and by defendant. The state introduced witnesses to prove, in reply, the good conduct of

deceased and his general reputation for peace and order. *Held*, that it was not error to exclude a witness offered by defendant to impeach the general character of state's witnesses, who testified for the first time in reply; the exclusion being within the discretion of the court.

8. The widow of deceased having testified, on cross-examination by defendant, in denial of an imputed act of violence on deceased's part, she could not be contradicted by defendant; the question of the commission of the act being collateral.

Pope, J., dissenting.

Appeal from general sessions circuit court of Lexington county; D. A. Townsend, Judge.

Charles C. Summer was convicted of murder, and he appeals. Affirmed.

Johnstone, Welch & Wingard, for appellant. J. W. Thurmond and Eard & Dreher, for the State.

POPE, J. The defendant, having been convicted of murder, with a recommendation to mercy, and having been duly sentenced, now appeals from the judgment of the court. We will now pass upon these grounds of appeal, 11 in number, in their order.

"(1) Because his honor, the presiding judge, erred in charging the jury as follows: 'A reasonable doubt is a strong doubt, based on the testimony.'" The language of the presiding judge in this connection was: "The state is bound to make out its case beyond a reasonable doubt; that is, before you can convict you must be satisfied beyond a reasonable doubt that the defendant is guilty,—'beyond a reasonable doubt,' remember the words. If there is a reasonable doubt in the mind of any juror you cannot convict. That is the rule that governs the state. A reasonable doubt is a strong doubt, based on the testimony, not on some imaginary matter outside." This court in the case of *State v. Coleman*, 20 S. C. 455, used this language: "We know of no law or practice which would permit this court to hold a circuit judge in error for charging a jury, * * * or for instructing them, that the phrase 'a reasonable doubt,' used in the books, means a 'serious, well-founded, substantial doubt.'" And in the case of *State v. Senn*, 32 S. C. at page 404, 11 S. E. 295, this court said: "It cannot be necessary to do more than repeat what this court said in *State v. Coleman*, 20 S. C. 455, that 'we know of no law or practice which would permit us to hold a circuit judge in error for instructing a jury that the phrase 'reasonable doubt,' used in the books, means a 'serious, well-founded, substantial doubt.'" Substitute the word 'strong' for that of 'serious,' and the cases are identical." This exception, upon the authority of the cases just cited, must be overruled.

"(2) Because the presiding judge erred in charging the jury as follows: 'The law would say you cannot place your enemy, antagonist, or fellow being,—can't surround him,—with such circumstances which you knew he would resent, and then mention it to him,—bring it up to him,—to make him fight, just to get to

kill him under circumstances which might appear to be sudden and unexpected. The law says you cannot do that." While the circuit judge was discussing the crime of manslaughter, after a very careful delineation of the principles of the law governing this phase of homicide, he, rather by way of summing up the law, said: "You see, then, manslaughter is killing without malice, but if the killing was done under circumstances which showed that previous criminal intention existed to bring about the fight, and to get to kill his assailant, the law would say that was murder; you brought that about,"—and then immediately follows the language embodied in this exception. And the charge of the judge on this point has this language, as a part of the paragraph of his charge set out in this exception: "If, although the fight might be sudden, yet it appears that there was a predetermination on the part of the slayer to bring it about, then, if he kills, it is murder, and not manslaughter." The language of the charge sets forth sound, wholesome law so clearly that the jury was obliged to see its force, and, too, it was not subject to any legal objection by the defendant. This exception is overruled.

"(3) Because in charging the jury with respect to manslaughter as being a killing under sudden heat and passion, upon sufficient legal provocation and without time to cool, the presiding judge, in using this language, 'because some people don't cool, and some don't want to cool,' conveyed to the jury the impression made upon his honor's mind by the testimony in the case, and thereby committed an error of law." We cannot agree with the appellant in this exception to the charge of the presiding judge. The language set out in the exception is only a part of what the judge charged in this connection. By reference to the charge, we see the judge was most earnestly endeavoring to bring home to the minds of the jury what manslaughter was. Among other things, he said: "Manslaughter is the unlawful killing of a human being, in sudden heat and passion, upon sufficient legal provocation. Sufficient for what? Sufficient to create that sudden heat and passion. Then you say, 'To what extent does the sudden heat and passion go?' It must go to that extent that the reason is partially or entirely dethroned, the man is not himself, and if he kills, then, for that provocation, and not for some past provocation, if he slays his fellow being just then for that provocation, and not to punish him for something else gone before, and while in that heat and passion, and before he cooled, or had time to cool,—because some people don't cool, and some people don't want to cool,—therefore the law says, if there is legal provocation, and it is sufficient to create such a great heat and passion that reason is partially or entirely dethroned, the man is not himself, and he slays his fellow man before he cooled or had time to cool,—and you must be the judges of that,—and for that provocation, then the law says, 'I am so mindful of the weakness of human

nature that I will not call such killing as that murder; I will call it manslaughter.'" We are unable to see how the language used could prejudice the minds of the jurors against the prisoner. The constitution requires the circuit judge to declare the law. In doing so, he cannot state the testimony. The circuit judge did not mention, directly or indirectly, any part of the testimony. He has declared the law faithfully. The exception is overruled.

"(4) Because the presiding judge erred in charging the jury as follows: 'If there is any reasonable, safe way to escape, the law says he [the defendant] ought to do it, and not take the life of his fellow man.'" The extract is part of a paragraph of the charge. The circuit judge had analyzed the defense and showed in what it consisted. Near the close of the analysis of the law, he said: "The right of self-defense is recognized by the law. A man's duty is to defend himself, and he is not bound to endanger himself by retreating; but, if there is any reasonable safe way of escape, the law says he ought to do that, and not take the life of his fellow man. I don't mean by that he has got to go away from the place because his adversary is there. He is not bound to turn out of his way. But, after the immediate conflict is commenced, it is his duty to retreat from it; avoid taking a man's life; to retire, if he can do so safely, but not bound to do so otherwise, because he has the right to defend himself." We must overrule this exception. See *State v. Trammell*, 40 S. C. 331, 18 S. E. 440.

"(5) Because the presiding judge erred in charging the jury upon the facts as follows: 'You must consider that matter,—consider the meeting of these parties'; thereby intimating to the jury the conclusion of his honor that these parties did meet, and that a matter did take place between them." In his charge to the jury the presiding judge did say: "You must consider the matter,—consider the meeting of these parties. It is claimed they met and had a fight. I cannot say they had a fight. I cannot say they had any trouble at all. It is claimed by the state there was trouble. I gather from the argument and indictment there was trouble. I cannot allude to the testimony. Now, under what circumstances did they meet?" We do not understand, from the trend of the prosecution or defense, as developed in the "case" for appeal, that there was any difficulty as to the time or place of the meeting of the accused and the deceased on the fateful Sunday afternoon when the tragedy occurred. While the provision of the constitution is mandatory upon circuit judges, wherein stating the testimony by them is forbidden, yet there must be some occasion for the provision of the constitution to apply before we can speak in condemnation. Here the circuit judge disowns any reference to the testimony as the basis of his remark to the jury which is complained of. On the contrary, he speaks of it as based up-

on the arguments and the indictment. If error, it was harmless. The fifth exception is overruled.

"(6) Because the presiding judge erred in overruling the defendant's objection, and holding as competent and relevant the testimony of the witness J. H. Shell, detailing certain declarations of the deceased in regard to the fight, made in the absence of the defendant." This exception must be overruled, for it is founded on an unintentional oversight by the appellant of the testimony of the witness Shell: "Witness: Mr. Murdock come to me, and submitted himself. Mr. Johnstone: In the absence of this defendant, it is not competent,—cannot bind this defendant. Solicitor: We are not proving statements; but we can prove whether he surrendered himself, and what— The Court: You can prove what he did, but not what he said. Witness: He did surrender himself to me." The "case" for appeal discloses that the counsel for the appellant had brought out in the cross-examination of this witness, Shell, that the deceased had had, on the day before he was killed, a difficulty with two brothers of the accused; and the witness, being the intendant of the town of Peak, where both difficulties took place, was questioned very closely as to his reasons for not arresting the deceased on Saturday, when the first difficulty took place. The solicitor was anxious, therefore, to show that Murdock, the deceased, one-half hour before he was killed, had surrendered himself to the intendant for the difficulty which occurred on Saturday. We see no error here, and the exception is overruled.

We come now to the seventh, eighth, ninth, and tenth exceptions, and we will consider them in a group: "(7) Because the presiding judge erred in excluding the testimony of Mrs. Moss, offered by the defendant to impeach the character and credibility of certain witnesses in behalf of the state, who, for the first time, testified in reply. (8) Because the presiding judge erred in not ruling that the objection to the right to introduce Mrs. Moss as a witness came too late, the objection not having been raised until after said witness had been offered for defense, and accepted by the court, sworn, and partially examined. (9) Because the presiding judge erred in not ruling that the solicitor, in failing to raise the objection to the introduction of Mrs. Moss as a witness at the time this witness was offered by the defendant, and before she was sworn, had waived the right to object to the witness testifying. (10) Because the presiding judge erred in excluding Mrs. Moss as a witness after she had been sworn and partially examined."

In order that we may understand how this matter covered by these exceptions arises, it will be better to copy herein what occurred in the circuit court when the question was presented. After the state closed its reply, the defense introduced and swore Mrs. Moss,

when the following took place, to wit: "Testimony for Defense in Reply. Mr. Johnstone: Mrs. Moss will please take the stand. Mrs. Moss, sworn, says: By Mr. Johnstone: You are the mother of Mrs. Murdock? A. Yes, sir. Q. Do you remember on one occasion when her child— Mr. Efrid (interrupting): You have no right to put up that witness. Mr. Johnstone: They waived that by not objecting before she was sworn. I had asked the question whether or not she was the mother of Mrs. Murdock, and she had answered it. The Court: I looked for objection to be made before she was sworn. Mr. Efrid: They have no right to put up further testimony. Mr. Johnstone: That objection, if tenable, should have been made before the swearing of the witness. Having sworn the witness, the only objection they can raise now is as to the legitimacy of the question. Mr. Efrid: Our objection takes in the whole matter,—the right to put the witness up and to the questions. (Argued.) During the argument Mr. Johnstone said: We wish to examine this witness as to the character and veracity of their witness Willis M. Wilson, whom they introduced as a witness in this case for the first time in reply. (Objection sustained. Exception noted.)"

We would not like to commit the court to the view embodied in the eighth exception. No doubt the state's attorneys ought to have made their objection to the witness before she was sworn. Still, if the testimony of such witness, from any legal cause, was incompetent, the witness might be prevented from testifying. It is not uncommon for the testimony of a witness to be ordered struck from the stenographer's notes. If that be so, we cannot see why an error committed in allowing a witness to be sworn might not be corrected. And for the same reasoning we cannot sanction the tenth exception.

It remains for us to examine with some care the seventh exception, because it presents a nice question of law, and the practice of our courts thereunder. In the appeal at bar, the "case" discloses the fact that the defendant sought to justify the alleged killing by him of one Murdock by showing, by a number of witnesses, that he was a violent, turbulent, ill-grained, dangerous man, and that these facts were well known in the community in which he lived, and were well known by the defendant. Hence, when the state made reply, pains were taken to do away with the effect of the testimony of the defense on this point, not by attacking the general character of defendant's witnesses, but by having the wife of the deceased to testify as to the conduct of her husband towards herself; and also by having the witness S. T. Swygert, who was re-examined, and the new witnesses O. P. Clark, J. B. M. Stuck, and Willis M. Wilson, to testify to the general reputation for peace and order of Murdock, the deceased, in his lifetime. It will be seen, therefore, that the defendant never had any means of at-

tacking the testimony of these new witnesses as to their general character. When the state announced that it had closed in reply, the defendant called a new witness (a Mrs. Moss) to the stand as a witness. She was sworn, and was proceeding, we must assume, to contradict Mrs. Murdock's testimony as to the gentleness of her deceased husband to herself, when the objection was presented that the defendant had no right to introduce testimony in surrebuttal. Defendant's counsel announced to his honor, the circuit judge, that his purpose was to contradict the state's new witness, Willis M. Wilson, by proof of general bad character. The circuit judge denied the defendant the right to this testimony. There can be no doubt, under our decisions of *Farr v. Thompson*, Cheves, 37, *Chapman v. Cooley*, 12 Rich. 654, and *State v. Jones*, 29 S. C. 230, 7 S. E. 296, that in case the witnesses for the state or the plaintiff should be attacked by the defendant, because wanting good general character, new testimony might be offered by the state in reply; but if the plaintiff or the prosecution in a criminal case, sought, in the reply to defendant's testimony, to break down the general character of defendant's witnesses, that, in such an event, the defendant could introduce testimony to rebut, or in surrebuttal, to speak more accurately. This position, in the eye of the law, is deemed but an act of duty owed to such witnesses so attacked. Not only so, but we find in the case of *McCoy v. Phillips*, 4 Rich. Law, 464, this language in the report of the case by the judge on circuit: "After defendants had closed their testimony, plaintiff offered in evidence a grant of land, obtained since the commencement of the suit (not the range in dispute), to show that there was vacant land on the swamp to that extent. The defendants objected to it, as not strictly in reply, but it was admitted, and the defendants were allowed and gave evidence in reply to it." On appeal, the ruling of the circuit judge was sustained. In 8 Enc. Pl. & Prac. p. 133, it is said: "Evidence in surrebuttal: The case, at first made out by the plaintiff, should apprise the defendant of the ground upon which the cause of action is finally to rest. Accordingly, if the plaintiff in reply puts new matter in evidence, or makes a new case, different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal." See authorities cited in *Id.* note 3, especially the case *Asay v. Hay*, 89 Pa. St. 77, where *Trunkey, J.*, said: "After the defense closed, the plaintiff called Dr. Thomas Hay, who testified to the defendant's admissions of indebtedness on the note in suit. That this testimony is pertinent and material is conceded. The defendant offered to rebut it with his own testimony." The court of last resort in Pennsylvania decided that the testimony of defendant should have been allowed, saying, among other things: "Had it been competent for the defendant to prove in chief what he offered in rebuttal, the court might have re-

fused a re-examination of the witness. As to matters that require explanation or as to new matters introduced by the opposing interest, a party has a right, in rebuttal, to re-examine his witnesses."

In the case at bar, Mrs. Murdock, and especially Willis M. Wilson, were new witnesses, introduced for the first time in reply. In a capital case, is it to be said that a defendant cannot attack the character for veracity of witnesses who may be swearing his life away with perfect impunity? If the reputation of a witness is so precious in the eyes of the law that where he has testified for the defendant, and the state attempts to blacken or blast his general character by testimony in reply, the law allows him, in surrebuttal, to introduce testimony in favor of his character, why does not the life or liberty of the defendant, when new witnesses are for the first time offered in reply, appeal for, yea demand, that the want of general character for uprightness shall be shown? We think the circuit judge erred here, especially as his exclusion of the testimony was not based upon the exercise by him of discretion, but, on the contrary, the exclusion seemed to be made by the circuit judge upon the absence of power in him to admit it.

As to the eleventh exception, it cannot prevail for the reasons assigned in the review of the eighth exception. Therefore, in my opinion, the judgment of this court should be: It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded to the circuit court for a new trial. But the majority of the court think otherwise. The judgment of the court is that the judgment of the circuit court be affirmed.

McIVER, C. J. (dissenting). While I concur in all the conclusions reached by Mr. Justice POPE in his opinion, except the last, I cannot concur in that, as I do not think there was any error of law, on the part of the circuit judge, in excluding the testimony of Mrs. Moss, offered by the defendant, after the state had closed its testimony in reply, for the purpose of impeaching "the character and credibility of certain witnesses" who had, for the first time, testified for the state in reply. It seems that the defendant, in offering his testimony, introduced witnesses who impeached the character of the deceased for violence, and testified "as well as to individual acts of violence within their personal knowledge and the personal knowledge of the defendant, Charles C. Summer," and the state, in reply, offered five witnesses to rebut that testimony. One of the witnesses offered by the state, in reply, was Willis M. Wilson, who testified only as to the good character of deceased. Another witness was Mrs. Murdock, the wife of the deceased, who denied two acts of violence, which seems to have been charged as done or threatened to her personally by her husband,—one a threat to slap her jaws, and

the other jerking her out of bed when her child was only four days old,—and she also testified as to his general kind treatment of her. Now, the testimony of Mrs. Moss, which is here in question, was manifestly introduced for two purposes: (1) to assail the credit of Mrs. Murdock by showing that her testimony denying that her husband had jerked her out of bed when her child was only four days old was not true; (2) to impeach the general character of Willis M. Wilson, one of the five witnesses introduced by the state, in reply, to sustain the peaceable character of the deceased which had been assailed by the testimony of the defense.

As to the first, it would have been clearly incompetent to receive the evidence of Mrs. Moss, at any time, to contradict Mrs. Murdock as to a collateral issue, brought out in her cross-examination. The rule upon this subject is thus stated in 10 Enc. Pl. & Prac. 294, 295: "The cross-examining party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed, even for the purpose of impeaching the witness." This rule has been, in express terms, recognized in this state in the comparatively recent case of *State v. Wyse*, 33 S. C., at pages 592, 593, 12 S. E. 556, 558, 559, as based upon the authority of the standard text writers on evidence,—Starkie, Phillips, and Greenleaf,—and other authorities there cited. It is true that one exception to this rule is there recognized, which, however, has no application to the present case. Now, in this case, the issue which the jury were called upon to try was whether the defendant was guilty of the offense charged in the indictment, and not whether he had been guilty of brutal treatment of his wife. The latter issue was, therefore, clearly a collateral issue; and, under the authorities above cited, it was not competent to introduce testimony to contradict the testimony of Mrs. Murdock as to such collateral issue, brought out on her cross-examination.

As to the second purpose for which the testimony of Mrs. Moss was offered, to impeach the general character of the witness Willis M. Wilson, it seems to me that was a matter for the discretion of the circuit judge, and I see nothing whatever in the case to warrant the idea that such discretion was abused. In 8 Enc. Pl. & Prac. 133, 134, I find the following language: "And it is within the discretion of the court to permit the introduction of evidence in rebuttal, where the plaintiff, in reply, has not transgressed the proper bounds of evidence in rebuttal, though in that case the privilege cannot be claimed as matter of right." The same view is manifestly recognized in the case of *State v. Jones*, 20 S. C., at page 231, 7 S. E. 311, where it is said: "The true view is that, when the state or a plaintiff attacks the character of a witness for the defense, a new issue is then raised which could not have been before present-

ed, and upon such new issue the defense has the right to offer testimony, as it could not before have been offered. It will not do to say, as has been said, that the view which we have taken would lead to an interminable protraction of the investigation, and the controversy might go on indefinitely; for it must be remembered that *the extent of the inquiry into character is sufficiently under the discretion of the court to prevent the evil result apprehended.*" (Italics mine.) While, therefore, there are certain rules regulating the time and manner in which testimony is to be introduced, yet, as was said in *State v. Olyburn*, 16 S. C., at page 378, upon the authority of the cases there cited: "The conduct of a case in the circuit court, so far as relates to the time when testimony may be introduced, must be left to the discretion of the circuit judge, to be governed by the particular circumstances of each case." Now, when the circuit judge in this case found that the proposition was to impeach the general character of Wilson, who had testified solely as to the peaceable character of the deceased, he might very well have concluded that such a departure from the general rule was not only not warranted by the particular circumstances of this case, but might lead to an indefinite protraction of an inquiry into character merely, and should not be permitted. At all events, I am unable to perceive any error of law in the ruling complained of. It seems to me, therefore, that the judgment of the circuit court should be affirmed.

JONES, J. I concur in the dissenting opinion of the CHIEF JUSTICE, that the judgment of the circuit court should be affirmed.

GARY, J. I dissent, and concur in the dissenting opinion of McIVER, C. J.

RICHMOND RAILWAY & ELECTRIC CO. v. BROWN.

(Supreme Court of Appeals of Virginia. March 23, 1899.)

COURTS — JURISDICTION — MANDAMUS — PARTIES PLAINTIFF—PETITION—SUFFICIENCY—ADEQUATE LEGAL REMEDY—ENFORCEMENT OF LEGAL DUTY —STREET RAILROADS — PASSENGERS — RIGHT TO TRANSFERS.

1. The circuit court of the city of Richmond has jurisdiction of mandamus to compel a street railroad to transfer a passenger from one of its cars to another at a point within the city, though the obligation to make such transfer appears from a record of the county court, since such record is not within Code, § 3218, providing that the jurisdiction of writs of mandamus shall be in the circuit court of the county wherein is the record to which the writ relates.

2. Mandamus to compel a street railway to transfer a passenger from one of its cars to another may be brought by such passenger in his own name, without the intervention of some officer authorized to represent the commonwealth, since the duty to make the transfer, though public, is not due to the government as such.

3. In a petition for mandamus to compel a street railroad to transfer a passenger from one of its cars to another, the petitioner's right to maintain the proceeding is sufficiently shown by an allegation that he is a citizen of the county in which the road is located, resides near a highway on which the road is constructed, and is entitled to such transfer, and that defendant refuses the issuance thereof, and that he has no adequate legal remedy.

4. The duty of a street railway to transfer a passenger from one car to another may be enforced by mandamus, since the wrong is continuous and constantly recurring, and the legal remedy by suit for damages is inadequate.

5. Acts 1889-90, p. 497, incorporated a company with power to operate street railways in certain cities and counties, with the consent of the city councils of such cities and the judges of the county courts of such counties, subject to the conditions imposed by them. The county court of a county named in the charter thereafter authorized the company to construct its railway over certain highways therein, on condition that passengers thereon should be entitled to a transfer to another car at a certain point. *Held*, that the issuance of such transfers could be enforced by mandamus, since it was a duty enjoined by law as a part of the company's franchise, and not merely contractual.

6. The franchise of a street railway provided that passengers on a line extending into the country should, on arriving in the city at a certain point, be transferred to the cars of another line, and, when so transferred, should have the same rights and privileges as passengers on that line. Passengers on the latter line were entitled, without additional fare, to one transfer therefrom to any of the company's cars going in the same direction. *Held*, that passengers on the country extension, on arriving in the city, were entitled to a transfer to the main line, and thereafter, without additional fare, to a transfer to other cars going in the same direction, as long as the city passengers were entitled thereto; since the franchise entitled country passengers to the same privileges as city passengers, and not merely to the same number of transfers.

Error to circuit court of city of Richmond.

Petition by one Brown for writ of mandate to the Richmond Railway & Electric Company. There was a judgment for petitioner, and defendant brings error. Affirmed.

Wyndham R. Meredith, for plaintiff in error. H. R. Pollard and Sands & Sands, for defendant in error.

HARRISON, J. The court is of opinion that the circuit court of the city of Richmond had jurisdiction to hear and determine the right of the defendant in error to the writ of mandamus prayed for in this case. If it was the duty of the plaintiff in error to transfer the defendant in error, as claimed in the petition for mandamus, the alleged violation of that duty occurred in the city of Richmond, within the jurisdiction of its circuit court, and it was a matter of no importance that the obligation to perform said duty appeared from a record of the county court of Henrico county. Section 3218 of the Code, providing that the jurisdiction of writs of mandamus shall be in the circuit court of the county wherein the record or proceeding is to which the writ relates, has no application to the case at bar.

The court is further of opinion that the demurrer to the petition was properly overruled.

The first ground of demurrer was that the petition should not have been brought in the name of a private individual, but in the name of some officer authorized to represent the commonwealth. The practice contended for does not obtain in Virginia, and is not sustained by the weight of authority elsewhere. That private persons may move for mandamus to enforce a public duty, not due to the government as such, without the intervention of a law officer of the government, is settled by the highest authority. *Railroad Co. v. Hall*, 91 U. S. 355.

The second ground of demurrer was that petitioner failed to allege that he was a permanent resident on Brookland Park boulevard, or that he owned or leased a home there, or that he was then, or would in the future be, entitled to the right sought to be enforced. The petition is sufficiently full in the respect mentioned to entitle the petitioner to be heard. The allegation is that he is a citizen of the county of Henrico, residing on Brookland Park boulevard, and that he is entitled to the benefit of the duty which the plaintiff in error fails and refuses to perform, and that he is suffering under the deprivation of his rights by the defendant company, and that he has no other adequate remedy at law.

The third ground of demurrer is that the prayer of the petition is wider than the wrong complained of. Exactly what is meant by this assignment of error does not appear. The petitioner can obtain no relief under his petition but that which the facts stated justify, and it is not perceived that the breadth of his prayer has, in any way, prejudiced the plaintiff in error.

The court is further of opinion that the motion to quash the petition was properly overruled. The first ground assigned in support of this motion was that the remedy was complete and adequate at law by a suit for damages. In order that the existence of another remedy shall constitute a bar to relief by mandamus, such other remedy must not only be "adequate," in the general sense of the term, but it must be specific and appropriate to the circumstances of the particular case. The remedy at law which will operate as a bar to mandamus must generally be such a remedy as will enforce a right or the performance of a duty. A remedy cannot be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question. Such other remedy, in order to constitute a bar to mandamus, must be adequate to place the injured party, as nearly as the circumstances of the case will permit, in the position which he occupied before the injury or omission of duty complained of. The controlling question is not, "Has the party a remedy at law?" but, "Is that remedy fully commensurate with the necessities and rights

of the party, under all the circumstances of the particular case?" Or, as was said in one case: "To supersede the remedy by mandamus, the party must not only have a specific remedy, but one competent to afford relief upon the very subject-matter of his application, and one which is equally convenient, beneficial, and effective as the proceeding by mandamus." 2 Spell. Extr. Relief, § 1375.

In the case at bar the mandamus was sought to compel the plaintiff in error to transfer the defendant in error from one to another of its street cars without additional charge. If the defendant in error was entitled, as alleged, to the transfer, it is manifest that a suit at law for damages for a failure to perform that duty was not an adequate remedy, and would not actually compel the performance of the duty in question. The wrong suffered was a constantly recurring and continual one, and, whatever may have been the result of repeated suits for damages, the remedy was not as convenient, as beneficial, or as effective as the proceeding by mandamus.

The second ground assigned in support of the motion to quash was that the duty charged as resting on the plaintiff in error was not based upon its charter, nor upon the general law relating to common carriers, but grew out of a contract between the plaintiff in error and the judge of the county court of Henrico, and was therefore purely contractual.

It is an important principle, constituting a distinguishing feature of mandamus, that it does not lie to enforce mere contractual duties. Its proper employment is to enforce the performance of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked. Rights of a private or personal nature, and obligations resting entirely upon contract, not involving any question of trust or of official duty, cannot be enforced by mandamus. In other words, the writ of mandamus cannot be substituted for a decree for specific performance of duties other than those growing out of public relations, or such as are clearly imposed by statute, or in some respects involving a trust. 2 Spell. Extr. Relief, § 1379.

We must therefore inquire whether or not the duty in question is incumbent, by law, upon the plaintiff in error.

By act of the general assembly approved February 20, 1890 (Acts 1889-90, p. 497), the Richmond Railway & Electric Company was made and constituted a body politic and corporate, with the power to construct, equip, maintain, and operate a line or lines of street railway in the cities of Richmond and Manchester and the counties of Henrico and Chesterfield. The act of incorporation provides that the plaintiff in error may construct and operate its line or lines of railway over the streets of said cities, and the public roads of said counties; provided, the councils of said cities, respectively, and the judges of the county courts of the said counties, respectively, who are vested with authority so to do, shall

consent to the location of said railway on the streets and highways within their respective limits or jurisdiction. And it is further expressly provided that all lines of railway constructed by the said company under the act of incorporation shall be at all times subject to all restrictions, conditions, and limitations, of whatsoever nature, which may be imposed, respectively, by the councils of said cities, or by the judges of said county courts, as to so much of said railways as may be within the limits or jurisdictions of said cities and counties, respectively.

In pursuance of this act of incorporation, the plaintiff in error petitioned the county court of Henrico for permission to construct its railway over the highways in a certain portion of that county; and in pursuance of the power vested in him, by the act of incorporation, the judge of that court, on the 14th day of October, 1896, entered an order granting the permission prayed for, and prescribing the terms and conditions upon which the said railway should be constructed and equipped.

There is no contract with the defendant in error that he is asking to have enforced, nor is the order of the county court of Henrico a contract with the plaintiff in error, except in the sense that the charter of a private corporation is a contract between the state and corporation for the benefit of those who are entitled to have performed the duties imposed by the charter. As already seen, one of the stipulations of the act of incorporation was that the plaintiff in error might build its railway upon the highways of Henrico county, upon such terms and conditions as the judge of that county should prescribe. When, therefore, the order of October 14, 1896, was entered, prescribing those terms and conditions, and in pursuance thereof the road was built and equipped, those terms and conditions became, so far as their binding force and effect was concerned, as much a part of the organic law of the company as if they had been embodied in the act of incorporation. The very life of the franchise in the county is derived from the judge of the county court, without whose consent, by the express terms of the act of incorporation, the plaintiff in error could not have constructed its railway upon the highways of the county.

In the case of *Clity of Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309, where it was contended that a city ordinance did not confer rights and impose obligations which could be enforced by mandamus in the same manner as charter obligations could be, the court says: "The obligations imposed upon a railroad company are seldom defined with any degree of particularity by the terms of its charter, and this is especially true of street railways, and in this state, where all corporations are formed under general laws. It is true that the company gets its charter under the general law of the state, but the right conferred by the charter of a street-railway company incorporated for the purpose or

operating a street railroad in the city of Topeka is but a barren grant, until it is given form and force by an ordinance of the city permitting it to enter on the streets and construct and operate its lines. From the state directly it derives but the bare power to exist. Its vital force comes from the state, indeed, but through the subordinate agency of the city council, which is given power by the legislature to fix the terms and conditions on which it may actually carry out the purpose of its creation."

So, in the case at bar, the act of incorporation is a bare grant giving the plaintiff in error an existence, valueless, however, until the purpose of its creation is effectuated by the subordinate agencies of the cities and counties, named therein, through whose respective limits its railway line might be run, consenting thereto, and prescribing the terms and conditions upon which the privilege might be exercised.

The order of the county court being the very life of the franchise in the county of Henrico, and necessarily a part of the organic law governing the plaintiff in error, it follows that the performance of the terms and conditions prescribed by that order constitutes a duty enjoined by law, which the plaintiff in error may be compelled by mandamus to perform.

The court is further of opinion that there is no error in overruling the motion to dismiss the petition on its merits.

The order of the county court of Henrico expressly prescribes, as one of the terms and conditions upon which the road should be constructed upon the highways in said county, that the plaintiff in error should transfer passengers on the county extension, for one fare, to and from that extension at First and Clay streets, to its Clay street cars, and that when so transferred said passengers should have all the rights and privileges of any passenger on the main line to which he is transferred at that point. One of the privileges enjoyed by the passengers on the main line to which the defendant in error is transferred at the corner of First and Clay streets is a transfer from that line to any of the cars of the plaintiff in error going in the same direction. The right of the defendant in error to enjoy this privilege, in common with the passengers on the main line, was recognized by the plaintiff in error, and was accorded, until a recent date, when it was refused, unless an additional fare was paid at the point of transfer in question, —the company contending that the defendant in error was only entitled to the one transfer at Clay and First streets; that to give him another from that line was according him two transfers going in one direction, while the Richmond passenger had but one. The object of the county court of Henrico was, not to secure to those sought to be protected by its order any particular number of transfers, but to secure to them, after being transferred to the main line at First and Clay streets, all the rights and privileges enjoyed by the other

passengers on that line. As long, therefore, as the privilege of transfer is enjoyed by other passengers, at the point in question, without additional charge, the passenger on the county line, who is transferred at Clay and First streets, is entitled to the same privilege, without additional charge.

For these reasons the judgment of the circuit court must be affirmed.

DAWES v. NEW YORK, P. & N. R. CO.
(Supreme Court of Appeals of Virginia. Feb. 8, 1899.)

LIMITATIONS—ABATEMENT AND REVIVAL—
EQUITY.

Code, § 2934, authorizing a new "action" within a year after abatement of a former action seasonably commenced, or reversal of a judgment on a ground not precluding a new action for the same cause, notwithstanding the bar of limitation in the meantime, does not apply to equitable proceedings.

Error to law and chancery court of city of Norfolk.

Bill by one Dawes against the New York Philadelphia & Norfolk Railroad Company. There was a decree for defendant, and plaintiff brings error. Affirmed.

Heath & Heath, for plaintiff in error. Borland & Wilcox, for defendant in error.

RIELY, J. It is plain that this suit, under the pleadings, cannot be maintained, unless the right to bring it is preserved by section 2934 of the Code; for, otherwise, as is conceded, the entire claim is barred by the statute of limitations.

Whether the right to bring it is so preserved depends upon the sense in which the word "action" is used in that section,—whether the legislature, in enacting the law, used the word in a technical sense, and meant it to apply only to actions at law, or also to include suits in equity.

The phraseology of the statute admits of no doubt as to its proper construction. Such of its provisions as have any bearing on this case apply, by their very terms, to actions which, for specified causes, abated, and to actions commenced within due time, in which judgment for the plaintiff was arrested or reversed upon a ground which does not preclude a new action for the same cause; and provide that a new action or suit may be brought within one year after such abatement, or such arrest or reversal of judgment. All these terms are peculiar to actions at law, and are wholly inapplicable to suits in equity. We do not speak of suits in equity abating, but only of actions at law; nor do we speak of the arrest of decrees, but only of judgments.

Section 2934 was taken literally from the Code of 1849; and the particular provisions under consideration were taken by the revisers of that Code from 1 Rev. Code 1819, c. 128, § 10, and, along with a similar provision from the act of January 13, 1842 (Acts 1841-42, p. 56).

made section 18 of chapter 149 of the Code of 1849. It will be seen, on examining the Code of 1819, that the words "actions or suits" were there used interchangeably, and referred expressly to actions or suits mentioned in that chapter, all of which were actions at law.

The statute was originally taken from section 4, c. 16, of the statute of 21 Jac. I., and many of the other states also adopted it, or have a similar statute. Being a remedial statute, it has been liberally construed, and held to apply to cases not expressly within its provisions, but, by an equitable construction, within its spirit. *Barker v. Millard*, 16 Wend. 572; *Coffin v. Cottle*, 16 Pick. 383; and 1 Rob. Prac. 605, 606, and the cases there cited. An examination of the cases declared to be within the equity or spirit of the statute shows that they were all actions or proceedings at law. We have found no case in which it was held to be applicable to a suit in equity.

In *Gray's Adm'x v. Berryman*, 4 Munt. 181, and in *Elam v. Bass' Ex'rs*, Id. 301, which were decided under the statute of December 19, 1792, the language whereof is exactly the same as it is in the Code of 1819, it was held that a party who had brought his suit in equity, which was dismissed for want of jurisdiction, and then renewed his suit at law for the same matter within one year from the dismissal of the suit in equity, was not entitled to the benefit of the statute. It would, however, be otherwise now, under section 2934 of the present Code, as amended by the act of March 5, 1894 (Acts 1893-94, p. 789), and by the act of February 8, 1898 (Acts 1897-98, p. 252), where the plaintiff had proceeded in the wrong forum or brought the wrong form of action.

The precise question before us arose upon a similar statute of the state of Alabama in the case of *Roland v. Logan*, 18 Ala. 307, and it was there held that the statute did not authorize the bringing of an action at law within a year after the dismissal of a bill in equity for the same subject-matter. See, also, 2 Wood, Lim. Act (2d Ed.) § 295.

The provision of section 2934 which authorizes a new suit to be brought within one year in consequence of the loss or destruction of any of the papers or records in a former suit, which was in due time, includes both suits at law and suits in equity. This manifestly appears from the act of January 13, 1842, above referred to, from which this particular provision was taken by the revisers of the Code of 1849. Hence, the use of both words "action" and "suit" in the concluding clause of the section. They are there used not interchangeably, but distributively,—the one applying only to actions at law, and the other to suits both at law and in equity.

No good reason is perceived why the other provisions of section 2934 should have been limited in their enactment to actions at law. The object of the statute is to prevent the miscarriage of justice. The reason for its enactment applies to suits in equity, as well as to

actions at law. It is matter of regret that we are forced to give the particular provisions in question a restricted construction. We can only say, "*Ita lex scripta est.*"

The judgment of the court below must be affirmed.

CARDWELL, J., absent.

NORFOLK & W. RY. CO. v. BOARD OF PUBLIC WORKS.

(Supreme Court of Appeals of Virginia. March 16, 1899.)

TAXATION—TUGS AND BARGES.

Tugs and barges owned by a Virginia corporation, and enrolled in the city of Philadelphia, were engaged in moving coal from a town in the county of Norfolk to certain Northern cities, never going to Philadelphia, and were not assessed for taxation in Pennsylvania, or elsewhere, except in Virginia. Held, that they were properly taxable in the county of Norfolk.

Error to circuit court of city of Richmond.

Suit by the Norfolk & Western Railway Company against the board of public works. Judgment for defendant. Plaintiff brings error. Amended and affirmed.

R. M. Hughes, for plaintiff in error. D. C. Richardson, Atty. Gen., for defendant in error.

KEITH, P. The Norfolk & Western Railway Company filed its petition in the circuit court of the city of Richmond asking to be relieved from an assessment upon certain of its properties, consisting of two tugs and six barges, assessed for taxation in the city of Norfolk by the board of public works of Virginia, which is made a party defendant. It is not claimed that the valuation placed upon this property of \$140,000 is excessive, but the contention is that the entire assessment is illegal, because the property is not subject to taxation in this state.

It appears that the tugs and barges are enrolled in the city of Philadelphia in the name of the secretary of the plaintiff in error, but it is also true that the plaintiff in error, the Norfolk & Western Railway Company, is a Virginia corporation; that it is largely engaged in the movement of coal from mines in Southwest Virginia and West Virginia to Lambert's Point, in the county of Norfolk, and thence, by means of tugs and barges, to New York, New Haven, Providence, and Boston, but they never go to Philadelphia. It further appears that this property is not assessed for taxation in Pennsylvania, nor, indeed, elsewhere than in Virginia. When in Virginia, they remain at Lambert's Point; the tugs, however, sometimes going to Norfolk for necessary supplies. At Lambert's Point they are loaded with coal for the several markets above mentioned. It appears that they are never loaded elsewhere than at Lambert's Point; that there are no facilities for loading them at Norfolk; and that

they are exclusively engaged in the transportation of coal.

That these tugs and barges are engaged in interstate commerce does not exempt them from taxation; nor does the place of their enrollment or registration fix their situs for taxation, though it is a circumstance to be considered in its determination. The facts, in our judgment, clearly show that the property in question is owned, and may be lawfully taxed, in this state; but we are further of opinion that it should have been assessed for taxation in the county of Norfolk, within whose limits Lambert's Point is situated.

We do not consider that the plaintiff in error is aggrieved by the judgment of which it complains, and we will direct an order to be entered amending and affirming it, in accordance with the views herein expressed.

CARTER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 16, 1899.)

CONTINUANCE—FALSE GROUNDS—CONTEMPT—DISCLAIMER—CONSTITUTIONAL LAW.

1. It was contempt of court for a party, on being wired by his counsel that his case was for trial, and to come at once, to falsely answer, to obtain a continuance, that he was sick of typhoid fever, and could not come, and this, though he disclaimed any purpose to commit a contempt.

2. Acts 1897-98, p. 548, providing for punishment for contempt of court, is unconstitutional in so far as it attempts to provide for jury trial for contempts of courts created by the constitution; the power to punish for contempt being inherent in such courts.

Error to circuit court of city of Lynchburg.

One Carter was adjudged guilty of contempt of court, and he brings error. Affirmed.

Jas. E. Edmunds and E. W. Saunders, for plaintiff in error. The Attorney General, for the Commonwealth.

KEITH, P. At its November term, 1897, the circuit court of the city of Lynchburg issued a rule against Carter, plaintiff in error, to appear before it on the first day of the next term to show cause why he should not be fined and attached for contempt, by attempting to obtain a continuance of the action of Grubbs against Carter by means of false telegrams. In answer to this rule, he appeared and stated that he is a resident of the county of Nottoway, and that, having received a telegram from his attorney, J. Emory Hughes, that his case was pending, and that he must come to Lynchburg on the next train, he wired in response, "Sick with typhoid fever, and can't come;" that this statement as to his health was false, and made without due consideration; that he had no idea of interfering with or impeding the course of justice; that he did not make the statement for the purpose of obtaining a continuance, and nothing was further from his mind; that no disrespect to the court was intended; and he prays that his fault may be overlooked.

When the matter came up for trial, Carter asked to be tried by a jury, which motion the court overruled, and, deeming his answer insufficient, entered a judgment against him for a fine of \$25 and costs, and that he be imprisoned for the term of two days in the jail of the city of Lynchburg, and afterwards, until he pays his fine and costs: provided, that this latter period shall not exceed two months. To this judgment, Carter obtained a writ of error from one of the judges of this court, and the errors assigned by him are: First, that upon the facts as shown in the record he was not guilty of a contempt; secondly, that the court erred in refusing to have a jury impaneled for his trial.

We are of opinion that, upon the facts shown, Carter was guilty of a contempt. The effort to obtain a continuance of his cause by means of a statement as to his health, which he knew to be false, tended directly to impede and obstruct the administration of justice. It is true that with respect to conduct or language, where the intent with which a thing is said or done gives color and character to the act or words, a disclaimer of any purpose to be guilty of a contempt, or to destroy or impair the authority due to the court, is a good defense (Rap. Contempt, § 115); but this is true only of language or acts of doubtful import, and which may reasonably bear two constructions. In the case before us there could have been but one motive, and that to influence the action of the court with respect to a case before it by means of a statement known and admitted to be false. We pass, therefore, to the consideration of the next error assigned. This presents a question of the utmost gravity, which has been argued with the ability which its importance demands, and has received from us our best consideration.

By an act of assembly passed in 1830-31 (see Sess. Acts, p. 48), the legislature undertook to enumerate and to classify contempts of court, and to prescribe the manner in which they should be punished. This act appears in the Code of 1849 as sections 24 and 25, c. 194, as follows:

"Sec. 24. The courts and the judges, and justices thereof, may issue attachments for contempts, and punish them summarily, only in the cases following:

"First, misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice.

"Secondly, violence or threats of violence to a judge, justice or officer of the court, or to a juror, witness or party going to, attending, or returning from, the court, for or in respect of any act or proceeding had, or to be had, in such court.

"Thirdly, misbehavior of an officer of the court, in his official character.

"Fourthly, disobedience or resistance of an officer of the court, juror, witness or other person, to any lawful process, judgment, decree or order of the said court.

"Sec. 25. No court shall, without a jury.

for any such contempt as is mentioned impose a fine exceeding fifty dollars, or imprison more than ten days. But in any such case the court may empanel a jury (without an indictment, information or any formal pleading) to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict."

This act was continued in force, without amendment, until the session of 1897-98, p. 548, when it was amended so as to read as follows:

"1. Be it enacted by the general assembly of Virginia, that section three thousand seven hundred and sixty-eight of the Code of Virginia be amended and re-enacted so as to read as follows:

"Sec. 3768. The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases, which are hereby declared to be direct contempts, all other contempts being indirect contempts.

"First. Misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

"Second. Violence or threats of violence to a judge or officer of the court or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court.

"Third. Misbehavior of an officer of the court in his official character.

"Fourth. Disobedience or resistance of an officer of the court, juror or witness to any lawful process, judgment, decree or order of the said court.

"When the court adjudges a party guilty of a direct contempt it shall make an entry of record, in which shall be specified the conduct constituting such contempt and shall certify the matter of extenuation or defense set up by the accused, and the evidence submitted by him and the sentence of the court.

"Subsection.

"Proceedings in Cases of Indirect Contempt. Upon the return of an officer on process, or upon an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person may be arrested and brought before the court, and thereupon a written accusation, setting forth succinctly and clearly, the facts alleged to constitute such contempt shall be filed, and the accused required to answer the same, by an order which shall fix the time therefor and also the time and place for hearing the matter. A copy of this order shall be served upon the accused, and upon a proper showing the court may extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt.

"After the answer of the accused, or if he fail or refuse to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed according to the rules

governing the trial of criminal cases, and the accused shall be entitled to compulsory process for his witnesses and to be confronted with the witnesses against him.

"Such trial shall be by the court, or upon the application of the accused, a trial by a jury shall be had, as in any case of a misdemeanor.

"If the jury find the accused guilty of contempt they shall fix the amount of his punishment by their verdict.

"The testimony taken on the trial of any case of contempt shall be preserved on motion of the accused, and any judgment of conviction therefor may be reviewed on writ of error from the circuit court having jurisdiction, if the judgment is by a county court, or on writ of error from the supreme court of appeals, if the judgment is by a circuit or corporation court. In the appellate court the judgment of the trial court shall be affirmed, reversed, or modified as justice may require. If the writ of error to the judgment of a county court is refused by the circuit court having jurisdiction, application may then be made to the court of appeals.

"2. All acts and parts of acts, so far as they conflict with this act, are, to that extent, hereby repealed."

Being of opinion that the defendant was guilty of contempt, we shall not attempt any classification of it as a direct or indirect contempt. If it were a direct contempt, then its punishment was without doubt to be ascertained and fixed by the court, without the intervention of a jury, by the terms of the law which the plaintiff in error himself invokes. If it were a contempt not within that classification, then it is incumbent upon us to consider whether it was within the power of the legislature to deprive the court of jurisdiction to punish it without the intervention of a jury.

Counsel for plaintiff in error insist that the question has already been decided by this court in the case of *Com. v. Deskins*, 4 Leigh, 685, and again in *Wells v. Com.*, 21 Grat. 500.

The latter case may be disposed of by the statement that this court reversed the judgment of the circuit court upon the facts, and held that the acts proved against Wells did not constitute a contempt of court.

With respect to the case of *Deskins v. Com.*, it appears that it arose and was decided under the constitution of 1829-30. In the fifth article of that instrument it is provided that "the judicial power shall be vested in a supreme court of appeals, in such superior courts as the legislature may from time to time ordain and establish, and the judges thereof, in the county courts, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in corporation courts, and in the magistrates who may belong to the corporate body. The jurisdiction of these tribunals, and of the judges thereof, shall be regulated by law."

The constitution did not create the courts nor clothe them with jurisdiction, but the courts themselves were established by the leg-

islature, and their jurisdiction was regulated by law. In this respect the constitution of 1829-30 was only less general in its terms than the first organic instrument adopted in 1776.

The constitution of 1851 (article 6, § 1), with respect to the judiciary department, provides: "There shall be a supreme court of appeals, district courts and circuit courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law."

The constitution now in force (article 6, § 1) provides: "There shall be a supreme court of appeals, circuit courts and county courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law." In a subsequent portion of the instrument, corporation courts are also provided for the cities of the state. These courts do not derive their existence from the legislature. They are called into being by the constitution itself, the same authority which creates the legislature and the whole framework of state government.

What was the nature and character of the tribunals thus instituted? Our conception of courts, and of their powers and functions, comes to us through that great system of English jurisprudence known as the "common law," which we have adopted and incorporated into the body of our laws.

That the English courts have exercised the power in question from the remotest period does not admit of doubt. Said Chief Justice Wilmot: "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the supreme court of justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the *lex terræ*, and within the exception of *Magna Charta*, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posteriority to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury. It is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other." 3 Camp. Ch. Just. p. 153.

In *U. S. v. Hudson*, 7 Cranch, 32, it was

held that "certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute."

In *Wells v. Com.*, 21 Grat. 503, it was said: "The power to fine and imprison for contempt is incident to every court of record. The courts, *ex necessitate*, have the power of protecting the administration of justice, with a promptness calculated to meet the exigency of the particular case."

It is unnecessary, however, to multiply authority upon this point, for we understand it to have been conceded by counsel for plaintiff in error that the power to punish contempts is inherent in all courts; but the contention is that it may be regulated by legislative action, and we are prepared to concede that it is proper for the legislature to regulate the exercise of the power so long as it confines itself within limits consistent with the preservation of the authority of courts to enforce such respect and obedience as are necessary to their vigor and efficiency.

Now, the contention of the plaintiff in error is that the act here punished was not a contempt under the statute of 1830-31, and that in order to hold it punishable summarily, it is necessary to hold that the statute referred to is unconstitutional. There has been no adjudication upon that statute, to our knowledge, since the adoption of the constitution of 1851; for in the case of *Wells v. Com.*, supra, *Wells* was, as we have seen, acquitted of the offense. So far, therefore, as the statute is to be considered as declaratory of the powers existent in the court established by the constitution, it is free from objection; so far as it is a reasonable regulation of the power vested in the courts, we have no disposition to question it; but if it is to be construed as a negation of the power of the court to punish a contempt, whether by excluding it from its enumeration and classification of acts which may be summarily dealt with by the court, or by taking from the courts the power to punish at all those acts enumerated as contempts, we are constrained to hold that the legislature has transcended the powers prescribed to it by the constitution.

It was contended by counsel for plaintiff in error that, inasmuch as the act of 1830-31 merely transferred the punishment of contempts from the court to a jury, and even made acts punishable as contempts not embraced within the act of 1830-31, that it was not obnoxious to the objection that it interfered with or diminished the power of the court to protect itself.

To this view we cannot assent. It is not a question of the degree or extent of the punish-

ment inflicted. It may be that juries would punish a given offense with more severity than the court; but yet the jury is a tribunal separate and distinct from the court. The power to punish for contempts is inherent in the courts, and is conferred upon them by the constitution by the very act of their creation. It is a trust confided and a duty imposed upon us by the sovereign people, which we cannot surrender or suffer to be impaired without being recreant to our duty.

Upon the point made by counsel for plaintiff in error, that the offense under consideration, if not embraced within the category of direct contempts by the act of 1897-98, neither was it by that of 1830-31, we cannot do better than to quote the language of the supreme court of Arkansas, in *State v. Morrill*, 16 Ark., at page 390:

"The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and state institutions, and a favorite theory in the government of the American people.

"As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect; but to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department, because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and devert them of power to punish any contempt."

Reliance was placed by counsel for plaintiff in error upon a class of cases of which *Ex parte Robinson*, 19 Wall. 505, may be considered typical. In that case *Robinson* had in the most summary manner, without the opportunity of defense, been stricken from the roll of attorneys by the district court for the Western district of Arkansas. He applied to the supreme court for a mandamus, which is the appropriate remedy to restore an attorney who has been disbarred, and that court held, Mr. Justice Field delivering the opinion, that: "The power to punish for contempts is inherent in all courts. Its existence is essential to

the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence, and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of congress of March 2, 1831," and the court declared that there could be no question as to its application to the circuit and district courts. "These courts were created by act of congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

Turning to the constitution of the United States, we find that it (article 3, § 1) declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." This language is the equivalent of that found in our constitution prior to that of 1851, hereinbefore quoted. The inferior federal courts and their jurisdiction are the creatures of congress, and not of the constitution.

It may be remarked, also, with respect to the case of *Ex parte Robinson*, that the United States statute of 1831, while it carefully enumerates the subjects for which courts may punish summarily for contempt, that enumeration is so comprehensive as to afford complete protection to the courts in the performance of their duties, and contains no limitation whatever upon the power to punish in the enumerated cases; and that, while punishment which courts may inflict is limited to fine and imprisonment, their discretion is without limit as to the amount of the fine or the duration of the imprisonment. The courts of the United States will never be embarrassed by the decision in *Ex parte Robinson*; for, while the power to disbar an attorney is denied in that case as a proper punishment for contempt, the jurisdiction of the courts to disbar, after citation to appear and notice of the ground of complaint against, and an opportunity for explanation and defense, is fully recognized.

It were an unprofitable task to attempt to review within the limits of an opinion all the adjudged cases to which our attention has been called, and which, with very many others, have been considered by us. For the benefit of those who may feel themselves moved to a further investigation of this subject, we cite, without comment, the following cases:

State v. Frew, 24 W. Va. 416; *Hale v. State*, (Ohio Sup.) 45 N. E. 199; *In re Shortridge*, 99 Cal. 526, 34 Pac. 227; *Storey v. People*, 79 Ill. 45; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *State v. Knight*, 3 S. D. 508, 54 N. W. 412; *State v. Galloway*, 5 Cold. 326; *Little v.*

State, 90 Ind. 338; *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820; *Arnold v. Com.*, 80 Ky. 300; *Ex parte Crenshaw*, 80 Mo. 447; *Hughes v. People*, 5 Colo. 445; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961; *Langdon v. Wayne*, 76 Mich. 367, 43 N. W. 310; and *Ex parte Schenck*, 65 N. C. 353.

In public apprehension, the legislature is deemed in a peculiar sense the agent and representative of the people. It is true, it constitutes the most numerous branch of the government, and the brief terms for which its members are elected, and the fact that they are directly voted for by the people, give color to and encourage this opinion; but a moment's reflection should serve to dispel it. In our system of government all power and authority are derived from the people. They have seen fit, by organic law, to distribute the powers of government among three great co-ordinate departments,—the executive, the legislative, and the judicial. The constitution of the state, which is the law to all, declares in the seventh section of the first article that "the legislative, executive, and judiciary powers should be separate and distinct." This is a quotation from the bill of rights,—an instrument which should never be mentioned, save with the reverence due to the great charter of our liberties. Of such importance is this principle deemed that it is repeated and constitutes a distinct article, which declares that "the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others; nor shall any person exercise the power of more than one of them at the same time, except as hereinafter provided." Whoever, therefore, belongs to either one of these great departments is an agent and servant of a common master; and each and all represent a part of the sovereignty of the state, so long as they move within the appropriate spheres prescribed to them by the organic law. A court, and the judge thereof, is as much an agent and servant of the people as any other officer of government, and he is bound by the duty and obligation which he owes to the commonwealth to cherish, defend, and transmit unimpaired to his successors the office with which the commonwealth has seen fit to honor him. A judge, therefore, in vindicating the dignity and authority of the court over which he presides, is discharging a solemn duty owed in his official character, and is not engaged in a personal and private controversy.

Speaking upon this subject, the supreme court of West Virginia in *State v. Frew*, 24 W. Va., at page 477, uses the following language:

"Having thus shown that this court has the power to punish for contempts, it must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never, except when the necessity is plain and unmistakable. It is not given for the private advantage of the judges who sit

in the court, but to preserve to them that respect and regard of which courts cannot be deprived and maintain their usefulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges, that the court may command that respect and sanctity so essential to make the law itself respected, and that the streams of justice may be kept pure and uncorrupted. * * *

"The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well-being of organized society, the rights of property, and the life and liberty of the citizen is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired. * * *

"We know full well that respect to courts or judges cannot be compelled. 'Respect is the voluntary tribute of the people to worth, virtue, and intelligence; and, while these are found on the judgment seat, so long, and no longer, will courts retain the public confidence.' But the people have placed the judge in a position in which he unavoidably comes in conflict with the jealousies and resentments of those upon whose interest he has to act. His character, virtue, and intelligence, however pure and unselfish, are not always a protection against the prejudices and passions of such as conceive themselves injured by his legitimate and proper official acts; and, when assailed by such, if he may not punish them as a court, 'he will be reduced to the alternative of either submitting tamely to contumely and insult, or to resenting it by force, or resorting to the doubtful remedy of an action at law.'"

As was said by Judge Dade in *Dandridge's Case*, 2 Va. Cas. 408: "In such a state of things it would rest in the discretion of every party in court to force the judge either to shrink from his duty, or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To suppose that the personal character of the judge would be a sufficient guaranty against this is to imagine a state of society which would render the office of the judge wholly unnecessary."

The enumeration of subjects punishable as direct contempts in the act under consideration seems to embrace almost every conceivable form of that offense which can occur in the presence of, or in proximity to, the court; that is to say, under circumstances likely to arouse the passion or prejudice of the judge, and disturb that equanimity essential to calm and wise judicial action. The court may punish summarily not only all such offenses, but for disobedience or resistance to any lawful process, judgment, decree, or order; its officers, jurors, and witnesses may also thus be punished; and only the parties to the suit are entitled to a trial by jury. Thus we see that

offenses of a nature personal to the court are to be punished by the court, while those which interest suitors are punishable only by a jury. So that suitors, having obtained a judgment or decree, after long and expensive litigation, find the court powerless to secure to them its fruition and enjoyment, and, unless their antagonist chance to be a law-abiding citizen, discover that their success has only begotten another controversy. Ours is a law-abiding community, and good citizens will, without compulsion, respect the lawful orders of their courts; but in every society there are those who obey the laws only because there is behind them a force they dare not resist. Is it wise or beneficent legislation which accepts the obedience of the good citizen, but is powerless to enforce the law against the recalcitrant? Under this law, the authority of the courts would be reduced to a mere "power of contention."

We are fully aware of the delicate duty involved in holding a statute to be unconstitutional, and we fully recognize that it should never be done, except in the case of a plain deviation from the organic law.

"The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree and dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it. But the courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action, and, in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction." *Cooley, Const. Lim. (8th Ed.)* p. 192.

"In exercising this high authority, the judges claim no judicial supremacy. They are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." See *Lindsay v. Commissioners*, 2 Bay. 38, 61; *People v. Rucker*, 5 Colo. 455.

Reading the constitution of the state in the light of the decisions of eminent courts which we have consulted, we feel warranted in the following conclusions:

That in the courts created by the constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated, but cannot be destroyed, or so far diminished as to be rendered ineffectual by

legislative enactment; that it is a power necessarily resident in, and to be exercised by, the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; that, while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred.

It was suggested in argument that to maintain the position that to intrust juries with the power to punish for contempts would impair the efficiency and dignity of courts disclosed a want of confidence in that time-honored institution. May it not be said in reply that to take from courts a jurisdiction which they have possessed from their foundation betrays a want of confidence in them wholly unwarranted by experience? The history of this court, and indeed of all the courts of this commonwealth, shows the jealous care with which they have ever defended and maintained the just authority and respect due to juries as an agency in the administration of justice; but our duty, as we conceive it, requires us not to be less firm in vindicating the rightful authority and power of the courts.

We cannot more properly conclude this opinion than by a quotation from a great English judge: "It is a rule founded on the reason of the common law that all contempts to the process of the court, to its judges, jurors, officers, and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction, or consequentially,—that is to say, whether they be by act or writing,—are punishable by the court itself, and may be abated instantaneis as nuisances to public justice."

"There are those who object to attachments as being contrary, in popular constitutions, to first principles. To this it may briefly be replied that they are the first principles, being founded on that which founds government and constitutes law. They are the principles of self-defense,—the vindication, not only of the authority, but of the very power of acting in courts. It is in vain that the law has the right to act, if there be a power above the law which has a right to resist. The law would then be but the right of anarchy and the power of contention." *Holt, Libel*, c. 9.

Whatever opinion may be entertained of some of his predecessors, Chief Justice Holt was no servile minion of arbitrary power. He was an actor in that great revolution which ended forever in Great Britain the pernicious dogma of the divine right of kings, which first recognized the will of the people as the only rightful source of government, and established the independence of the judiciary as one of the surest bulwarks of free institutions.

The judgment of the circuit court is affirmed.

TRIMBLE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 23, 1899.)

**CONTEMPT—CONSTITUTIONAL LAW—REVIEW—
HABEAS CORPUS.**

1. Acts 1897-98, p. 548, providing for punishment for contempt of court, is constitutional so far as it gives the supreme court jurisdiction to review the judgment of the court below on writ of error.

2. The court, in habeas corpus to recover a child, remanded the child to respondent's custody until further orders, and, with the court's consent, she took the child out of the state on a visit to her sister, on whose suggestion and the advice of counsel a competent court of the foreign state appointed, as guardian of the child, the sister, who made a beneficial arrangement for the child's nurture. There was no showing that this was done to defeat the jurisdiction of the first court. *Held*, that the action did not amount to a contempt.

Error to corporation court of Lynchburg.

Ella Trimble was adjudged guilty of contempt of court, and she brings error. Reversed.

H. M. Ford and R. D. Yancey, for plaintiff in error. The Attorney General, for the Commonwealth.

KEITH, P. One Susie Fox filed her petition in the corporation court for the city of Lynchburg, alleging that she is the mother of a female child five years of age, named Lillian May Fox; that she had theretofore placed this child with a certain Ella Trimble to keep and care for during the petitioner's expected absence from the city of Lynchburg, with the understanding that the child would be delivered to her on her return. Ella Trimble refused, upon the mother's demand, to restore the child to her custody, and thereupon this petition was filed, praying for a writ of habeas corpus. A rule to show cause against the writ was issued, and, upon the answer made by Ella Trimble, the court entered the following order:

"Upon consideration of the within petition and answer and the evidence, the court doth remand the child Lillian May Fox to the custody of Ella Trimble until the further order of the court. May 10, 1897."

On the 22d of March, 1898, the following order was entered in this proceeding:

"It is ordered that the defendant, Ella Trimble, do produce the body of Lillian May Fox in court on the first day of the next term of the said corporation court for the city of Lynchburg, and show cause, if any she can, why the said order heretofore made on the said 10th day of May, 1897, should not be revoked."

In compliance with this order, Ella Trimble filed her answer, in which she states the proceedings up to that time, and then goes on to say that when the case was before the court in May, 1897, and the child was remanded to her custody, she understood it to be the wish of the court that she should either place the child in some private family, or at a school,

where it would be properly cared for; that, in order to effect this object, she went with the child to Wake county, N. C., where, at the suggestion of her sister, Mollie Trimble, and acting under the advice of counsel, a guardian, upon motion of her sister, was appointed by the superior court of that county; that the child had since been placed with one W. E. Bonner, who the evidence shows to be a kind-hearted, honest, and industrious citizen. Respondent further states that, "when she took this child, it was in a sick and starving condition, when neither the law, nor any person on its behalf, gave it any attention; that she has spent more than a year of sleepless and anxious nights in watching and coaxing the little spark of vitality into life"; and that the child has gradually improved under her care. The answer further avers that she is unable to comply with the mandate of the court to produce the body of the child before it; that she no longer has the care and control of it; that she has no desire to evade the process of the court; and, in an amended answer filed at a subsequent day, she specifically disclaims any contempt of court.

The court certifies in the record that it did not consider either the relator or respondent a suitable person to have the child; that in the summer of 1897 respondent asked if it would be wrong for her to take the child on a short visit to her sister in Raleigh, N. C., and was informed by the judge of the court that it would not be if she would not keep it away; that, while on this visit, her sister, who is not a proper person to have the child, qualified in a North Carolina court as its guardian, and the child has never returned.

Upon the consideration of the rule, answer, and exhibits filed with it, and the facts thus stated by the court, it was of opinion that the answer of Ella Trimble was insufficient, and entered an order that "she be attached until she produces the body of the said child, in the proceedings mentioned, before this court, or until the further order of the court." To this judgment, a writ of error was awarded.

With respect to some of the questions presented, we refer, without further comment, to the opinion of the court in the case of *Carter v. Com.* (Va.; decided at the present term) 32 S. E. 780, which is, so far as applicable to the case, made a part of this opinion.

We are of opinion, however, that the act of the legislature of 1897-98, which was in that case adjudged to be unconstitutional in some of its aspects, is a valid statute, in so far as it gives this court jurisdiction upon writ of error to review this judgment.

That a statute may be constitutional in part and unconstitutional as to some of its provisions is well settled. See *Homestead Cases*, 22 Grat. 266, *Wise v. Rogers*, 24 Grat. 169, and *Black v. Trower*, 79 Va., at page 127, where it is said: "It is true that a statute in some of its provisions may be unconstitutional and void, and in others valid and enforceable. But when the valid part is so com-

nected with, and dependent on, that which is void, as that the parts are not distinctly separable, so that each can stand as the will of the legislature, the whole must fall." But the converse is equally true; and, where the parts may be so separated as that each can stand as the will of the legislature, the good does not perish with the bad.

We are of opinion that the case is properly before us by virtue of the act of 1897-98, p. 548.

We gather from the record that plaintiff in error took this child, which had been restored to her custody by the order of May 10, 1897, to North Carolina, with the assent of the corporation court of Lynchburg, and with the intention of carrying out a commendable purpose, sanctioned by the court, with respect to this little waif. When in North Carolina, at the suggestion of her sister and upon her motion, and acting under the advice of counsel, a court of competent jurisdiction in that state was requested to appoint, and did appoint, a guardian for this little child. That guardian seems to have made an arrangement with respect to the child's nurture of a beneficial character, and there is no evidence that in thus acting the respondent did so with the object of defeating the jurisdiction and authority of the corporation court of Lynchburg. She disclaims any such purpose, and beyond the facts stated, which do not necessarily, or, it may be said, even naturally, bear such an interpretation, we are of opinion that the offense wherewith she was charged has not been established, and that the corporation court of Lynchburg erred in the judgment rendered, which is reversed.

RICHMOND UNION PASS. RY. CO. v. RICHMOND, F. & P. R. CO.¹

(Supreme Court of Appeals of Virginia. Jan. 26, 1899.)

CORPORATIONS—CONTRACTS—RATIFICATION—CONSIDERATION—JUDICIAL NOTICE—STATUTE OF FRAUDS—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

1. A contract made on behalf of a street-railway company, by its officer, with another carrier, to erect gates and keep a watchman at a crossing of their respective tracks on a city street, and to share the expense equally, is ratified by the street-railway company by paying a bill rendered to it by the other carrier for its share of constructing the gates, and for part of the wages of the watchman.

2. The contract being for the mutual benefit of both companies, it was founded on a sufficient consideration, though the street-railway company had the right to cross the tracks of the other carrier without its consent.

3. Courts will take judicial notice that the maintenance of gates and a flagman at a crossing of the tracks of a railroad and a street railway on a city street diminishes the danger of accidents.

4. An oral contract between two carriers to jointly erect gates and maintain a flagman at a crossing of their respective tracks is not a

contract not to be performed within one year, within Code 1887, § 2840, ch. 7, requiring such contracts to be in writing.

Error to circuit court of city of Richmond.

Action by the Richmond, Fredericksburg & Potomac Railroad Company against the Richmond Union Passenger Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wyndham R. Meredith, for plaintiff in error. Leake & Carter and Preston & Leake, for defendant in error.

KEITH, P. The Richmond, Fredericksburg & Potomac Railroad Company sued the Richmond Union Passenger Railway Company in the circuit court of the city of Richmond to recover the amount of a certain account alleged to be due it. The defendant pleaded non assumpsit, and under that plea it was agreed that any lawful defense might be made. The defenses relied on are want of consideration; want of authority on the part of George A. Burt, who acted on behalf of the Richmond Union Passenger Railway Company, to make the contract relied upon by the plaintiff; that there was no ratification of the contract; the statute of limitations; and the statute of frauds. The whole matter of law and fact was submitted to the court, and it, overruling all the foregoing defenses, except the statute of limitations, and allowing it so far as it was applicable, rendered judgment for the plaintiff for the sum of \$540. To that judgment the electric railway obtained a writ of error.

The plaintiff owned and operated a line of railway which passed along a part of Broad street, in the city of Richmond; and the defendant company, in constructing its line, found it necessary to cross the track of the said company on Broad street, near Hancock street, in said city. Thereupon Mr. Myers, on behalf of the railroad company, entered into an arrangement with Mr. Burt, the superintendent of the electric company, for the erection of gates and the maintenance of a watchman at that crossing, the expense of which was to be borne equally by the companies. The gates were erected, a watchman employed, and the bills were paid by the railway company, and payment of its share demanded of the electric company, and payment made of the account rendered, which embraced the cost of erecting the gates, and one-half of the flagman's wages at Hancock street during the month of March, 1888. Subsequently the electric company was advised that it was under no obligation to pay any part of the flagman's wages, and it refused to do so; hence this suit.

The alleged contract between the two companies was, as we have said, entered into on behalf of the railroad company by Mr. Myers, and on behalf of the electric company by Mr. Burt, the superintendent, who was introduced to Mr. Myers by John F. Barry, the secretary and treasurer of the Richmond Union

¹ Rehearing denied.

Passenger Railway Company, by whom Burt was instructed "to make any arrangement with Myers that would be amicable to both corporations." After this introduction, says Burt, who was examined on behalf of the plaintiff, "I proceeded with Mr. Myers to the spot designated, and came to a full and complete understanding of what would be necessary, subject to the approval of the city engineer." Now, it is claimed on behalf of the electric company that as there was no resolution on the part of the directors conferring such authority upon Burt, its superintendent, the contract entered into by him does not bind it, and is a nullity. We are disposed to think that such a contract, under the circumstances disclosed, might fairly be considered as within the competency of the superintendent and the secretary and treasurer of a corporation, by virtue of their respective positions, but we find it unnecessary to decide that point. The contract was made, and, at most, was voidable at the election of the Richmond Union Passenger Railway Company. It chose not to annul, but to confirm, it, as is shown by its payment, when demanded, of the bill for the erection of the gates and the services of the watchman, in part. A ratification, when made, is final, and cannot be retracted. *Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845.

It is said, however, that this contract is without consideration; that the electric company had the right, with or without its consent, to cross its tracks,—authority to do so having been conferred by the city of Richmond. This we concede, but we know that the crossing of railways at grade is always attended with danger, and that, when this crossing occurs in the streets of a city, the danger is greatly enhanced. It was therefore for the mutual convenience, safety, and protection of the two companies that some arrangement should be made by which the danger incident to the situation might be diminished, if not wholly obviated. Counsel for the electric company says that the erection of gates does not tend to diminish the danger, and was not to the advantage of the electric company, because its employes are thereby induced to rely upon such means of protection against accident, and relax their own vigilance, and are rendered less attentive to their duties. We think, however, that we can with propriety assume that it is a matter of common knowledge that the tendency of gates and a gate keeper is to promote safety. There are facts of which courts will take judicial notice, and this, we think, is one of them, as it is the result of the general experience of society, evidence of which is to be found in the great number of adjudicated cases bearing upon the subject, and the treatises of text writers.

As bearing upon the class of subjects of which courts will take judicial notice, we refer to 1 *Tayl. Ev. (Am. Ed.)* p. 21, note 38, where it is said that "facts which are so generally known that every well-informed person

knows them, or ought to know them, need not be proved, and will be judicially recognized without proof." And to quote the language of the supreme court of Alabama: "This cognizance may extend far beyond the actual knowledge, or even the memory, of judges, who may therefore resort to such documents of reference, or other authoritative sources of information, as may be at hand, and may be deemed worthy of confidence. The rule has been held in many instances to embrace information derived informally by inquiry from experts." *Gordon v. Tweedy*, 74 Ala. 232.

In *Railway Co. v. Wynant*, 114 Ind. 533, 17 N. E. 118, speaking of the disposition of a horse to shy at objects of unusual character on a highway, the following language is used: "Roads are prepared with reference to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit. These are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject to be pleaded and proved, whether a box car, or any other particular object, is naturally calculated to frighten horses. This is to be determined by the experience, observation, and intelligence of the court and jury, as applied to all the facts of the particular case before them."

As throwing light upon the subject of the sources to which a court may look in determining of what it may take judicial notice, we refer to the case of *U. S. v. Teschmaker*, 22 How. 392, where Justice Nelson says: "From the numerous cases which have already been before us, as well as from our own inquiries into the customs and usages of the inhabitants of California,—especially those engaged in the business of raising cattle and other stock,—this mode of occupation furnishes very unsatisfactory evidence of possession and cultivation of the land, in the sense of the colonization laws of Mexico." From this quotation it appears that we may with propriety look to the vast number of adjudged cases upon the subject of railroad crossings, and the treatises of text writers, to ascertain that such devices are resorted to to prevent accidents, and are regarded as useful and beneficial contrivances in aid of, but not superseding the necessity of, care and watchfulness upon the part of all concerned. This record itself shows that the city of Richmond has at many points required the erection of such gates. The contract, having thus been entered into and ratified, is, we find, supported by a sufficient consideration, in the benefits which it has conferred upon the parties thereto, in the safety and protection in the operation of their respective roads, which we are authorized to infer is in some measure due to the flagman employed and gates erected in accordance with its terms.

Is the contract void under the statute of frauds? No time is fixed by the contract within which it should be performed, but it is contended by plaintiff in error that, if any contract is proven, it was to continue during the

life of its charter; that is to say, for 30 years.

"Clause 7, § 2840, Code 1887, contemplates such contracts as on their face have performance postponed beyond one year, and not such as may or may not chance to be performed within that period." *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326.

"Agreements to continue to do something for an indefinite period, which may be terminated at any time by either party, or which may be terminated by such a change in the circumstances of the parties as will make it unreasonable or unnecessary that they should be further bound, the contingency of such change of circumstances being implied in the nature of the contract, are not within the statute." *Browne, St. Frauds* (5th Ed.) 276a; 1 *Reed, St. Frauds*, § 197.

In *Talmadge v. Railroad Co.*, 13 Barb. 493, this principle is strikingly illustrated. In that case the defense to an action for injury to the plaintiff's cattle by running over them with railway cars was that the plaintiff had verbally agreed to build and maintain a fence along the railroad opposite his land, whence his cattle escaped onto the track at the time of the injury. This agreement was held not to require a writing, under the statute of frauds, but, says *Browne* (section 276a), upon doubtful ground. "It would have been properly so held upon the ground," says that author, "that the duration of the plaintiff's promise to maintain the fence was obviously limited (though no words said to that effect) by the duration of the circumstances of the parties which led to the making of it. If the road should cease to be used by the promisee or its assigns for railway purposes, it is unreasonable to suppose that the fence was still to be maintained, the reason for maintaining it no longer existing; and this might well happen within the space of a year, consistently with the understanding and rights of the parties."

The case cited seems to be quite as strong for the application of the statute as that under consideration. A change of circumstances surrounding the parties would at any time have determined the contract, and it may be observed that such a change has in fact taken place, and the gate is no longer maintained where it was placed in the first instance.

There are decisions to the contrary of the position here taken, but we have adopted it because it has the approval of distinguished text writers, and seems to be in harmony with the general current of authority upon this and kindred questions.

The whole matter of law and fact was submitted to the court. Its conclusions upon the evidence, at whatever point their correctness may be questioned,—whether as to the inception of the contract, the authority of those by whom it was entered into, the consideration upon which it rested, or the amount of the recovery on the quantum meruit, when that point in the investigation is reached,—all are to be solved in favor of the judgment, if there is evidence enough to support it, applying to

its consideration the rule governing a demurrer to evidence.

We have, upon the whole case, no hesitation in affirming the judgment of the circuit court.

BUCHANAN and HARRISON, JJ., absent.

NEWPORT NEWS, H. & O. P. DEVELOPMENT CO. v. NEWPORT NEWS ST. RY. CO.

(Supreme Court of Appeals of Virginia. March 16, 1899.)

LIMITATIONS—ACTION ON WRITTEN INSTRUMENT—CORPORATE RESOLUTION.

1. To be a written contract, within the statute fixing the time for suing on such instruments, a resolution of the board of directors of a corporation must show on its face a complete and concluded contract.

2. A resolution that the corporation donate, in aid of an electric line, a certain sum, and certain property, to be selected by the executive committee of the corporation, "the money to be paid out, and the lots to be deeded, under such conditions and at such times as the executive committee may agree upon with the representative of said electric line," does not contain a complete contract.

Error to law and equity court of city of Richmond.

Action by the Newport News Street-Railway Company against the Newport News, Hampton & Old Point Development Company. Judgment for plaintiff, and defendant brings error. Reversed.

B. T. Crump and Leake & Carter, for plaintiff in error. H. Taylor, Jr., and A. S. Segar, for defendant in error.

HARRISON, J. This action was brought to recover on an alleged contract of the plaintiff in error to contribute or donate the sum of \$2,500 in money, and 13 lots, of the value of \$2,500, towards the construction of a street railway, by the defendant in error, through the lands of the plaintiff in error.

There was a demurrer to the declaration, the general issue pleaded, a plea of the statute of limitations, and two pleas setting up the statute of frauds. A jury was waived, the whole matter of law and fact submitted to the court, and judgment given for the defendant in error for \$5,000 and interest.

To avoid the plea of the statute of limitations, that relied on being three years, the defendant in error insisted that the contract was in writing, and signed by the party to be charged thereby, and that its claim is therefore not barred for five years from the time the right of action accrued.

In support of this contention, the following resolution of the board of directors of the plaintiff in error, signed by its president and secretary, is vouched:

"Resolved, that this company donate to the Newport News Street Railway (being the line proposed to be constructed by Mr. Darling from Hampton to Newport News), for the pur-

pose of continuing their line through the property of this company, the sum of \$2,500 in money, and thirteen lots in the plan of the company, said lots to be selected by the executive committee; the money to be paid out, and the lots to be deeded, under such conditions, and at such times, as the executive committee may agree upon with the representative of the said electric line.

"That the president and secretary have printed, in the form of a circular, and mailed to each stockholder of this company, with a proper form of approval for signature, the resolution above mentioned, or a resolution of similar import, with the statement that the board of directors recommend its adoption; and, upon its approval in that manner by the stockholders of this company, the said resolution shall stand as adopted by this company, and the executive committee shall be authorized to proceed under the said resolution.

"The following form was ordered to be sent to each stockholder:

"I hereby signify my approval of the resolution of the board of directors, adopted at the meeting held at Newport News on July 13, 1892, for the subscription by the Newport News, Hampton and Old Point Development Company of twenty-five hundred (\$2,500) in cash, and thirteen lots; the said cash and lots to be given upon such conditions as may be prescribed by the executive committee of the Newport News, Hampton and Old Point Development Co.

"I am the owner of ——— shares of stock.

"Given under my hand and seal this ——— day of ———, 1892.

"————— [Seal.]

"No further business appearing, the board adjourned.

"L. T. Christian, Secretary.

"J. Taylor Ellyson, President,"

A resolution of a board of directors of a corporation, duly signed by its president and secretary, which sufficiently sets forth the terms of the contract, is a compliance with the statute of frauds as to contracts for the sale of real estate. *Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175. When, however, such a resolution is relied on as the evidence of a written agreement, it must, like other written contracts, show on its face a complete and concluded agreement between the parties. Nothing must be left open for future negotiation and agreement; otherwise, it cannot be enforced. *Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888; *Berry v. Wortham* (Va.) 30 S. E. 443; *Bolsseau v. Fuller*, Id. 457.

The resolution relied on in the case at bar, as the evidence of a written contract, clearly shows on its face that the parties had not reached a final and concluded agreement. After resolving that the company donate the sum of \$2,500 in money and 13 lots, the same sentence provides as follows: "Said lots to be selected by the executive committee; the money to be paid out, and the lots to be deeded, under such conditions, and at such times, as

the executive committee may agree upon with the representative of the said electric line." The resolution is an agreement to make the donation upon certain conditions. The conditions upon which the donation is to be made are, however, not settled, but expressly left open for future negotiation and agreement between the representatives of the two contracting parties.

There being no complete and concluded contract by writing, the claim of the defendant in error rests upon an oral contract, and, the action not having been brought within three years, the plea of the statute must prevail. Code, § 2920.

For these reasons the judgment of the law and equity court must be set aside, and judgment given for the plaintiff in error.

CARDWELL, J., absent.

ROANOKE ST. RY. CO. v. HICKS.

(Supreme Court of Appeals of Virginia. March 23, 1899.)

COURTS—FINAL ORDERS—MODIFICATION—IMPLIED REVERSAL.

1. The appellate court cannot at a subsequent term modify a final order of a previous term.

2. Where an appeal is from both a decree for money and an order appointing a receiver, a reversal of the former is an implied reversal of the latter; hence a beneficiary under the order has no rights in respect thereto.

Application for modification of opinion. Denied.

For opinion, see 32 S. E. 295.

PER CURIAM. This is a motion by appellant to modify the order entered in this cause on the 1st day of December, 1898 (32 S. E. 295), of which motion the appellees have had notice, and resist the same, filing a brief in support of their view, upon the ground that the order sought to be modified was a final order of this court at a former term, and cannot now be modified.

It appears that there are in the record two separate and distinct causes of Roanoke Street-Railway Company against R. R. Hicks, Trustee, etc. In the first there was a decree for money, and the second was a suit to enforce that decree, in which an order was entered appointing a receiver. The appeal was from the decree in both cases. The sole question argued before this court was the propriety of the decree in the first case, and in entering the order setting aside that decree the court inadvertently failed to set aside, in terms, the decree in the second case. The effect, however, of the order setting aside the decree for money, which was the basis of the second case, was necessarily to destroy the entire ground upon which the decree in that case rests, and to leave the beneficiary of that decree without standing in court in the second case. The court is of opinion that they have no power to modify the order in question. They are, however,

further of opinion, that the reversal of the decree for money in the first case was, for the reasons already stated, an implied reversal of the decree of February 17, 1898, and that the beneficiary of said decree has no rights in respect thereto, and has no standing to maintain further the second suit.

CUSSEN v. BRANDT et al.

(Supreme Court of Appeals of Virginia. March 16, 1899.)

MORTGAGES — NOTES — ASSIGNMENT — PAYMENT — BONA FIDE PURCHASERS — PRIORITIES.

1. Where notes were delivered to a bank for collection, and by it surrendered, uncanceled, to one who was under no obligation to pay them, and who informed the bank that he did not wish to pay them, but to purchase them as an investment, and who paid full value therefor, not knowing that the bank held them for collection, the transaction was a purchase, and not a payment; and the notes take precedence over a lien created by a deed executed subsequent to the deed of trust securing them.

2. One who purchases a note after maturity takes it subject to all the equities to which it was subject in the hands of the transferor.

3. Where the holder of secured notes placed some of them, which were due, in a bank, for collection, and they were sold by the bank, with the restrictive collection indorsement canceled, but still legible, to one who had no actual knowledge that the bank held for collection only, and the bank paid the proceeds of the notes to the former owner, who believed the notes had been paid, and the security for the unpaid notes thereby enhanced, the lien of the notes so purchased is subordinate to the notes remaining unpaid in the hands of the original owner.

Appeal from chancery court of Richmond.

Bill by Brandt and Dunlop, as trustees, against Charles H. Talbott and others, to execute a trust under direction of court. There was a decree determining priority of liens, from which defendant Emilie Cussen appealed. Affirmed.

L. L. Lewis, for appellant. Jackson Guy, Coke & Pickrell, John Dunlop, and B. B. Munford, for appellees.

BUCHANAN, J. On the 15th day of December, 1892, Charles H. Talbott executed a deed of trust on certain improved real estate in the city of Richmond to secure the payment of 20 negotiable notes, aggregating \$35,800, drawn by Talbott to his own order, payable at the City Bank of Richmond, and secured in the order of their maturity. The first note was payable six months from that date, and the other 19 notes were each payable six months later than its immediate predecessor; the last or twentieth note of the series being payable 10 years after date.

The notes were afterwards, for value, indorsed in blank, and delivered by Talbott to William A. Marburg, of Baltimore, Md. The first, second, and third notes were paid as they respectively matured. A few days before the fourth note, which was for \$2,690, became

due, Talbott applied to Marburg to extend the time for its payment, or, if he was not willing to do that, to assign it to some one willing to purchase it. Marburg refused to sell the note, but extended the time for its payment 90 days; Talbott paying the interest, and executing his negotiable note for a like sum payable at that time. Some days before the renewal note became due, it, with the original note, was sent by the National Union Bank of Maryland to the City Bank of Richmond for collection. The latter bank delivered the original note, and, as is contended by the appellant and Marburg, the renewal note also, to Elam, either as purchaser or payor. Shortly before the fifth note of the series, payable 30 months after date, became due, it was also sent to the City Bank for collection, and was delivered to Elam, under substantially the same circumstances as those under which he acquired the \$2,690 note. The money which was paid by Elam was the full amount of both notes, and was received by Marburg.

When the sixth note of the series, which was payable in December, 1895, became due, the time for its payment was extended for four months; and, upon the failure of Talbott to make payment when the renewal note became due, the trustees in the deed of trust were required to make sale of the property.

They filed the bill in this case to have the trust executed under the direction of the court, because, as they allege, they learned for the first time when they were about to execute the trust that one Henry Grimmell held the 24-months note for \$2,690, having taken up the same about the time of the maturity of the 90-days renewal note, and that the 30-months note was held by J. B. Elam, who had acquired it about the time of its maturity, and that they had no evidence that Marburg had assigned these notes to the parties who held them, and were demanding that the property should be sold for cash sufficient to pay them.

Talbott and wife, Marburg, Grimmell, and Elam were made parties defendant to the suit.

Elam filed his answer, claiming that he had purchased the notes, and afterwards transferred the 24-months note to Grimmell, and that he (Elam) was still the holder of the 30-months note.

Grimmell answered, stating that he had purchased the note held by him from Elam; and both asserted their right to have the property sold, and the notes held by them paid in their order of priority as fixed by the deed of trust.

Marburg filed his answer, denied that he had sold the notes as claimed by Elam and Grimmell, or authorized their sale, and denied that those notes could be paid out of the proceeds of the trust property until the notes held by him were paid.

Subsequently the appellant, Emilie Cussen, who had a large debt secured by a subsequent deed of trust upon the same property, became a party to the suit. In her answer she asserted her claim under her deed of trust; alleged that the notes held by Elam and Grimmell

had been satisfied, and were no longer liens upon the property, and that she was entitled to have the trust subject sold for the payment of her debt, free from the liens of these notes.

The matters involved in this appeal depend upon the question whether the notes in controversy were paid, or purchased, by the appellee Elam when he obtained them from the City Bank. Elam and its cashier are the only witnesses as to what occurred when he acquired them. Elam's version of what took place is as follows:

"On the 11th of March, 1895, Mr. Charles Talbott came to see me at my office, and stated that a note of his for \$2,690 was about to mature; that he was unable to pay it, and desired me to investigate the matter, and inform him whether I could effect an extension thereof. He stated what the security was, giving the date of the note, and said that it was one of twenty notes secured upon his two houses, next to the corner of Second and Franklin streets, that the original transaction had been negotiated by Mr. Jackson Brandt, that the three notes prior to the said note of \$2,690 had been paid by him, and that this note of \$2,690, which he wished extended, was then held by the City Bank of Richmond. I asked him whether this note was a prior lien to the notes maturing subsequently under said deed. He said that he did not remember, but thought, in any event, the security was ample; stating his estimate of the two houses, and undertaking to convince me that, even if it were not a prior lien, there was no doubt about the security. I stated to him that if the City Bank was the holder of the note, and if it was a prior lien upon the property,—that if the notes had priority one over the other, as usual,—that I could probably effect the extension of the note for \$2,690 for him, provided the bank was the holder and would transfer the same by delivery, and that I would investigate the matter, and inform him of the result. I then went to the office of Mr. James W. Sinton, the cashier of the City Bank, and inquired if he held the said note for \$2,690, naming the date and time, and the amount of it; stating to him that my purpose was not to pay the note, but to effect an extension of it, provided, upon investigation, the security was satisfactory. He stated that he held the note, and, upon my request to look at it, he went to his vault, and brought me the note referred to by Mr. Talbott. I stated to him that I would investigate the security, and, if it were found satisfactory, I would wish to take up said note, for the purpose of extending it. He said that would be all right, and in that event I could bring my check for it. I went then to the clerk's office of the chancery court, and read the deed securing said notes, and found that the notes were liens in the order of their maturity; that they were drawn by Charles H. Talbott to his own order, and indorsed by him in blank, and secured to the holder or holders thereof; and that the property described was as repre-

sented by Mr. Talbott. I then went to see the client who had a day or two previously stated to me that he would have, within a day or two, about three thousand dollars for investment in real-estate paper. I stated to him that I could probably give him a note for \$2,690, stating to him what the security was; and he consented to take it upon the receipt of the money. I then took my firm's check for \$2,690, went to the office of Mr. Sinton, at the City Bank, stated to him that I had satisfied myself as to the security of said note about which I had spoken to him previously on the same day, and that I was prepared to take up said note. He brought me the note, and I handed him the check.

"Then, some three months later, Mr. Talbott called, and stated that the note for \$630, which was the next note in order under said deed, was very nearly due, and that he was unable to pay it; that he would be glad if I would effect an extension of it in the same manner as I had done the other. I told him I thought I could effect an extension of that in the same manner; and accordingly on the 17th of June, 1895, as I now remember, I went with my firm's check to Mr. Sinton's office, and said to him that I would be willing to take up and extend said note for \$630, if I might do so in the same manner in which I had taken up the former note for \$2,690; that this was one of the same series of notes secured by the same deed. He said, 'Very well,' and went and brought me the note for \$630; taking my check for the same, and delivering to me the said note."

The cashier of the bank gives no connected account of what did occur; his recollection of it seems to be very imperfect; many of his statements are vague and indefinite,—in some instances, contradictory; and altogether his testimony is very unsatisfactory. But in respect to the facts which are, to our minds, controlling in determining the character of the transaction when the bank parted with the notes, the cashier's evidence tends to sustain Elam's account of what occurred. Elam says that when he went to the bank to inquire into the matter, and to see whether or not he would take up and extend the \$2,690 note, he told the cashier what his purpose was, and that he did not wish to pay the note. Upon this point the cashier says: "I remember absolutely Mr. Elam's coming to me and making inquiry regarding certain Talbott notes,—I do not now recall the date,—and my giving him what information I could, and his statement that he did not wish to pay said note or notes." Again, when asked, "Do you, or not, recall that when Mr. Elam told you that his object was not to pay said note, but to take it up and extend it, provided he found the security satisfactory upon investigation, that you told him he could do so?" he answered, "I recall his stating that he wished to make certain examination before taking up said note, and I stated that he could get the note." When asked whether or not the \$630 note (the

other note in controversy) was delivered to Elam "as a paid note or as a transferred note," he replied, "We regarded it as an unpaid note." Elam states positively that the Baltimore bank's indorsements on the notes, "For collection," were canceled when they were delivered to him, and that when he first went to the bank he inquired if it held the \$2,690 note, and was told that it did, but he was not informed that it held it for collection. When the cashier was asked whether, in any of his interviews with Elam in reference to the notes, he informed Elam that his bank held the notes for collection, and that it had no authority to sell or transfer them, he replied, "I have no recollection of so stating to Mr. Elam."

Whether a transaction like this is a payment or a purchase is a question of intention,—of fact rather than of law,—and is to be settled by the evidence. *Wood v. Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131. It is undoubtedly true, as contended by counsel for appellant, that it is essential to a sale that both parties should consent to it; but it is as difficult to see how there can be a payment, and an extinguishment thereby of a debt, by a stranger who is under no obligation to pay, when there is no intention to pay, as it is to see how there can be a sale without an intention to sell. This assent, however, need not be expressed, nor shown by direct evidence. It may be inferred from the circumstances attending the transaction, and often is. *Ketchum v. Duncan*, 96 U. S. 659.

It appears from the record that Elam, who was neither a party to, nor under any obligation to pay, the notes, did not intend to satisfy or discharge, but to purchase, them as an investment; that he informed the bank of such intention; that with full knowledge of his purpose to purchase for an investment, and not to pay, it received his money, and delivered the notes to him uncanceled. These facts and circumstances show that Elam intended to purchase, and that the City Bank of Richmond tacitly assented to the sale. Upon no other theory can its conduct in receiving Elam's money, and delivering the notes uncanceled, with full knowledge that he intended to purchase them as an investment, and not to pay them, be explained.

The authorities hold that a transaction like that under consideration is a purchase, and not a payment. It was said by the supreme court of the United States, in a case similar to this, upon the question under consideration, that "in cases like that before us, where the intention to continue the existence of the note, and not to cancel it by payment, is made evident when the money is paid to the collecting agent appointed to receive it, and the owner of the note receives the amount due to him, the authorities sustain the transaction as a purchase." *Dodge v. Trust Co.*, 93 U. S. 379; *Ketchum v. Duncan*, 96 U. S. 659; *Carter v. Burr*, 113 U. S. 737, 5 Sup. Ct. 713; *Swope v. Leffingwell*, 72 Mo. 348; *McDonnell v.*

Burns, 28 C. C. A. 174, 83 Fed. 866; *Brice's Appeal*, 95 Pa. St. 150.

The case of *Bank v. Lay*, 80 Va. 436, which was much relied on by the appellant's counsel to sustain his contention that the notes must be considered as paid, while clearly right upon the facts of that case, sheds but little, if any, light upon this, because of the material difference in the facts of the two cases. In each case the party who had taken up the paper was a stranger to it, but in that case he was, by another contract, expressly and primarily bound to pay it, while in this case he was neither a party to the paper, nor bound in any way for its payment.

When one who is primarily bound for the payment of a note takes it up, it is a payment—an extinguishment—of the note, no matter what his intention may have been. 2 Daniel, Neg. Inst. §§ 1236, 1238; *Bank v. Lay*, 80 Va. 440.

The notes in question having been purchased by Elam, they are not extinguished, as appellant contends, but are existing liens upon the trust subject, and are entitled to priority over the deed of trust given to secure her debt. The trial court so held, and its decree upon that question must be affirmed.

Under rule 9 of this court, the appellees Elam and Grimmell insist that the decree appealed from is erroneous in so far as it provides that Marburg shall have priority over them, and shall be first paid out of the proceeds of the trust subject, and ask that the decree in that respect be corrected. This contention we do not think can be sustained. The notes held by them respectively were purchased by Elam under circumstances which make it equitable that their payment should be postponed until the notes held by Marburg have been paid. When Elam acquired them, one note was overdue, and held by the City Bank for collection. It had no authority to sell them, but of this Elam had no actual knowledge; but he did have notice of circumstances which were sufficient to put him upon inquiry, which inquiry would have disclosed the facts of the case. The note for \$2,690 being overdue when Elam purchased it, he acquired nothing but the actual right and title of the City Bank. He took it subject to all the equities to which it was subject in its hands. *Arents v. Com.*, 18 Grat. 750; *Davis v. Miller*, 14 Grat. 1; 1 Daniel, Neg. Inst. § 724a.

The other note had not yet matured, but it, as well as the \$2,690 note, had upon it the restrictive indorsement of the Baltimore bank, canceled, according to Elam's statement; but still both indorsements were legible through the pen marks by which they were canceled. These indorsements destroyed the negotiability of the notes, and were notice to persons dealing with the City Bank that it held them for collection only. The cancellation of the indorsements changed the character of the notes, and restored their negotiability. This was a material change in the character of the

notes, apparent upon their face, sufficient to put Elam upon inquiry (*Angle v. Insurance Co.*, 92 U. S. 330; 1 Daniel, Neg. Inst. [4th Ed.] § 795), which inquiry, if pursued, would have disclosed the fact that the City Bank only held the notes for collection, and had no authority to sell them. Elam made no such inquiry; gave no notice to Marburg of his purchase; allowed him to remain under the belief that the notes had been paid, and that the security for the payment of other notes held by him was thereby increased, which latter object was no doubt the chief reason why he refused to sell the larger note before its renewal. If, as Elam and Grimmell contend, the trust property will sell for a sum sufficient to satisfy the notes held by Marburg and themselves, then no injury will result to them, except a delay of two or three years in getting their money, as the property, by consent, is to be sold for one-fourth cash, and the residue payable in one, two, and three years. If, on the other hand, it does not sell for a sufficient sum to pay all the notes, we do not think it would be equitable or just, under all the circumstances of the case, that Marburg should suffer loss resulting from Elam's negligence when he purchased the notes, and the delay of the holders in asserting their claim.

We are of opinion, therefore, that there is no error in the decree complained of, and that it should be affirmed.

CARDWELL, J., absent.

BEATTY v. BARLEY et al.

(Supreme Court of Appeals of Virginia. March 16, 1899.)

EQUITY—BILL OF REVIEW—ERRORS OF LAW—CHANGE OF BASIS—DISMISSAL WITHOUT PREJUDICE—ADMINISTRATION.

1. On a bill to review a decree, for error in law, the error must appear on the face of the decree, orders, and proceedings in the cause, arising on the facts either admitted by the pleadings or stated as facts in the decree.

2. Complainant's bill alleged that defendant held a trust deed as security for a debt owing by complainant's deceased husband to defendant, that defendant also held insurance on the life of decedent as additional security for the same debt, that complainant, not knowing defendant held the insurance, paid the debt to secure the release of the trust deed, and that defendant also collected the insurance and refused to account to the estate therefor; and complainant prayed recovery on the ground that defendant had been paid twice. The answer denied that the insurance was the property of the estate, and the bill was dismissed. *Held*, on a bill of review, that complainant could not recover on the ground that defendant did not have an insurable interest in decedent's life.

3. Complainant's bill against the administrator of her husband's estate and a creditor of the estate alleged that the creditor had collected insurance on the life of decedent and refused to account to the estate therefor, and that the administrator, through collusion with the creditor, had refused to bring an action to compel an accounting. The creditor's answer denied that the insurance was the property of the estate, and the administrator's an-

swer denied the collusion, and alleged that the reason that he had not sued was that he was unable to ascertain that such insurance was an asset. *Held*, that a decree of dismissal should be without prejudice to the right of complainant to charge the administrator with any sum which it was his duty to collect from the creditor on account of the insurance collected by the latter.

Appeal from corporation court of city of Alexandria.

Bill by one Beatty against Louis C. Barley and another. On a trial on bill and answer the bill was dismissed. Complainant filed a bill of review, which was dismissed, and she appealed. Modified and affirmed.

J. A. D. Richards, L. A. Bailey, and J. M. Johnson, for appellant. Saml. G. Brent and A. W. Armstrong, for appellees.

CARDWELL, J. In October, 1895, appellant filed her bill in the corporation court of the city of Alexandria against Louis C. Barley and Charles H. Yoke, administrator c. t. a. of Charles H. Beatty, deceased, alleging that her husband, Charles H. Beatty, died in Warren county, Va., in December, 1891, after making and publishing his last will and testament, which was duly probated in the county court of Warren county, whereby he made complainant his sole legatee and devisee; that Charles H. Yoke, then barely 21 years of age, was brought from Alexandria city to Warren county for the purpose of qualifying as administrator c. t. a. of her deceased husband, at the February term, 1892, of the county court of Warren, Louis C. Barley, also a citizen of Alexandria city, becoming his surety; that complainant supposes she consented to this, but that, as her husband had just died, she was in great affliction, besides in no sense a business woman, and her condition such that she was incapable of knowing what was best, and had had no opportunity to consult with friends, before consenting to the qualification of Yoke, if she did. She alleges, further, that, in his lifetime, Beatty, her husband, had taken out a policy of insurance on his life, for the benefit of complainant, for the sum of \$6,500, which she realized after his death; that Beatty was seised and possessed of certain real estate in Front Royal, Va., which at his death was subject to a deed of trust securing to said Louis C. Barley a debt of the principal sum of \$3,000; and that complainant, desiring to save and preserve the property liable to this deed of trust, used and appropriated \$3,000 of her insurance money to pay to Louis C. Barley the debt thereby secured to him, and the lien of the deed of trust was released to her. She further charges that, at the time she used a part of her insurance money to pay Louis C. Barley the debt of \$3,000 secured by the deed of trust aforesaid, she was not advised and informed that Barley had an insurance policy on the life of her husband, Charles H. Beatty, which he, Barley, held as collateral security for the debt of \$3,000 secured by the trust deed aforesaid, which policy of insurance

of \$3,000 Barley had collected after the death of Beatty, whereby Barley had realized upon both securities held by him for the same debt of \$3,000 due him, and had therefore been twice paid the debt,—once by complainant out of the insurance she had on the life of her husband, and again out of the insurance realized by Barley on the policy held by him on the life of Beatty.

She further charges that Yoke, as administrator of Beatty, has made no effort to compel Barley to refund this \$3,000 to the estate of Beatty: that he has done nothing in the way of a proper administration of the estate, having returned no inventory or appraisement of the estate; and that Barley and Yoke, as administrator of Beatty's estate, seemed to be in collusion and conspiracy, so that there can be no collection of Barley's indebtedness to the estate. It is then charged by complainant that, such being the case, she is entitled to recover the \$3,000, with interest, due from Barley; and that, as Yoke, the administrator of Beatty, has not collected it or attempted to do so, she has the right to resort to a court of equity to compel Barley to pay over to her or into court, for the benefit of her husband's estate, this sum of \$3,000, with interest, realized by him on the policy of insurance which he held on the life of Beatty as collateral security for the debt paid him (Barley) by complainant. She calls upon Barley for a discovery as to what insurance he had on the life of Charles H. Beatty; what company it was in; when taken out; for whose benefit; when and how much collected thereon; by whom the insurance was effected; what indebtedness existed between him (Barley) and Charles H. Beatty, etc.

The prayer of the bill is that Barley be required to pay the amount realized by him on the insurance policy into court, subject to the order of the court, and for general relief.

On November 11, 1896, both Barley and Yoke, as administrator of Beatty, answered the bill. Barley, in his answer, admits, or refrains from denying, the allegations of the bill, other than those that directly charge or intimate that he procured Yoke to qualify as the administrator of Beatty's estate, and was then in collusion or conspiracy with the administrator so that his indebtedness to the estate of Beatty could not be enforced. These charges Barley indignantly denies and repels; and sets out that complainant consented to the appointment of Yoke as the administrator of Beatty's estate, upon the condition that he (Barley) would become Yoke's surety, and that this consent was given after consulting and advising with her attorney; that, owing to the condition of Beatty's affairs, it was impossible to get any man of business in Front Royal, Warren county, to act as administrator of his estate; that a number of business men had been appealed to to act as such administrator, but had declined; that Beatty had been in partnership in Front Royal with William H. Barley, respondent Barley's father, from No-

vember, 1877, to April, 1882; that William H. Barley died in February 1881, and the partnership accounts between these partners had never been settled, although William H. Barley's executor brought suit for their settlement in September, 1882.

The charge that he had twice collected the same debt of \$3,000 due him from Beatty's estate is emphatically denied by respondent Barley; and, in this connection, he says that, at the time the debt referred to was paid him by complainant, he fully and elaborately explained to her, in the presence of several gentlemen, that his father, William H. Barley, on the 23d of July, 1879, took out a policy of insurance on the life of her husband and his (William H. Barley's) partner, Charles H. Beatty, in the Equitable Life Assurance Society of the United States for the sum of \$3,000, payable to Anna V. Barley, William H. Barley, Jr., and himself, or the survivors of them; that, the first two having died, the insurance came wholly to respondent, and that after the death of Beatty in January, 1892, respondent collected it.

Respondent further says that this was the only insurance he ever had on the life of Charles H. Beatty; that it was taken out nearly five years prior to the deed of trust referred to in complainant's bill, and had no connection whatever with the debt secured by that trust deed; that the debt secured by the trust deed was originally contracted with H. H. Downing, and evidenced by the joint bond of Charles H. Beatty and his wife (complainant), secured by trust deed on the real estate of complainant,—not that of her husband,—and Downing afterwards assigned the debt to respondent for a valuable consideration; that the principal of this debt was only \$2,500; that, in order to relieve her property, complainant, in February or March, 1892, did pay respondent, as assignee of Downing, the sum of \$3,000 in full of the debt, including interest, but that respondent, a few days thereafter, voluntarily paid back to complainant \$200 of the money she had paid him, and released the lien of the deed of trust to her. Respondent further says that, at the time of Charles H. Beatty's death, there was no individual indebtedness between Beatty and respondent; but, owing to the unsettled condition of affairs of Beatty, Barley & Co., it is impossible to state what indebtedness exists between Beatty and respondent, as the only heir and legatee of William H. Barley, deceased; and that respondent believes and charges that Beatty, having received out of the assets of the firm of Barley, Beatty & Co. very much more than his share thereof, is largely indebted to the estate of William H. Barley, and that respondent has made every possible effort to have a settlement of the partnership affairs of the firm of Barley, Beatty & Co., both in the lifetime of Beatty and since his death, but has been unable to do so.

Yoke, as administrator of Beatty, in his answer, also says that it was with the consent and at the request of complainant that he

qualified as the administrator of her husband's estate; that he was 28 years of age, instead of barely 21, as alleged, and had had business experience, etc.

He also denies and repels indignantly the charge of collusion and conspiracy between him and Barley, his co-respondent, whereby he has made no effort to collect of Barley his indebtedness to the estate of Beatty. He admits that he has done nothing towards collecting of Barley the \$3,000 received by the latter on the policy of insurance on the life of Beatty, but says that the reason he has not done so is that, after diligent inquiry, he was unable to ascertain that it was an asset of his decedent's estate. The reason given by this respondent for not having returned an inventory and appraisal of his decedent's estate is that, so far as respondent could learn from the complainant (widow of Beatty) and other sources, he found nothing to appraise, as the estate of Beatty consisted of his interests in the partnership assets of the firms of Beatty, Forsythe & Co. and Beatty, Forsythe & Harrison, which partnerships had to be settled up by the surviving partners; that respondent had done all in his power to have these partnership affairs settled; that suits are now pending for this purpose; that respondent has settled an account of his transaction as administrator of Beatty, and stands ready to perform all duties devolving upon him as such administrator, etc.

Upon the filing of these answers at the November term of the court, 1895, the cause was continued to the December term; then to the January term; and then to the February term, 1896, when it was heard on the bill and answers, and the exhibits therewith, and the court dismissed the bill, with costs to respondents.

In August, 1896, the complainant filed her bill of review, setting forth the allegations of her original bill, the statements and admissions in the answers thereto, and all the proceedings in the cause; and alleging that the decree dismissing her original bill "is erroneous, and ought to be reviewed and reversed for many apparent errors and imperfections, inasmuch as it appears by answer of Louis C. Barley that the alleged beneficiaries under the policy of insurance for \$3,000 had not any interest in the life of the said Charles H. Beatty when issued, or at any time, and the said Louis C. Barley should be made to account for said money, as trustee for complainant, or those interested in or entitled to the estate of said Beatty."

In her original bill, the grounds upon which complainant sought the relief she asked were that Barley held two separate and distinct securities for one and the same debt due him from the estate of complainant's husband, Charles H. Beatty, deceased,—one a deed of trust on Beatty's real estate, and the other a policy of insurance on the life of Beatty held by Barley as collateral security for the debt secured by the trust deed; that complainant

had, out of her own money, paid Barley the debt thus secured, and Barley had also collected the amount of the insurance policy (\$3,000), whereby he had been twice paid the same debt, and refused to refund to appellant, or to the estate of Beatty, the amount improperly received by him on the policy of insurance.

The original bill does not allege that Barley had no insurable interest in the life of Beatty. On the contrary, it sets out a state of facts upon which Barley is shown to have had an insurable interest on the life of Beatty; and the allegation is made, upon the facts stated, that he did have such interest, because of the debt due him from Beatty.

The grounds upon which appellant seeks to recover of Barley the amount realized by him on the policy of insurance on the life of Beatty, set out in her bill of review, are solely that the beneficiaries named in the policy of insurance in question had not, at the time the policy was issued, or at any other time, an insurable interest in the life of Beatty.

On a bill to review a decree on the ground of error in law, the errors must be such as appear on the face of the decrees, orders, and proceedings in the cause, arising on the facts either admitted by the pleadings or stated as facts in the decrees; but, if the error be error of judgment in the determination of facts, such errors can be corrected only by appeal. *Rawlings' Ex'r v. Rawlings*, 75 Va. 76; 1 Bart. Ch. Prac. p. 382.

As was said by the learned judge of the court below, in a written opinion made a part of the decree dismissing the bill of review: "In the bill of review the complainant entirely changes her position, which cannot be done in a bill of review. This lies only for error apparent on the face of the decree complained of and the proceedings in the cause in which it is entered, and the 'proceedings' in this case only means the bill and answers, so far as responsive. If the answers disclosed anything in favor of the complainant, she could have amended her bill, but the decree could only have been based on the allegations of the bill. The allegations of the bill were fully responded to and denied by the answers, so far as material."

The complainant neither amended her bill nor offered any evidence in support of its allegations, although the cause was continued from the November term of the court, 1895, over two intervening terms, to the February term, 1896. The decree then made upon the original bill, the answers, and exhibits therewith, was clearly a proper decree, and, had the court below decreed the relief sought by the bill of review, it would have been the adjudication of an entirely different case from that made in the original bill.

We are of opinion, however, that the decree dismissing the bill of review appealed from ought to have shown clearly that it was done without prejudice to the right of the complainant to have the administrator c. t. a. of

her deceased husband (Charles H. Beatty) charged with any sum which it was his duty to collect, but which he failed to collect, from Louis C. Barley, on account of the policy of insurance held by him on the life of Beatty.

This court will therefore so amend the decree appealed from, and, as amended, affirm it.

BUCHANAN and HARRISON, JJ., absent.

HAIRSTON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 28, 1890.)

RAPE—VERDICT—CERTAINTY—EVIDENCE—SUFFICIENCY.

1. Where an indictment in a single count charges a person named with an attempt to commit rape on a certain female, a verdict, "We, the jury, find the prisoner guilty of attempted rape, and fix his punishment at eight years in the penitentiary," is not uncertain.

2. On a trial for an attempt to commit rape, prosecutrix testified that accused rode up about noon, and commenced talking to her in the yard; that he then made an indecent proposal, got off his mule, started towards her, renewing the request, and made a motion as if to pull up her clothes, but that she dodged, and he did not touch her; that she threw a stone at him and screamed; that he advanced further, and she threw more stones at him, whereupon he rode away; and that her father, mother, and sister were in the house, but did not see the trouble or hear her screams. *Held*, that the evidence did not sustain a conviction.

Error to Henry county court.

One Hairston was convicted of an offense, and he brings error. Reversed.

William M. Peyton, for plaintiff in error. The Attorney General, for the Commonwealth.

RIELY, J. The first assignment of error is that the verdict of the jury is defective for uncertainty.

The indictment contains a single count, and charges the accused with an attempt to commit rape upon a certain female. The verdict of the jury is in these words: "We, the jury, find the prisoner guilty of attempted rape, and fix his punishment at eight years in the penitentiary."

The verdict of a jury in a criminal case is always to be read in connection with the indictment; and if, upon reading them together, the meaning of the verdict is certain, this is sufficient. *Hoback's Case*, 28 Grat. 922. The indictment in this case charges the prisoner with an attempt to commit rape, and names the female upon whom the attempt was made. The verdict is a direct response to the issue of guilty or not guilty, which the jury were sworn to try. It finds the prisoner guilty of attempted rape, and ascertains his punishment. It was not necessary to insert his name in the verdict. The verdict, by the use of the word "prisoner," identifies the person named in the indictment, in custody, and on trial, as the person guilty of the offense, and finds him guilty of attempted rape; that is, of the attempt to commit rape, with which he is charged

in the indictment. This is plainly the meaning of the verdict.

The only other assignment of error is the refusal of the court to grant the accused a new trial. The insufficiency of the evidence to warrant the verdict was the ground of the motion for a new trial.

The court is of opinion that this error is well assigned. To sustain the charge of an attempt to commit rape, there must be evidence of force, or of an intention on the part of the offender to use force in the perpetration of the heinous offense, if it should become necessary to overcome the will of his victim. 1 Bish. Cr. Law (7th Ed.) § 731; 3 Am. & Eng. Enc. Law (New Ed.) 258; *Com. v. Fields*, 4 Leigh, 648; *State v. Massey*, 86 N. C. 658; and *State v. Kendall* (Iowa) 34 N. W. 843.

The evidence of the prosecutrix is that the accused came to her father's house, riding upon a mule, and commenced talking to her, as she stood in the edge of the yard, about paying him for some work that he had done, and followed it up by making to her an indecent proposal; that he then got down off his mule, and started towards her, renewing his indecent request, and making a motion at her and very close to her as if he would pull up her dress, but did not touch her; that she jumped to one side, and dodged him, screamed, picked up a stone, and threw it at him; that he advanced on her after she threw the stone; and that she then threw three more stones at him, when he turned away, got on his mule, and left.

The occurrence took place between 12 and 1 o'clock in the day, in the edge of the yard of the father of the prosecutrix, about 50 yards from the house, and in sight of, and very near, the house of a colored family. No one witnessed the occurrence or heard the screams. The father and mother of the prosecutrix were in the house, sick in bed; and her sister was in the back room, washing dishes, with the front door shut.

The whole evidence, taken together, is of a very doubtful and inconclusive character. There was no attempt to use force, no threat, only solicitation. The absence of all violence, and of evidence of any intention to use force, if necessary to overcome the will of the prosecutrix, the time and the place, and all the surrounding circumstances, invest the charge with very great improbability. However reprehensible is the conduct of the accused, the evidence is consistent with a desire on his part to have sexual intercourse with the prosecutrix, but without evidence of an intention to use force. If necessary, to gratify his desire,—only persuasion. The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

The court is of opinion that the county court erred in refusing to grant the plaintiff in error a new trial, for which error its judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

STATE v. KNOTT.

(Supreme Court of North Carolina. April 18, 1899.)

FALSE PRETENSES—WHEAT CONSTITUTES.

Prosecutor went to accused, and said he understood he was agent for F., who would furnish money to any one at the rate of \$10 for each \$1 invested; and afterwards on the same day he made a bargain with accused that on payment of \$21.50 accused would procure \$150 for him from F., and accused told him he had furnished money at those rates to others. Held, the money not having been furnished as agreed, that it did not constitute obtaining money under false pretenses, since there was no false representation of a subsisting fact.

Appeal from superior court, Forsyth county; McIver, Judge.

Cicero Knott was convicted of obtaining money under false pretenses, and he appeals. Reversed.

Moore & Sapp, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant is indicted for obtaining money under a false pretense. Code, § 1025. The state's witness testified that "he went to the defendant, Knott, and told him he understood he was an agent for one Franklin, who would furnish good and lawful money to any one at the rate of \$10 for each \$1 invested, and that he afterwards on the same day made a bargain with defendant, Knott, that upon the payment of \$21.50 the said Knott was to procure for him from said Franklin the sum of \$150; that defendant, Knott, told him he had furnished money at these rates for Ogburn, Hill & Co." and others; further, that said money had not been received by him. Does this evidence constitute an indictable offense under our Code? It does not. It shows a promise to be performed in the future, but does not show a false representation of a subsisting fact. This question was fully explained in *State v. Phifer*, 65 N. C. 325, which has been followed as a leading case. There it was held that "there must be a false representation of a subsisting fact, calculated to deceive, and which does deceive," but it does not extend to mere tricks of trade. It makes no difference whether the prosecutor was a prudent or imprudent man, or one easily imposed upon; for, if he was deceived, it was done by a promise, and not by a false representation of an existing fact. New trial.

MITCHELL et al. v. CORPENING et al.

(Supreme Court of North Carolina. April 18, 1899.)

WILLS—MENTAL INCOMPETENCY—EVIDENCE—INSTRUCTIONS—NEW TRIAL—JURY—COUNSEL.

1. For an attorney in a cause to give the jurors in the box a drink of water at their request is not cause for new trial.

2. To refuse an instruction on insanity in a will contest, where the evidence tends to prove imbecility only, is not error.

3. It is not error to refuse an instruction which is covered by the main charge.

4. In proving imbecility of a testatrix, evidence of gradual decline having been introduced, her mental incapacity a few days after execution of the will may be shown.

Appeal from superior court, Caldwell county; Coble, Judge.

F. B. Mitchell and others filed a caveat to a will propounded by A. J. Corpening and others. From a judgment for caveators, propounders appeal. Affirmed.

Edmund Jones, for appellees.

MONTGOMERY, J. The appellants were not represented here by counsel, nor was there a brief filed in their behalf; in fact, the case on their part seems to have been abandoned; and, upon our reviewing it, we feel safe in saying that in that respect, at least, their course was a wise one.

The first exception was to what the appellants call the conduct of one of the counsel of the caveators on the trial. The offending lawyer during the trial, in open court, went to the water pitcher near the jury box, and quenched his own thirst with a glass of water; several jurors, taking the contagion, gave him a sign that they too would like to partake of the cooling draught, whereupon he politely waited on them. For which cause it is insisted that the supreme court ought to grant a new trial of the case. This, to us, seems to be trifling with the court.

The second exception was to the refusal of his honor to instruct the jury that "sanity is the natural and usual condition of the human mind, and every person is presumed to be sane. If the deceased was not insane, then the execution of her will was a valid one." The first sentence of the requested instruction was taken word for word, from the opinion of the court in the case of *Wood v. Sawyer*, 62 N. C. 277. In that case the caveat to the will was filed on the alleged ground of the insanity of the testator. In the case before us the foundation of the caveat to the will is not the alleged insanity of the testatrix at the time of its execution, but her imbecility of mind growing out of weakness produced by a long-continued illness; and there was not a syllable of the evidence introduced for the purpose of showing insanity of the testatrix, or that tended to prove it. There was, however, testimony strongly tending to prove imbecility (total mental incapacity), as well as great physical exhaustion from weakness and disease. The instruction could not have been given in any view of the case.

The third exception was to the refusal of the court to charge the jury "that the caveators impeaching the validity of the will must affirmatively show the want of capacity, or the exercise of undue influence, which is defined to be influence by fraud or force, and they must show its application to the making of the will. How this exception could be insisted on, in the face of the instruction on the point

which his honor gave in the general charge, is a puzzle to us. His honor said: "Did she, the said Lucinda L. Tuttle, at the time of the execution of the script or writing in question, have sufficient mental capacity to understand the nature and character of the property disposed of, to whom she was giving her property, and how she was disposing of the property? If so, then she was of sound mind and memory, within the meaning of the law; if not, then she had not testamentary capacity. The law is that, to be of sound and disposing mind and memory, so as to be capable of making a valid will, the deceased must at the time of executing the paper writing have had sufficient mental capacity to understand the nature and character of the property disposed of, to whom she was willing it, and how she was disposing of her property. If at the time of the alleged execution of the said writing the said testatrix had the capacity to know what she was doing, and was capable of understanding the nature and character of the property disposed of, to whom and in what way she was disposing of her property, then her mental capacity would be sufficient. On the question of undue influence the real inquiry to be determined is: Did the said Lucinda L. Tuttle, deceased, make and execute the alleged will, in all its provisions, of her own free will and volition, so that it now expresses her own wishes and intentions, or was she constrained or coerced through the undue influence, restraint, or coercion of others, in making her will, to act against her own desire and intention, as regards the disposition of her property or any part of it? And the jury are instructed that the influence exercised over a testator or testatrix, which the law regards as undue or illegal, must be such as to destroy her free agency in the matter of making the will; but it matters not how little the influence, if her free agency is destroyed it vitiates the act which is the result of it; and the amount of undue influence which will be sufficient to invalidate a will may vary with the strength or weakness of the mind of the testatrix, and the influence which would subdue and control a mind and will naturally weak, or one which had become impaired by age, disease, or other cause, might have no effect to overcome a mind naturally strong and unimpaired. The jury are instructed that any influence exercised upon the testatrix, if proved, by reason of which her mind was so embarrassed and restrained in its operations that she had not control of her own opinions and wishes in respect to the disposition of her estate, was undue influence, within the meaning of the law. It is not, however, unlawful for one by honest advice or persuasion to induce a person to make a will or to influence him in the disposition of his property by will. To vitiate a will on account of undue influence it must appear from the evidence that there was something wrongfully done, amounting to a species of fraud or moral force and coercion or other

improper conduct destroying free agency, so that the will does not express the real wishes of the testatrix or testator, but those of some other person." Several exceptions were made to the charge of his honor; but, upon an examination of them, they are found to be no more meritorious than those to the refusal of his honor to give the special instructions requested.

One of the objections made by the propounders to a part of the evidence is of sufficient importance to be considered. The testatrix had been sick some year or more, and in bed for the two or three months preceding her death. The evidence of the caveators tended to prove that the mind and body of the testatrix had gradually declined and weakened from her long and serious sickness, till her death; and there was evidence tending to show that when the will was executed she did not have testamentary capacity, and her bodily strength was almost exhausted. In connection with that matter, a witness was allowed to testify, over the objection of the propounders (appellants), that, in a very few days after the execution of the will, he, in company with the pastor of the testatrix, went to see her, and that she was found utterly unable to understand or to comprehend anything he said to her. If the testatrix had had a protracted illness, and there had been a gradual weakening of the body and mind until her death, and if, at the time of the execution of the will, she was not of testamentary capacity, and so weak that she had to be lifted up to sign the paper, then we think that her condition of mind at that time was some evidence of what her mental condition was when the will was made. In *Norwood v. Marrow*, 20 N. C. 442, this court held: "It seems to us that the evidence offered of the bargainor's declaration, connected with his conduct the next day, was relevant and proper. When the inquiry is whether a particular malady, mental or corporal, existed at a particular time, its existence previously and just up to the period, and its existence also just afterwards, furnished together the strongest presumption that the disease was seated in the system at the given period." The principle of evidence announced in the last-named case is not precisely like that involved in this case, but we think there is an analogy between them. There was no error, and the judgment is affirmed.

FURCHES, J., did not sit on the hearing of this case.

BALK v. HARRIS.

(Supreme Court of North Carolina. April 18, 1899.)

GARNISHMENT—NONRESIDENT GARNISHEE.

Unless a nonresident garnishee have personality of the debtor with him, or his debt is payable in the state where garnished, the garnishment is a nullity.

Petition for rehearing. Dismissed.
For former opinion, see 30 S. E. 318.

CLARK, J. This is a petition to rehear the decision reported in 122 N. C. 64, 30 S. E. 318. The judgment of another state, condemning the debt due by Harris to Balk, can only be recognized as valid here when that court acquired jurisdiction. It was not founded on personal service, but it is contended that the Maryland court acquired jurisdiction by attaching the debt due Balk by serving notice upon Harris, who was transiently in the city of Baltimore. The situs of the debt for purposes of taxation, and usually for all purposes, is with the creditor. But there are many states whose courts hold that, for the purposes of attachment, the situs of the debt is at the residence or domicile of the debtor. The conflicting authorities are summed up and arrayed in the notes to *Railroad Co. v. Smith* (Miss.) 19 Lawy. Rep. Ann. 577 (s. c. 12 South. 461), whose accomplished editor sums up a careful review of the authorities, as follows: "The true doctrine seems to us to be that no jurisdiction can be obtained to condemn a debt due to a nonresident unless jurisdiction of his person is obtained; that is, that the situs of the debt, for the purpose of garnishment, is at the residence of the creditor. To hold that such situs is with the debtor seems against reason, because he has no property in the debt, and because it allows a proceeding to condemn one's property to be prosecuted without notice to him, or representation by any one who cares for the protection of his interests. Such a proceeding seems unworthy to be called 'due process of law.'" There is logic and force in these views, if it were an open question with us; but North Carolina is one of the states whose courts have held that, for purposes of an attachment, the situs of a debt is where the debtor resides. *Cooper v. Security Co.*, 122 N. C. 463, 30 S. E. 348; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 108.

The apparent inconsistency or hardship of such ruling is much lessened by the uniform holding by courts of that line of thought that the attachment of the debt can only be made where the debtor resides, and "can have no validity if levied upon him when only passing through, or transiently in, another state. It is thus stated in 8 Am. & Eng. Enc. Law, 1129, 1130: "Choses in action upon which the garnishee is liable are not to be considered as following the former wherever he may be transiently found, to be there taken, at the will of a third person, within a jurisdiction where neither such debtor nor his creditor resides. As a general rule, therefore, the courts of a state cannot, by their service of process upon an inhabitant of another state transiently within their jurisdiction, charge such person as garnishee. But if, when so served, the garnishee have in his possession, within the state, money or property of the defendant, or has contracted to pay money, or deliver property, within such jurisdiction, he may be char-

ged." This is sustained by uniform decisions (many of which are there stated in the notes), among many others: *Smith v. Eaton*, 36 Me. 208; *Lovejoy v. Albee*, 33 Me. 415; *Sawyer v. Thompson*, 24 N. H. 510; *Baxter v. Vincent*, 6 Vt. 614; *Ray v. Underwood*, 3 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Cronin v. Foster*, 13 R. I. 196. In the last case it is said: "When a person transiently in another state is sued for his own debt, it is a different case. But if a person by garnishment is compelled, in order to satisfy a debt not his own, but due from one of his creditors, to pay his own debt, in a mode very different from that in which he would otherwise have paid it, it would be a hardship." The court, proceeding, admits the recognized exceptions above stated, that the foreign court could acquire jurisdiction by service upon a garnishee transiently within the state, (1) when the garnishee has personal chattels of the debtor with him (which usually could be attached without garnishment), and (2) when the debt due by the garnishee is contracted to be paid within the state. Among other cases to same effect: *Wright v. Railroad Co.*, 19 Neb. 175, 27 N. W. 90, in which it is said (page 182, 19 Neb., and page 94, 27 N. W.): "The rule is well settled that garnishment served upon a nonresident of the state, but temporarily within it, is not effectual as an attachment,"—citing, to same purport, *Green v. Bank*, 25 Conn. 452; *Casey v. Davis*, 100 Mass. 124; *Sawyer v. Thompson*, 24 N. H. 510; *Lawrence v. Smith*, 45 N. H. 533; *Nye v. Liscombe*, 21 Pick. 263; *Tingley v. Bateman*, 10 Mass. 343; *Jones v. Winchester*, 6 N. H. 497; *Mathews v. Smith*, 13 Neb. 190, 12 N. W. 821; *Danforth v. Penny*, 3 Metc. (Mass.) 564; *Gold v. Railroad Co.*, 1 Gray, 424. In *Bush v. Nance*, 61 Miss. 237, it is said that, unless the debt of the nonresident garnishee was payable in the state where garnished, "he was not subject to garnishment in that state, and the writ served on him there was a nullity, and this seems settled law by the authorities. The reason is that the court entertaining a garnishment must have some jurisdiction over the thing garnished, and where the garnishee is a nonresident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within that state, the jurisdiction is defeated. Such is the well-settled law. *Drake, Attachm.* (5th Ed.) §§ 474, 475, and cases there cited." This is sustained by reference to the citation from *Drake on Attachment*, and also by *Wap. Attachm.* 228. There are many other cases to same effect, among them *Squalr v. Shea*, 26 Ohio St. 645; *Railroad Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21; *Commercial Nat. Bank of Chicago v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 172. The defect being jurisdictional, the garnishee cannot waive it, because it is not with him a personal matter, and he has no right to prejudice the defendant. *Rindge v. Green*, 52 Vt. 204; *Wap. Attachm.* 228; *Drake, Attachm.* § 476.

Inasmuch as an attachment is, in effect, a

proceeding by the principal debtor (the defendant in the action), in the name of the plaintiff, against the garnishee, it is thus properly held, even in those courts which hold that the situs of a debt for this purpose is with the debtor (garnishee), that the action must be brought where he "resides" or "has his domicile," since it is there that his creditor must have sued him. One or two cases unguardedly say the action may be brought "wherever the debtor [garnishee] may be found," but the context and the facts in those cases show that they mean where he may be found "resident" or "domiciled," as it is expressly held in all cases where the point is made. As upon the uniform authorities above cited, and others not necessary to cite, the Maryland court acquired no jurisdiction, as against Balk, by service of notice upon his debtor, Harris, who had no tangible property of Balk in his possession, and was not resident in that state, we reaffirm our former decision, but, after the benefit of the able and exhaustive argument upon the rehearing, for an entirely different reason from that given on the first hearing. Petition dismissed.

FIRST NAT. BANK v. RIGGINS.

(Supreme Court of North Carolina. April 25, 1899.)

BANKS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—SET-OFF.

A stockholder in a national bank in the process of liquidation cannot set off his distributive share in the assets against his liability on his stock.

Appeal from superior court, Forsyth county; Allen, Judge.

Action by the First National Bank against H. L. Riggins. Judgment for plaintiff, and defendant appeals. Affirmed.

Watson, Buxton & Watson and Jones & Patterson, for appellee.

FAIRCLOTH, C. J. The plaintiff, the First National Bank, is in liquidation, and a committee duly appointed has charge of its property, to collect the assets, pay its debts, and distribute the balance among the stockholders. The defendant is a stockholder in plaintiff bank, and is indebted to it for his stock, which was deposited as collateral security; and this action is brought to collect the amount due on said stock, and to sell the stock in payment, or part payment, of the amount found to be due. The defendant alleges that upon a final settlement of the bank's affairs he will be entitled to \$800 as his distributive share of the assets, and demands a credit on his debt for that amount. This allegation and this right are denied, and it does not appear what will be his distributive share. In cases of insolvency, private or corporate, the general rule is that the net balance must be distributed pro rata among the beneficiaries. Under the national banking act, when an assessment is

made, each stockholder is required to pay his part in full, regardless of whether he is a debtor or creditor of the bank, and when the collections are made, and all debts and expenses are discharged, an equitable distribution of the assets is made. The same rule applies in the settlement of insolvent estates by executors and administrators. And so it is in winding up the business of insolvent building and loan associations, as was held by this court in *Mears v. Duncan*, 123 N. C. 203, 31 S. E. 476, and cases cited. If the defendant's contention was allowed, he would get the full value of his stock, at least pro tanto, and thus the net amount for the other stockholders would be reduced, and the principle of an equitable settlement would be disturbed, as the liability of the stockholder would be diminished, and that of the other stockholders increased, which would be a result not contemplated in law or equity. As a stockholder, he is liable to an amount equal to his stock, or to a just proportion, if all is not required; but, as a creditor, he is entitled only to a dividend in proportion to other creditors. His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions. The money arising from unpaid shares is a trust fund for all the creditors, and cannot be affected by any individual transactions of the stockholder, to the prejudice of the other stockholders. *Hobart v. Gould*, 8 Fed. 57; *Morse, Banks*, p. 500. Besides, the distributive share of the defendant is unknown, and it seems it would be impracticable to ascertain it with any certainty. The above authorities do not stand upon facts on all fours with the present case, but they all enunciate a principle plainly applicable to the present case; and that principle is so manifestly just that we have no hesitation in adopting it. We think, therefore, that the defendant cannot set off what he supposes to be his distributive share against his individual indebtedness to the bank. Affirmed.

DOUGLAS, J. (concurring). I concur in the judgment of the court, but not in the opinion, which is based upon principles some of which have apparently no application to the facts, and may be confusing to us in other cases. I do not think this case involves any equitable principles, but is simply a plain question of legal set-off or counterclaim, as all such matters are now designated under the Code. Neither does it come within the principles governing the rights of creditors to the assets of an insolvent corporation, for the simple reason that there are no creditors, as is expressly alleged in the complaint and admitted in the answer. Strictly speaking, the bank is not insolvent, because it owes no debts, but it has gone into voluntary liquidation, because its capital has become impaired to such an extent as to prevent its carrying on a profitable business. It is true that all corporations, in their

statements, place their capital stock among their liabilities; but this is necessary to offset the asset representing the money paid in on the stock. Paid-up stock may in one sense be a liability of the corporation, but in no sense can it be a debt. It represents a certain share or part of the corporation, and for that reason, in England, the holders of such shares are called "shareholders" instead of "stockholders." Such holders cannot withdraw their stock at will, but only upon the dissolution of the corporation, and then they are entitled, not to any particular sum, but to such a proportion of its assets as their respective shares bear to the entire stock. This cannot be definitely ascertained until the assets are all collected or reduced to a certainty. They are, of course, entitled to reasonable dividends; but such dividends should come only from profits, and should never impair the capital. As a stockholder is entitled only to his distributive share, he cannot demand it in advance of a general distribution. By this is not meant a final distribution, but such a distribution, in whole or in part, as applies equally to all the stockholders. In other words, if one stockholder is given 10 per cent., all can demand 10 per cent. As the defendant's share was not demandable at the bringing of this action, or at any time before judgment, it was not the subject of set-off, which at common law applied only to mutual debts, upon which independent actions could have been brought. The counterclaim is the creature of the Code, and is an extension of the set-off, enlarging the class of claims that may be pleaded, and enabling the defendant to obtain judgment for the excess; but the Code (section 244) specifically provides that "the counterclaim * * * must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action." This question is discussed in *Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288. If the stock itself and the money due in payment therefor were mutual debts, capable of mutual set-off, then no stock subscription could ever be collected; and if the stockholders could individually withdraw their shares at their option, the very purpose of incorporation would be defeated. As the defendant could not have brought suit for his individual stock, then he cannot set it off against the debt due the plaintiff. The note sued on is clearly a debt, although given in part payment of a stock subscription. The defendant subscribed for 20 shares of the capital stock of the plaintiff bank, and apparently paid \$700 in cash, and gave his note for the balance, with the stock itself as collateral security. It appears that by consent the capital of the bank was reduced one-half on account of losses; but, as the reduction was uniform, the actual value of the stock remained the same, as it represented the same relative proportion of ownership in the same amount of assets. It therefore makes no difference in this suit. It is the duty of those winding up the affairs of a corporation

to do so with the least possible expense and inconvenience to the stockholders; but, in the absence of any allegation of fraud or oppression, we should not interfere with their reasonable discretion even in a proper action. We certainly cannot do so on a mere plea of set-off or counterclaim. For the reasons herein stated, I concur in the judgment of the court.

MONTGOMERY, J. I concur in the concurring opinion.

DOWDY et ux. v. WESTERN UNION TEL. CO.

(Supreme Court of North Carolina. April 25, 1890.)

TELEGRAPHS—DELAY IN DELIVERING NIGHT MESSAGE—AGENCY OF RAILROAD OPERATORS.

A telegraph company authorizing railroad operators to receive messages in the night, and the charges therefor, is liable for mental anguish caused by a failure to deliver a message so received during the night, though it customarily does not deliver such messages until after the arrival of its own agents in the morning.

Faircloth, C. J., dissenting.

Appeal from superior court, Chatham county; Timberlake, Judge.

Action by W. B. Dowdy and wife against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. C. Strong, for appellant. H. A. London, for appellees.

MONTGOMERY, J. This action was brought to recover damages for mental anguish alleged to have been suffered by the plaintiffs on account of the alleged negligent failure of the defendant to deliver a certain telegraphic dispatch sent by the feme plaintiff to the male plaintiff, her husband. In the wife's telegram she informed the husband that their child was very sick, and requested him to come home at once. The wife was at Sanford, and the husband at Aberdeen, both places being on the Augusta Air-Line Railroad. The defense of the defendant as set up in their answer was that the message was not delivered to their agent at Sanford, nor transmitted to their agent at Aberdeen, but was delivered for transmission to the night operator of the Seaboard Air-Line system of railroad at Sanford, and was received by the night operator of the same railroad company at Aberdeen; and that upon the delivery of the telegram to the defendant's agent at Aberdeen, when he went on duty the next morning, at 7 o'clock, by the night operator of the railroad company, it was promptly delivered to the sendee, the male plaintiff.

J. M. Dowdy, the father of the male plaintiff, testified that he delivered the telegram to Huntley, the agent of the defendant at Sanford, on the 21st of February, 1898, at 8 p. m.

to be transmitted to the agent of the company at Aberdeen for the sendee, the male plaintiff, and paid the charges. Huntley denied that he received the telegram from J. M. Dowdy. He said, however, that on the next morning, on going to his work in the office of the defendant company, he found on the hook the message; that it was attached to a Western Union Telegraph Company blank; that he put it with "Western Union Telegraph Company's business"; and that the night operator gave him the money for transmitting the message, which he turned over to the defendant company.

S. A. Johnson, a witness for the defendant, testified that he was the night operator of the Sanford Air-Line Railroad Company, and that he received the telegram at 9:45 p. m. on the 21st of February; that when he received it he wrote it out on a Western Union Blank; that, when messages not on railroad business came, he always did this, and, after making memoranda thereon as to the time of transmission and receipt, according to rules, hung them on a hook in the office, where the Western Union operator could get them when he came on duty in the morning. Johnson further said that he never took such messages for delivery; that there was no provision made for delivering messages at night. Johnson, Huntley, and W. F. Williams, another witness of the defendant, all testified that at Sanford and Aberdeen the custom of the defendant company was to close those offices for public business from 7 p. m. to 7 a. m. of each day, and that after 7 p. m. the night operators of the railroad company went on duty for railroad business only. The house in which the male plaintiff was staying at Aberdeen was about a fourth of a mile from the office of the defendant company, and Johnson, the night operator, knew where he was when the telegram was received. There was a train leaving Aberdeen for Sanford at 12:02 a. m., and the plaintiff could have arrived at the latter place an hour afterwards had the telegram been delivered to him before the departure of the train from Aberdeen. It was not delivered to him until 7 a. m. the next morning, too late for the plaintiff to arrive at Sanford before the baby's death. The defendant's contentions were that the defendant company had the right to establish reasonable rules for the regulation of its business, and, in the exercise of that right, that they had made a rule that their offices at Aberdeen and Sanford should be closed for public business each day from 7 p. m. to 7 a. m.; that, the office hours for business at Sanford, when the telegram was delivered there to the night operator of the railroad company, having been over, the defendant could not be held liable for any neglect on the part of the railroad operators at either Sanford or Aberdeen as to the delivery of the telegram to the male plaintiff; that, even if the person who received the telegram at Sanford had been the agent of the defendant, he had no right or authority to

receive it contrary to the rule of the company closing the office at 7 p. m.; and that, even if the agent of the defendant at Sanford had received the telegram, either before or after the office hours, at that point, and had transmitted it to the agent at Aberdeen after the close of business there, the defendant would not be liable for the failure of the agent at Aberdeen to deliver it to the sendee unless he had failed to deliver it within a reasonable time after the opening of the office for business on the morning of the 22d.

These contentions of the defendant were the subject-matter, in various forms, of those of its special prayers for instructions, which his honor refused to give. His honor's view of the case, as is seen in his charge to the jury, was that, upon the testimony of the defendant's witnesses, the person who received the telegram at Sanford and the one who received it at Aberdeen, notwithstanding that they were in the employment of the railroad company for receiving and transmitting of railroad business dispatches, were also the agents of the defendant; and we think his view the right one. These night operators were in the offices of the defendant, and were using their wires and their instruments. The offices were not closed in fact, but were open, and the persons who were in charge were receiving messages, and making the usual charges therefor. The defendant company cannot keep its offices open, receive messages for pay, and then, when a negligent delay in the delivery service occurs, screen itself by saying that the persons who are in its places of business, take the messages, and receive payment therefor, are not its agents. Johnson, the night operator at Aberdeen, who received the message from Sanford, stated that when he received such messages he made memoranda on them at the time of their receipt, according to rules, and hung them on the hook for the agent of the company next morning. What rules did he refer to? Certainly the railroad authorities had nothing to do with business other than that which concerned railroad transactions. The rules must have been for the benefit of the defendant company, and to keep accounts and checks between and on the agents at the different stations, who were receiving and transmitting telegrams and receiving the charges therefor. Agency is a matter of law, purely, when the facts are undisputed. The facts in this case as to how this telegram was received and transmitted are undisputed, and they, in law, in our opinion, constitute the person in the office at Sanford, to whom the message was delivered for transmission, and the one in the office at Aberdeen, who received it, agents of the defendant; and that was the view his honor took of the matter, and there was no error in the manner in which he submitted the case to the jury. From the view we have taken of the legal relation between the persons in the offices of the defendant at Aberdeen and Sanford, who handled the message,

any discussion of the matters argued by the defendant's counsel involving the right of the company to establish reasonable office hours, and the benefits attendant upon that right, has become unnecessary. Affirmed.

FAIRCLOTH, C. J., dissents.

STATE v. BEARD et al.
(Supreme Court of North Carolina. April 18, 1899.)

CRIMINAL LAW—EVIDENCE—OTHER CRIMES—INSTRUCTIONS—FORNICATION—ADULTERY.

1. Where the facts are not complicated, nor the evidence, it may be a sufficient summing up of the case for the court merely to read the notes of the evidence and charge the law in general terms.

2. On a trial for fornication and adultery, where the state introduces evidence of illicit intercourse between defendants in another county, it is error to refuse to instruct that such evidence may be considered only in connection with other evidence to prove the offense in the county where the venue is laid, and not to prove the offense in such other county.

Appeal from superior court, Catawba county; Coble, Judge.

Henry Beard and another were convicted of an offense, and they appeal. Reversed.

M. B. Cline and T. M. Hufham, for appellant. The Attorney General, for the State.

FURCHES, J. This is an indictment for fornication and adultery, and both defendants were on trial. Verdict of guilty, and appeal.

Defendants' first exception is that the court only read the notes of the evidence, and charged the law in general terms. We do not understand from this exception that there is any complaint upon the ground that the charge contained erroneous propositions of law. Nor do we understand that there is any complaint alleging any error committed by the court in reading the notes of the evidence, but that the court did not sufficiently array and sum up the evidence in its charge to the jury; and the case of *State v. Boyle*, 104 N. C. 800, 10 S. E. 696, 1023, is the principal authority relied on for this contention. The case of *State v. Boyle* has been so often criticised, explained, and overruled upon the point for which it is cited that it can no longer be considered as authority. The court in that case undertook to say how well a judge should succeed in aiding the jury to understand the evidence, and seems to have succeeded better in producing confusion than in establishing the rule of practice intended to be established. We do not wish to fall into this error again. It is true that the object of the charge is to state the law of the case to the jury, and to aid them in applying the facts to the law; but the manner in which this is done must be left, to a very great extent, to the good sense and sound judgment of the judge who tries the case. There are a few general principles

that should be observed by court and counsel on the trial, whether civil or criminal. Prayers for instruction should be hypothetical, not too long, and not confused. The charge should consist in hypothetical propositions, where addressed to the jury; should consist of clear-cut propositions, as far as practicable; should not be too discursive,—as it is usually addressed to plain, intelligent jurors, who can comprehend a short, concise statement better than a discussion of the matter. 1 Enc. Pl. & Prac. 151, 152. But we do not think that the facts or the evidence in this case were complicated, and they must have been fully understood by the jury. This exception is not well taken, and cannot be sustained.

The interesting question intended to be presented by defendants' seventh prayer, and refusal of the court to give the same, does not arise, as both defendants were on trial, and both were convicted. And we do not propose to consider it until it is presented.

The eighth and ninth exceptions, based upon prayers asked and not given, are not sustained.

But it appears from the record that the state was allowed to introduce evidence tending to prove adulterous intercourse between the defendants in Caldwell county. This was competent evidence, and could not be excluded on objection of defendants. But it was only competent to be considered in connection with other evidence to prove adultery between the parties in Catawba county, and not to prove the crime of fornication and adultery between the defendants in Caldwell county. It is competent evidence upon the same principle as is evidence of facts more than two years before the finding of the bill, or facts that have taken place after the bill is found. The defendants could not be convicted for these acts; but it is competent to prove them, to aid the jury in coming to a correct conclusion, or, in other words, to properly interpret the evidence tending to prove the offense in Catawba county. The court was asked to so instruct the jury, and declined to do so. In this there was error. The point is expressly decided in *State v. Guest*, 100 N. C. 410, 6 S. E. 253. New trial.

BROADFOOT v. CITY OF FAYETTEVILLE.

(Supreme Court of North Carolina. April 18, 1899.)

MUNICIPAL CORPORATIONS—REPEAL OF CHARTER—REINCORPORATION—LIABILITY FOR DEBTS—OBLIGATION OF CONTRACTS—TAXATION—LIMITATION OF ACTIONS—SUSPENSION OF STATUTE.

1. Where the charter of a municipal corporation is repealed, and a new one thereafter granted embracing the same territory, taxable property, and corporators, the property of the old corporation passing to the new without consideration, the new corporation is the successor of the old, and becomes liable for the debts of the old; the liability beginning when benefits of the property of the old are received.

2. The legislature cannot withdraw or limit the taxing power of a municipal corporation so

as to impair the obligation of its contracts or destroy the remedies of its creditors, which existed at the time the contracts were made, for the enforcement of such obligations, unless other adequate remedies are provided, whether the debt be that of the same corporation or one of which it is successor by virtue of a new charter.

3. The loss of the ability of the creditor to sue a municipal corporation by reason of the repeal of its charter suspends the operation of the statute of limitations until its successor, organized under a new charter, takes benefits from the property of the old corporation.

Appeal from superior court, Cumberland county; Bynum, Judge.

Action by C. W. Broadfoot against the city of Fayetteville on coupons issued by the town of Fayetteville. From judgment for plaintiff, defendant appeals. Affirmed.

N. W. Ray and H. McD. Robinson, for appellant. R. P. Buxton and J. C. & S. H. MacRae, for appellee.

MONTGOMERY, J. Under the provisions of an act of the general assembly of the session of 1881, the charter of the town of Fayetteville was surrendered and repealed. At its session in 1883, the general assembly created a taxing and police district out of the territory included in the boundaries of the old town of Fayetteville, the taxing and police district to be called "Fayetteville." Under the last-mentioned act, all of the property of the former town of Fayetteville was transferred to the custody and control of the board of commissioners appointed by the general assembly. The public buildings, streets, and squares, and the policing of the same, were placed under the charge of those commissioners. Taxes were levied by the general assembly, with a specification as to the purposes to which they were to be applied. The general assembly at its session of 1893 incorporated the inhabitants within the old territory of the town of Fayetteville under the name of the "City of Fayetteville." The plaintiff in 1880 and 1881, being the owner of 52 coupons cut from bonds executed by the town of Fayetteville, presented the same for payment; and, upon payment being refused, brought two actions against the town of Fayetteville to recover the amounts due on the coupons. Judgments were rendered at August term, 1882, of Cumberland superior court in the two actions in favor of the plaintiff; but, between the time of action begun and judgment rendered, the charter of the then defendant, the town of Fayetteville, was surrendered and repealed.

The complaint in the present action embraces three causes of action: The first is founded upon the judgments procured in 1882 by the plaintiff against the town of Fayetteville; the second, upon the coupons themselves upon which the judgments were procured; and the third, upon the plaintiff's alleged right to have the two cases against the town of Fayetteville, which were pending in the superior court of Cumberland county at its August term, 1882, reinstated on the civil issue docket, brought

forward and consolidated into one action, and judgment rendered therein for the amount due on the 52 coupons mentioned in those actions. The plaintiff's allegations are that the judgments against the town of Fayetteville, or the coupons, if the judgments are invalid, are still due; that, although the charter of the old town of Fayetteville was repealed and surrendered under the act of 1881, yet the act incorporating the city of Fayetteville rehabilitated the old town of Fayetteville; and that the city is the successor of the old town, and therefore liable to the plaintiff for the amount of the coupons.

The defendant admits the repeal of the charter of the town of Fayetteville, that the coupons have never been paid, that the judgments were entered against the town of Fayetteville after its charter had been surrendered, and that the inhabitants of the old town have been incorporated by the act of 1893 under the name of the "City of Fayetteville." The defendant avers, however, that the judgments procured by the plaintiff against the town of Fayetteville were void, and denies that the city of Fayetteville is the successor of the old town of Fayetteville, or liable on the coupons or on the judgments.

It is of the first importance, then, to consider whether the city of Fayetteville, the new corporation, chartered by the act of March, 1893, is so far the successor of the town of Fayetteville, the old corporation, as to be liable for its debts. If this question is answered in the affirmative, the statutes of limitation set up in the answer as a defense to the action will then have to be discussed and decided. This court at one time adopted the old common-law rule that, upon the civil death of a corporation, the grantors of its real estate took it by reversion, and the debts due to and from it were extinguished. *Fox v. Horah*, 38 N. C. 358. This rule was changed by the court in the case of *Wilson v. Leary*, 120 N. C. 90, 28 S. E. 630, and that of *Fox v. Horah*, supra, was overruled. The debt, then, due to the plaintiff by the town of Fayetteville was not extinguished by the repeal of its charter, and still exists, notwithstanding that repeal. *Meriwether v. Garrett*, 102 U. S. 472; *Wolff v. New Orleans*, 108 U. S. 358; *Mobile v. U. S.*, 116 U. S. 289, 6 Sup. Ct. 398; *O'Connor v. City of Memphis*, 6 Lea, 730. Apparently, each corporation created by a separate charter is a distinct entity, and from this it may be argued with plausibility that no two successive corporations can be connected, unless they are connected by the terms of the act which created them. But that view must be often only apparently true. If, in the case of a municipal corporation, the old charter should be repealed and a new one granted, and the new one should include the same territory, substantially the same people, and the great mass of the taxable property of the old corporation, and the property of the old corporation used for public purposes be passed over to the possession and control of the new

corporation, without consideration from the new corporation, it would be difficult to appreciate how the property and the benefits of the old corporation could be received by the new one, without the shouldering of its responsibility by the new one. It must be that the creditors of a defunct municipal corporation, whose money and property have helped to build up and improve the wealth and influence of the old corporation (although they must submit when a charter is absolutely abolished, and while the old territory and people remain unincorporated), have the right in equity to have a new corporation, embracing the same territory, and the same inhabitants and the same taxable property, considered as the successor of the old, at least so far as its liabilities for the debts of the old corporation are concerned. When the old charter is repealed, and a new one is granted, upon which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new. Where the benefits are taken, the burdens are assumed. So strong has this view been impressed upon the courts that in *O'Connor v. City of Memphis*, *supra*, the court said: "But in no case have the courts ever failed to declare the identity or succession or continuity of the two corporations, where the same corporators and the same corporate property have passed to the new corporation. The terms of the charter have in such cases never been construed otherwise." The same doctrine was laid down in *Mount Pleasant v. Beckwith*, 100 U. S. 514, in *Broughton v. Pensacola*, 93 U. S. 206, in *Wolff v. New Orleans*, and in *Mobile v. U. S.*, *supra*. The acts of the legislature repealing the old charters of the cities of Memphis and Mobile, and reincorporating those cities, were passed on the same day; and it might be inferred that these acts were considered as one and the same in legislative intent. But in the case of *Amy v. Selma*, 77 Ala. 103, cited, indorsed, and approved with high commendation by the supreme court of the United States in *Mobile v. U. S.*, *supra*, the acts were not simultaneously passed. The repealing act was passed in December, 1882, and the reincorporating act in February, 1883. In that case the supreme court of Alabama held that the act repealing the charter of the city of Fayetteville was without effect or operation upon the liabilities of the city of Selma; that the act of February, incorporating the inhabitants and territory formerly embraced within the limits of the city of Selma, was a reorganization under the corporate name of Selma of the same corporators, and embraced substantially the same territory as the city of Selma; that Selma was the successor of the city of Selma, and liable for the payment of its debts.

It appears, also, in the case of *Broughton v. Pensacola*, *supra*, that the repeal of the charter of Pensacola was under one act, and the reincorporation of the city under the same name was under a different law. In the case

before us 12 years elapsed between the repeal of the charter of the town of Fayetteville and the incorporation of the city of Fayetteville; but we cannot see how that can alter the principle involved in the case. The foundation on which the liability of the new corporation rests is that the new corporation embraces the same territory, the same corporators, the same taxable property, and has received the property of the old incorporation without consideration; and for these benefits it must, in return, bear the burdens of the old corporation. The liability in such a case commences from the receiving of the benefits, and whether those benefits were received one or ten years, or more, from the repeal of the old charter, makes no difference. But it is argued for the defendant that, even if the act of 1893 did have the effect to make the city of Fayetteville the successor of the old town of Fayetteville, yet the new corporation was not liable for the debts of the old corporation, but, on the other hand, was expressly prohibited from assuming the debts of the old town or from paying any part of them, except such as were provided for in the act of 1883; and the plaintiff claimed no benefit under that act. The position was without any citation of authority to support it, and to us it did not seem to be sound; and the authorities, so far as they have been examined by us, are all the other way. If the law was as is contended for by the defendant, then it would be in the power of the legislature to destroy the claims of creditors against municipal corporations by simply repealing their charters on one day, and on the next reincorporating the same inhabitants in the same territory, taking care to insert in the repealing acts a provision to the effect that the new corporation should not be liable for the debts of the old. Such legislation would be contrary to every idea of justice and law, and obnoxious to the constitution of the United States, and to that of our own state. In *Amy v. Selma*, *supra*, it appeared that the act incorporating Selma authorized the proper officials to levy taxes, but declared that no funds derived by the corporation from the collection of taxes or from any other source should be used for the payment of any of the debts of the city of Selma, the old corporation; and, as we have seen, the supreme court of Alabama in that case held that the provision was inoperative against the debts and liabilities of the city of Selma, and the supreme court of the United States in *Mobile v. U. S.*, *supra*, cited the decision with marked approval.

But the defendant further contends that, even if it should be held by this court that the debts against the town of Fayetteville were not extinguished by the repeal of the town charter, and that they are valid and good against the city of Fayetteville, yet the officials of the new corporation are not only not authorized to levy taxes to pay those debts, but are prohibited from doing so by the very terms of the act of incorporation, and that

"the power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature," as was said in *Meriwether v. Garrett*, supra. That is a good proposition of law, and it was applicable to the condition of affairs which appeared in that case, as well as from the view of the law which that court took of the effect of the repeal of the charter of Memphis, and the one creating out of the same territory a taxing district. That court held that the charter of Memphis was absolutely repealed, and treated the case of *Meriwether v. Garrett* upon that view. The effect of the act creating the taxing district was not directly before the court.

¶ We have seen that the supreme court of Tennessee in *Luehrman v. Taxing Dist.*, 2 Lea, 425, and *O'Connor v. City of Memphis*, 6 Lea, 730, held that the taxing district was a reorganization of the city of Memphis. But the act of the Tennessee legislature, creating the taxing district of Shelby, was a very different act from the act of the North Carolina legislature which created the taxing district of Fayetteville. The former conferred on the officers of the former extensive legislative and judicial powers, and provided that at the end of two years the district should be governed by officers of its own choice. No such powers were conferred on the officers of the taxing district of Fayetteville. But that the power of taxation which is vested in the legislature is such a power as the defendant contends for cannot be maintained. The power is subject to the qualification which attends all state legislation; that is, that it must not be exercised to impair the obligation of contracts, thereby conflicting with the constitution of the United States and that of North Carolina.

¶ There is no doubt of the power of the legislature to repeal, out and out, a municipal charter; and there is no doubt that, after the application of the property of the defunct corporation not necessary for public uses (public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, and engineering instruments, being property necessary for public uses, as is held in *Meriwether v. Garrett*, supra, and not subject to the demands of creditors of the corporation) towards the payment of any remaining indebtedness, the debt cannot be enforced, although it is not extinguished. But as long as the charter is not repealed, or, if repealed, the town be rehabilitated so as to become the successor of the old and liable for its debts, the taxing power in the hands of the legislature cannot be used to decrease or impair the rights of the creditor in the enforcement of the collection of the debt. In reference to this matter, it was said in the case of *Wolff v. New Orleans*, supra: "This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation con-

tinues in existence, the court has said that the control of the legislature over the power of taxation, delegated to it, is restrained to cases where such control does not impair the obligation of contracts made upon a pledge expressly or impliedly given that the power shall be exercised for their fulfillment. However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts." The same doctrine is declared in *Mobile v. U. S.*, supra, and many cases there cited, where it is said: "But when [municipal corporations are] empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals. Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power, and leaves no adequate means for the payment of the bonds, is forbidden by the constitution of the United States, and is null and void."

Now, to apply the law as we have found it to be to the particulars of the case before us: Under what circumstances did the debt of the plaintiff against the town of Fayetteville arise, and what were the means provided, at the time the debt was contracted, for its payment? The Western Railroad was incorporated by the general assembly of North Carolina, at its session of 1852, by chapter 147. By an act passed at the same session (chapter 207), the town of Fayetteville was authorized to subscribe for shares of stock in that railroad company, the shares of stock to be held for the use and benefit of the town. To meet the payment of any subscriptions that might be made, the town was authorized to issue and sell bonds bearing interest, and by section 4 to levy and collect taxes for the payment, yearly, of the interest, and to create a sinking fund for the ultimate payment of the debt, and to invest from time to time, in profitable stock, the surplus of their taxes to meet the maturity of the bonds. An election was held according to the provisions of the act, and a majority of the qualified voters cast their ballots for "subscription," and the bonds were issued. On the 22d of March, 1875, the general assembly of that year passed an act (chapter 248) in which the town of Fayetteville was authorized to fund the bonded debt of the town contracted for stock of the Western Railroad Company by virtue of the act of 1852. The debt was

funded, and the coupons on which this suit was brought are clipped from the bonds issued by the town under the funding act of 1875. It appears, then, from the above statement of the facts, that the bonds were originally issued by the town, with the express provision in the act which authorized their issue (1852) that the town authorities were to levy and collect an annual tax upon the property and polls within the town, with which to pay the interest (coupons), and in the same way to raise a sinking fund to pay the bonds at maturity. The act of 1875, authorizing the town to fund the original bonds, provided for the payment of the new bonds in the same manner and to the like extent as were the old bonds. It follows, then, from the conclusion at which we have arrived, aided, as we have been, by the decisions of other courts, that the act of 1852 was the basis of a contract between the holders of the bonds which were issued to buy the stock of the Western Railroad Company, and the town of Fayetteville, by which the town authorities were to levy a tax upon the property and polls of the town, with which to pay the coupons, and also to provide a sinking fund with which to pay the bonds at maturity; that the coupons upon which this suit was brought were clipped from the bonds issued under the act of 1875 under which the old bonds were funded; that the new bonds are of the same nature as the old bonds, and were invested with the same security for their payment; that these bonds are still in force; and that the obligation to pay the same, together with the coupons (the interest), rests upon the city of Fayetteville, as the legal successor of the town of Fayetteville. The provisions in the act of 1893 incorporating the city of Fayetteville, which prohibit the levying of taxes for the payment of the bonds by the new corporation, are invalid, and cannot be regarded. In support of this position, we refer to the case of *Mobile v. U. S.*, supra, "All laws passed since the making of the contract, whose purpose or effect is to take from the city of Mobile or its successor the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded;" to *Wolff v. New Orleans*, supra, where the court said, "The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed, and by mandamus, compel, at the instance of parties interested, the exercise of that power, as if no legislation had ever been attempted." The conclusion at which we have arrived, as to the liability of the city of Fayetteville, the new corporation, for the debts of the town of Fayetteville, the old corporation, makes it necessary for us to discuss and decide the question of the statute of limitations set up by the defendant in the answer as a bar to the action. The coupons, being for interest to become due on the bonds, are a part of the bonds, and

partake of their nature; and the statute of limitations, therefore, which applies to the bonds themselves, must be the same statute which is applicable to the coupons. The bonds are specialties, and so are the coupons. The ten-years statute begins to run against coupons from the time of their maturity. 8 Am. & Eng. Enc. Law, p. 18; *Clark v. Iowa City*, 20 Wall. 583; *Amy v. Dubuque*, 98 U. S. 470; *Koshkonog v. Burton*, 104 U. S. 668. The coupons in this case became due in 1881, the charter of the town of Fayetteville was repealed in October, 1881, the city of Fayetteville was incorporated in March, 1893, and this action was brought in 1894. If the time which elapsed between the repeal of the charter of the town of Fayetteville and the act of 1893 which incorporated the city of Fayetteville, and during which time the territory was a taxing district, is to be counted, then the statute of limitations (ten years) will be a bar to the action; if that time is not to be counted, then the statute will not be a bar to the action. We are of the opinion that the time should not be counted. (In *Lilly v. Taylor*, 88 N. C. 489, it was held that, as a result of the repeal of the charter of Fayetteville (and that, too, after the court had taken official knowledge of the act of 1893 creating the taxing district), the creditors of the town had had all remedies for coercing the payment of their debts taken from them; and, by the reference of the court to the case of *Meriwether v. Garrett*, supra, as decisive of the case before them, the court could have had no other idea than that the creation of the taxing district did not in any way or for any purpose revive the old corporation.)

But the defendant insists that the statute of limitations began to run against the coupons in 1881, when they fell due, and that more than 10 years elapsed between that time and the time when this action was begun, and that, when the statute once begins to run, no subsequent happening or event can obstruct its course. That, as a general proposition of law, is true; and we have numerous decided cases in our own reports which lay down that rule in the clearest language. In *Hamilton v. Shepperd*, 7 N. C. 115, the plaintiff insisted that his action was not barred because there was fraud in the conduct of the defendant; but the court said: "But it [the matter on which the plaintiff relied to take his case out of the operation of the statute] is not in the act, nor is there anything like it; and we cannot put it there. It is neither in its letter nor spirit." In *Vance v. Granger's Ex'r*, 1 N. C. 204, the court said: "The act of limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso. We cannot add to these others which the legislature has omitted." But we are satisfied that, when these decisions were made, the court had in mind only cases where the ability to bring suit on the part of the plaintiff, or some one for him, had not been taken away by law (by statute), and

where the courts were open for the hearing of all matters of which they had jurisdiction. Statutes of limitation are founded on the idea that one who has a cause of action will undertake to enforce it within a reasonable time, if the courts are open to him. To prevent confusion and to produce certainty as to what is reasonable time, the law (the statutes of limitation) has fixed the periods within which actions must be brought. These views are so well expressed in the case of *U. S. v. Wiley*, 11 Wall. 508, that we cannot do better than quote a part of the opinion in that case: "But it is the loss of the ability to sue, rather than the loss of the right, that stops the running of the statute. The inability may arise from a suspension of right, or from the closing of the courts; but, whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitations are, indeed, statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have." This view of the law is strengthened by what was said by the court in *Hanger v. Abbott*, 6 Wall. 532: "They [the statutes of limitation] proceed, also, upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period; and they take away all solid ground of complaint, because they rest on the negligence or laches of the party himself." These cases were approved in *Braun v. Sauerwein*, 10 Wall. 218, where it was said: "Similar decisions (referring to *Hanger v. Abbott*, supra) have been made in the state courts. They all rest on the ground that the creditor has been disabled to sue by a superior power, without any default of his own; and, therefore, that none of the reasons which induced the enactments of the statutes apply to his case; that, unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue."

It is unnecessary to consider at any length the effect of the judgment which was entered up against the town of Fayetteville, after the charter of the town of Fayetteville had been repealed. For the purposes of this case, we will treat it as void, as was contended by the defendant. The second cause of action founded on the coupons is good.

In conclusion, we are of the opinion that the city of Fayetteville, the new corporation, is the successor of the town of Fayetteville, the old corporation; that the debts of the old corporation were not extinguished by the repeal of its charter; that the same power to as-

sess and collect taxes to pay the plaintiff's claim, which existed at the time that the bonds were issued, is in the new corporation, and has not been affected by the provision in the act incorporating the city of Fayetteville, which prohibits the collection of taxes for the payment of claims like those of the plaintiff; that the statute of limitations did not run during the time when the territory and inhabitants of the territory formerly embraced in the town of Fayetteville was a taxing district, and therefore is not a bar to this action; and that the plaintiff is entitled to a peremptory mandamus, requiring the proper authorities of the city of Fayetteville to levy and collect taxes upon property and polls within the city, with which to pay the plaintiff's claim.

Affirmed.

KEITH v. SCALES et al.

(Supreme Court of North Carolina. April 13, 1899.)

WILLS—CHARITIES—TRUSTS—FINDINGS—DISCRETION OF TRUSTEE—ESTATES.

1. A devise was in trust to the "Moravian Church of S." There was a denomination commonly known as the "Moravian Church," but officially designated as the "Board of Provincial Elders of the Southern Province of the Moravian Church," having headquarters at S., and which held the title to all the schools and churches within its jurisdiction. There was also at S. a Moravian church owing allegiance to the province, which controlled no property beyond its vicinity. *Held*, that this was a latent ambiguity explainable by parol.

2. A finding of the trial court as to which trustee was intended was binding on the heirs.

3. Where an ambiguity in a will is as to the trustee, and not the beneficiaries, equity will not allow the trust to fail for want of a trustee.

4. Where a trustee under a devise in trust for a charitable use is an organization not yet incorporated, the court will hold the fund until incorporation can be effected.

5. A devise in trust to build a church and school is not void because the church and school are not in esse.

6. A devise in trust to a religious society provided for the erection of a church to cost not to exceed a certain sum. *Held*, that the discretion to be exercised in the trustee.

7. A devise in trust to a church to purchase land, directing that each member of the church, not to exceed 100, should have one acre, is not invalid because to persons incapable of being designated.

8. A provision for the education of children of such members is sufficiently definite, the parents being ascertainable.

9. A devise to a religious society in trust to build a home for a minister and teacher is not void for indefiniteness as to who the teacher should be, as the selection of the teacher would fall on the trustee.

10. A devise was to a religious society to maintain a church and school, and when, if ever, they were abolished, the estate was to go to heirs. *Held*, that the devise was not void as authorizing the trustee to abolish the church and school, the contingency being a condition subsequent, which could not prevent the vesting of the estate.

11. A base or qualified fee is not void in North Carolina.

12. No technical words of conveyance are required in wills.

13. A devise in trust for the maintenance of

a church and school is a charity, though it provides that each member of the church be given an acre of land, and his children be educated free at the school.

14. A devise was in trust for a Moravian church and school at S., testator's native town, to be managed and controlled by the Moravian Church of S. *Held*, that the charity was not void for indefiniteness.

Appeal from superior court, Forsyth county; Allen, Judge.

Action by E. W. Keith, administrator with the will annexed of E. T. Clemmons, deceased, against Mary Scales and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

A. H. Eller and Holton & Alexander, for appellants. Watson, Buxton & Watson, Jones & Patterson, and W. R. Whitson, for appellee.

CLARK, J. This proceeding is brought by the administrator with the will annexed of E. T. Clemmons against his heirs at law, next of kin and devisees, to have the will proved in solemn form, and for a construction of the same. He died childless. After a devise to his widow, which is eliminated from our consideration by reason of, her having dissented, and three small bequests to relatives, which are not contested, the testator devised and bequeathed his estate, estimated at \$100,000, as follows: "After the above, then I will and bequeath all the rest of my estate, including my wife's at her death, for a Moravian church and school in my native town, Clemmonsville, Forsyth county, N. C. I desire the Moravian Church of Salem appoint proper persons to purchase one hundred acres of land in or near Clemmonsville; to first erect a substantial church of brick, not to exceed in cost \$10,000, a school building not to exceed in cost \$10,000, and a comfortable house for the entire use of a Moravian minister and teacher. I desire each member of said church have a lot of one acre of this land purchased at \$1.00 each, as far as the land goes, and his children to be sent to school free of charge as long as any part of my estate remains to pay the expenses of said church first, then school. To be managed and controlled by the church of Salem, N. C. It is my intention that all my estate, except as before stated, be used and managed by the Moravian Church of Salem, to maintain a church and school at or near Clemmonsville, N. C., and when, if ever, abolished, then to go to my nearest living relatives." The case having been transferred, upon issues raised by the pleadings, to the superior court, the judge, upon facts agreed, found as a fact that "the Board of Provincial Elders of the Southern Province of the Moravian Church, or Unitas Fratrum," officially located at Salem, N. C., and a corporation under the laws of North Carolina, was the trustee intended in his will by the designation "Moravian Church of Salem," and adjudged that the bequest and devise of the residue of the estate as above set forth were valid, and directed that the net pro-

ceeds of the personalty after payment of the widow's distributive share, the three small bequests mentioned, and the costs of administration, be paid over to said trustee, and that said trustee is the owner and entitled to the possession of all the real estate of which the testator died seised, subject to the dower rights of the widow. From this judgment the defendants appealed, assigning the following grounds of exception, which will be noted seriatim:

The first two exceptions are to the findings of fact that the "Board of Provincial Elders of the Southern Province of the Moravian Church" was the trustee named. This was shown to be the official designation of the religious denomination commonly known as the "Moravian Church," with its headquarters at Salem, which is incorporated in North Carolina, and owns large bodies of land, having received, *inter alia*, at one time a grant of 1,000,000 of acres of land from Earl Granville, holding and investing the funds of the province, and the legal title to the churches and chapels and schools within its jurisdiction, including the well-known and long-established female college at Salem. It was also in the facts admitted that the Moravian Church, a congregation at Salem, owing allegiance to the province above referred to, of which it is a member, was also incorporated, and owned considerable property, including four affiliated chapels, and is also commonly known as the "Moravian Church of Salem," but it exercises no control over any property or church beyond its immediate vicinity, and is subject to the authority of the province of which it is a member, and from which its ministers receive their appointment. This last corporation and its charter have been before this court in *Congregation, etc., of Salem and Vicinity v. Forsyth Co. Com'rs*, 115 N. C. 489, 20 S. E. 626. At the most, this was a latent ambiguity, and explainable by parol evidence. *Simmons v. Allison*, 118 N. C. 763, 776, 24 S. E. 716; *Sons of Temperance v. Aston*, 92 N. C. 578; *Ryan v. Martin*, 91 N. C. 404; *Tilley v. Ellis*, 119 N. C. 233, 26 S. E. 29. The finding of fact by the judge, to whom, by consent, it was submitted, is binding upon the defendants. In *Tilley v. Ellis*, supra, a latent ambiguity was sent back to be passed upon by the jury, but as, in that case, the ambiguity was as to the cestui que trust, the court added that, if it could not be determined who was meant, the devise would lapse for the benefit of the heirs. *Trustees v. Colgrove*, 4 Hun, 368, and cases there cited. But here, the ambiguity being as to the trustee, the court would not allow a trust to fail for want of a trustee. Besides, it is not ground for exception to the defendants, who cannot be concerned who is trustee. But when the case gets back into the superior court it may be well for the administrator, for his own protection, to cause the Moravian congregation at Salem, which is officially incorporated as the "Congregation of the United Brethren of Salem," to be made a party defendant (it is not

a party to this action), that it may be bound by the final order holding the Provincial Elders of the Moravian Church to be the trustee designated, or given opportunity to contest the same if that congregation should so desire. It is a matter between the two congregations commonly known as the "Moravian Church of Salem" as to which was intended to be the trustee. This will not affect the validity of the devise or the rights of the defendants. An uncertainty as to the cestui que trust is fatal to a devise in trust, unless it is a latent ambiguity, which can be ascertained. *Tilley v. Ellis*, supra; *President, etc., v. Norwood*, 45 N. C. 65. It is otherwise where the uncertainty is as to the trustee, in which case the court will protect the trust, and, if need be, appoint a new trustee. 2 *Perry, Trusts*, §§ 730, 731.

The next two exceptions are that the court erred in not holding that the trustee, the Moravian Church, could not hold real estate, and, besides, has no corporate existence. It appears from the facts agreed that both the organizations referred to above, and both of which are commonly known as the "Moravian Church of Salem" (one being the province, with headquarters at Salem, and the other the congregation of that church in that town), were incorporated, and both have power to take and hold property, real and personal. But, if there had been no incorporation, the court would hold the fund until "incorporation could be taken out" (*Allen v. Baskerville*, 123 N. C. 126, 81 S. E. 363; *Ould v. Hospital*, 95 U. S. 303); and, if that were not done in a reasonable time, appoint a substituted trustee.

The other exceptions are to alleged error in not holding the devise for a church and school at Clemmons-ville void:

"(1) That the same is attempted to be given to a church and school not in existence." In *Griffin v. Graham*, 8 N. C. 96, the will provided that two acres of land should be purchased, and "that a brick house shall be erected on said land suitable for a school room, and furnished in a plain manner for the accommodation of indigent scholars, and be called 'Griffin Free School.'" The school had no previous existence, but was to be established by the trustees. The court upheld the trust, and the institution is still the pride of New Berne. To same effect, *White v. Attorney General*, 30 N. C. 19; *Vidal v. Mayor, etc.*, 2 How. 127 (the famous Girard Will Case); *Ould v. Hospital*, supra. In *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, it is said: "The bequest in the twenty-third clause of the will, of \$1,000 to the first Christian church erected or to be erected in the village of Telfairville, in Burke county, or to such persons as may become trustees of the same, is supported by *Ingles v. Trustees*, 3 Pet. 99, *Ould v. Hospital*, supra, *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, and is directly within the decisions of *Lord Thurlow* in *Attorney General v. Bishop*, 1 Brown, Oh. 444, of *Sir John Copley*, afterwards *Lord Lyndhurst*, in *Society v. Attorney General*, 8

Russ, 142, and of *Lord Hatherly* in *Sinnett v. Herbert*, L. R. 7 Ch. 232." In fact, a very large proportion of devises of this nature are to institutions to be established in consequence of the will, and, if sufficiently definite, they have always been upheld. Certainly we know of none declared void on the ground assigned in this exception.

"(2) That a church and school house are directed to be built at a cost not exceeding \$10,000, thereby giving a discretion, without a person or corporation being named capable of exercising the discretion." It is evident that the discretion was to be exercised by the trustee, and this is a limitation thereon.

"(3) That 100 acres of land are directed to be bought, and one acre allotted, each, to parties incapable of being designated nor capable of enforcing the trust." A devise "for the establishment of a free school or schools for the benefit of the poor of the county" was held valid (*State v. McGowan*, 24 N. C. 9; *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, and 17 N. E. 491), and also one "for the poor in the county of Beaufort" (*State v. Gerard*, 37 N. C. 210). A devise to "A., bishop of N. C., and his heirs, in trust for the poor orphans of the state of N. C., and the said bishop and his successors have the right to select such orphans," was upheld by *Pearson, C. J.*, in *Miller v. Atkinson*, 63 N. C. 537. A gift to trustees, "to be by them applied to the payment of tuition money for such poor children as the trustees may designate," was sustained in *Newton Academy v. Bank of Asheville*, 101 N. C. 488, 8 S. E. 174; and the interest on the fund to be applied for the "educating of poor mutes" was treated as valid in *School for Deaf and Dumb v. Institution for Deaf, Dumb, and Blind*, 117 N. C. 164, 23 S. E. 171. "Each member of said church, not to exceed 100," is sufficiently definite.

"(4) That the will attempts to provide for the education of the children of the indefinite persons to whom the one acre of land is given." The parents being ascertainable, as above said, this exception is untenable.

"(5) That the paper writing attempts to provide a house for a Moravian minister and teacher, and is too indefinite in providing who that teacher may be." The selection was evidently left to the trustees, the Moravian Church, and intended to be so left, just as the trustees of *Girard College*, of the *Griffin School*, and other institutions established by virtue of a devise, select the president and professors from time to time.

"(6) That the provision reciting his intention that his estate shall be used and managed by the Moravian Church of Salem to maintain a church or school at or near Clemmons-ville, N. C., is too general and indefinite, and fails to point out the beneficiaries, or the means by which they may be ascertained." This has been already discussed.

"(7) That the said Moravian Church is not an incorporation, and is incapable of holding a trust." This is counter to the facts agreed

and need not be considered. Besides, it does not concern the defendants.

"(8) That there are no beneficiaries mentioned in said paper writing sufficiently identified that can enforce the trust." As much so as in the Girard College Case, the Griffin School Case, and all similar instances. In these cases, what boy could come into court, and say, "I, among others, was intended to enjoy this bounty." The trustees could answer, "In our judgment, you are not best entitled to the benefit of the donation." Yet such devices were upheld. In *Sinnett v. Herbert*, supra, the court held that "a gift to a charitable purpose, if lawful, is good, although no object be in existence at the time"; citing *Attorney General v. Bishop*, 1 Brown, Ch. 444, sustaining a gift for "establishing a bishop in his majesty's dominions in America," in which case it was also said: "It is immaterial whether the person to take be in esse or not, or whether the legatees were, at the time of the bequest, a corporation capable of taking or not, or how uncertain the object may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to these objects; or whether their corporate designation be mistaken,"—which is cited in *Vidal v. Mayor*, etc., supra, which adds, "If the intention sufficiently appears in the bequest, it should be valid." In *Holmes v. Mead*, 52 N. Y. 232, it was held that a beneficiary need not necessarily be described by name; that it is not material that a legatee should be definitely ascertained and known at the date of the will, or even at the death of the testator; and it is sufficient, if he is so described that he can be ascertained and known when the right to receive the gift accrues. A provision by will that the whole estate should be used at discretion by the selectmen of B. for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in B. is valid. *Beardsley v. Selectmen*, 53 Conn. 489, 3 Atl. 557. The whole matter of enforcing and controlling private charities is regulated by sections 2342 to 2345 of the Code, whereby the attorney general or solicitor is authorized, on the suggestion of two reputable citizens, to bring suit.

"(9) That the power given to the trustees to abolish the church and school makes the devise to them void." No power is given to the trustees to abolish the church and school, and the reference to the possible abolition thereof is merely a condition subsequent, and does not prevent the vesting of the estate in the trustees. This objection was answered by *Pearson, C. J.*, in *Miller v. Atkinson*, supra: "It will be time enough at his [Bishop Atkinson's] death to make the objection that his successor cannot exercise the power." So it will be time enough to discuss the effect of an abolition, if it ever happens, at the time it takes place; but such a condition subsequent cannot possibly have the effect of destroying the estate.

"(10) That the estate attempted to be devised is a base or qualified fee, and is therefore void." If it be admitted to be a base or qualified fee, it is not void in North Carolina. "But, however broad may be the language quoted, we have no idea that it was the purpose of the chief justice to say that the limitation expressly defined by him as a base or qualified fee in *Merriman's Case*, 55 N. C. 470, could not be valid in North Carolina. Such limitations are not infrequent in this and other states, and we are not prepared to adopt a view which leads to such a revolution in the law of limitations of real property." *Hall v. Turner*, 110 N. C. 292, 14 S. E. 791.

"(11) That there are no words of conveyance conveying the estate to any one to hold in trust, and it therefore descends to the heirs and distributees." No technical words of conveyance are required in wills. *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15; Code, § 2180.

"(12) That the will does not contemplate a charity, for it provides that only the children of each member having one acre of the land be sent to school free of charge 'as long as any part of my estate remains to pay the expenses of said church first, then the school,' and is not in contemplation of section 2342 of the Code." While the will prescribes that such children shall be educated free, that is only a part of the trust, which provides, in addition, for the maintenance of the church and school at that point. The charity is not too vague and indefinite, but quite specific,—for "a Moravian church and school at my native town, Clemmons ville, in Forsyth county, N. C., to be managed and controlled by the Moravian Church of Salem, N. C." The trust is not difficult of execution according to the intention of the testator. He says that it is his intention that all of his estate be used and managed by the Moravian Church of Salem to maintain the charity which he was about to establish. Instead of himself naming new trustees to administer the trust, he places this trust in the hands of that church. The testator himself was a native of Clemmons ville. He was, and had been for 50 years, a member of the Moravian Church at Salem, and died childless, and evidently wished, through his church, to perpetuate his family name by establishing at the place of his nativity, which took its name from his family, a charity to be managed and controlled by the parent church. Courts incline strongly in favor of charitable gifts, and take special care to enforce them. 2 Story, Eq. Jur. § 1169. Charitable bequests are said to come within that department of human affairs where the maxim, "Ut res magis valeat quam pereat," has been and should be applied. 2 Perry, Trusts, § 687. Until the statute of distributions (22 Car. II. c. 18) was enacted, the ordinary was obliged to apply a portion of every intestate's estate to charity, on the ground that there was a general principle of piety and charity in every man. 2 Perry, Trusts, § 690; 2 Bl. Comm. 494, 495. This was doubtless a crude begin-

ning of the graduated inheritance tax, by which in Great Britain and most of our states the estates of the dead are now made to contribute to the benefit of the public.

It is contended that there are several cases in North Carolina in which charitable bequests were declared invalid. But these were very different from the one now before the court. In *McAuley v. Wilson*, 16 N. C. 276, the testator directed that his property should be formed into a fund to pay a preacher of the Associate Seceding Party to preach at the Church of Gilead, which belonged to the Reformed Party. The Reformed Party would not allow the preacher to preach, but fastened the door and windows of the church against him. The court said that it did not have the power to force the church to let him preach, and so the devise failed. In *Holland v. Peck*, 37 N. C. 255, the will required the sum to be disposed of by conference, or the different members composing the same, as they shall, in their godly wisdom, judge to be most expedient or beneficial for the increase and prosperity of the gospel. Held too indefinite to be executed. In *Bridges v. Pleasants*, 39 N. C. 26, the bequest was to foreign missions and to the poor saints. The court, with fine irony, said that it was impossible for a court to say that this man or that was a saint, and the bequest was declared void, though it was careful to add that, if the testator "had made it plain who he thought were saints, the court would enforce the trust." In *White v. Attorney General*, 39 N. C. 19, the court pronounced a provision that the proceeds be laid out in building convenient places of worship, free for the use of all Christians who acknowledged the divinity of Christ and the necessity of a spiritual regeneration, as void for uncertainty. There are numerous cases that where the testator does not select the object of his bounty, but attempts to leave it to his executors or trustees to select the purpose or class, this is too indefinite, and the devise is void, because one cannot appoint another to make a will for him. Among cases of this kind are the famous *Tilden Will Case* (*Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880); *Bridges v. Pleasants*, supra; *Johnson v. Johnson* (Tenn. Sup.) 36 Am. St. Rep. 104, 22 Lawy. Rep. Ann. 179, and notes (s. c., 23 S. W. 114); *Gambell v. Trippe* (Md.) 23 Atl. 461. But that is an entirely different matter from a case where the object of the bounty, or the class out of which the individuals are to be selected, is definite, as in the *Girard Will Case*, the *Griffin School Case*, and others cited above, in which the selection of the individuals of the class designated to share in the bounty is necessarily left to the trustee; since they might not even be born till long after the testator's death. To the latter class the present devise belongs.

The doctrine of *cy pres* does not obtain in North Carolina (*Bridges v. Pleasants*, supra), and would have no application to the case before us if it did, and therefore needs no discussion. That doctrine was simply that, if a

trust failed for any reason, the court would apply the fund to some other charity, as similar as possible,—to "something else as good." Nor does the validity of charitable devises depend upon whether St. 43 Eliz. c. 4, "Charitable Uses," is or is not in force in this state. The opinion to that effect has been thoroughly exploded, says the United States supreme court in *Ould v. Hospital*, supra; and further says, citing 2 Perry, Trusts, § 687: "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-being of social man."

To sum up:

1. This is a charitable use.
 2. Neither the doctrine of *cy pres* nor St. 43 Eliz. c. 4, in any wise affects the validity of a devise for such purpose in this country.
 3. A latent ambiguity as to either cestui que trust or trustee is explainable.
 4. The latent ambiguity here being as to the trustee, if not explained, the trust could not have failed, but a new trustee would be appointed.
 5. If the object of the trust were indefinite, it would be void; otherwise, where, as in this case, it is definite, and the selection of the individuals to enjoy its benefit is left to trustees.
- After a careful review of the elaborate argument on both sides, which has been of great assistance to the court in drafting this opinion, the judgment below is affirmed. Affirmed.

STATE v. NICHOLSON.

(Supreme Court of North Carolina. April 25, 1899.)

HIGHWAY ROBBERY.—WHAT CONSTITUTES.—FELONIOUS INTENT.—PUTTING IN FEAR.—FORCEFUL TRESPASS.—INSTRUCTIONS.—LARCENY.

1. A conviction of robbery near a highway is warranted where the crime was committed at a place within 50 or 75 yards of a county road, in plain view thereof, though neither prosecutor nor accused knew of such road, and the prosecutor had not been enticed to leave a highway, and the parties had gone to the place without traveling on one.
2. In a prosecution for robbery, a felonious taking is established by showing that it was with the intent to deprive the owner of the use of the property and to appropriate it to the use of the taker.
3. To make the taking of property, by putting the owner in fear, robbery, it is not necessary that the fear amounted to great terror, but it is sufficient if it made him apprehensive of danger.
4. A conviction of larceny may be had under an indictment for robbery.
5. Prosecutor testified that he was walking with accused, who invited him to step aside to a pile of wood, and take a drink out of a flask, which he produced. After doing this, accused asked him for his pistol, which was handed to him; whereupon accused proposed trading, and, when witness refused, he pointed the pistol at him, and made him give up his watch and money, and, as witness was about to run, shot him. Accused testified that they stepped aside to the place where the alleged robbery took place to play cards, and that he won the prosecutor's

watch, money, and pistol at cards, and they then got into an altercation, and, as prosecutor was about to strike accused, he shot him. Held, that it was unnecessary to charge on forcible trespass, or to explain the difference between forcible trespass and robbery.

Appeal from superior court, Union county; Coble, Judge.

W. W. Nicholson was convicted of robbery, and he appeals. Affirmed.

The offense is alleged to have been committed upon one H. A. Lowery at or near a certain highway in Union county, to wit, the Monroe and Wingate road. The state introduced Lowery as a witness, who testified that on the morning of December 22, 1898, he was walking on the Carolina Central Railroad from Monroe to Wingate, a distance of about six miles, when he overtook the defendant about two and a half miles out of Monroe. That they exchanged greetings. Were old acquaintances, and were reared within three miles of each other, in Lancaster county, S. C. That they engaged in conversation concerning Lowery's relatives, whom the defendant had recently seen, and continued to walk on the railroad for some distance. That defendant inquired of the witness if he had a pistol. Witness stated that he had; whereupon defendant asked to see it, and, after examining it, returned it to witness. After walking a mile or more further, the defendant stepped off about 35 yards from the track to a pile of cord wood, and called to witness, and asked him to come and take a drink of whisky. Defendant produced a flask of whisky, and the witness took one drink. Defendant again desired to see witness' pistol, and he handed it to him, and defendant proposed trading, but witness said he didn't wish to trade. Defendant said, "Lowery, this is my gun," and pointed the pistol at witness, who thought defendant was joking, and told defendant so. Defendant said, "No, by God, I ain't; hand up your watch." Witness handed him his watch, whereupon defendant demanded witness' money, and he handed him his pocketbook, which defendant opened, keeping the pistol at witness' breast while he counted the contents,—\$9.35. Defendant then gripped the pistol as if to fire. Witness was about to run, and defendant shot him in the breast, and as he ran off the defendant shot him in the hip. This occurred about 50 or 75 yards from the Monroe and Wingate road, but witness did not know of said road, or that there was any public road near, at the time the alleged robbery was committed. Witness had not seen defendant in several years, and did not recognize him when they met on the railroad. Witness was just returning to his home from Arkansas. Defendant testified about meeting Lowery while walking on the railroad, and suggested that they go to the edge of the woods, and they agreed to do so, and Lowery proposed a game of cards, and defendant consented; that they sat down on the ground, about 35 yards from the track, by a pile of

cord wood, and played two games of "five up," which Lowery won; that Lowery then said, "Oh, I can beat you," and offered to put up his watch against the defendant's, which was agreed to, and defendant won; that Lowery then put up \$5 against his watch, and defendant won again; that he then put up \$4.95 and his pocketbook against \$5, which was also won by the defendant, and then he proposed to put up his pistol against defendant's, and, after some discussion about the value of the pistols, the wager was accepted, and the pistols were placed on the ground; that defendant was about to win this game, when Lowery grabbed for his pistol, and thereupon defendant grabbed his own pistol, and also snatched Lowery's from him, and Lowery then jumped up, and grabbed a stick of cord wood, stating that he was going to have his pistol, and drew it over defendant, and thereupon defendant shot Lowery in the breast; that Lowery turned to run, and defendant shot him again. Defendant also testified that he was not familiar with that part of the county, and did not know there was a public road near the scene of the shooting, and that there was woods on both sides of the railroad where the shooting occurred. There was other evidence by the state showing that the public highway was 40 or 50 yards from where the prosecuting witness alleged he was robbed, and that the place where the alleged robbery occurred was in plain view of the highway,—one person passing along the highway and seeing the defendant and the witness just before the occurrence took place; that the highway paralleled the railroad; that the defendant at once fled, and when captured, the same day of the robbery, denied his name, and made conflicting statements as to where he was from.

Defendant's counsel, in writing, asked the following instructions:

"(1) That to constitute the crime of robbery, as alleged in the indictment, it is necessary that the offense should be committed on a public highway, or that the person robbed should have been procured or enticed to leave the public highway by some threat or inducement offered by defendant for the purpose of securing an opportunity to commit the crime. (Refused.)

"(2) That a railroad is not a public highway, in the sense that a theft from a person walking thereon would constitute robbery, even if all the other attributes of that crime should be established. (Given.)

"(3) That even if the jury should find from the evidence that defendant obtained the property of Lowery in such a manner as would constitute a robbery, and that the act was committed within 50 or 75 yards of a public highway, yet if they find, further, that Lowery and defendant arrived at the scene of the alleged robbery by way of the railroad, or any way other than by the public highway, it would be the duty of the jury to acquit. (Refused.)

"(4) That unless the evidence as a whole convinces the jury beyond a reasonable doubt that defendant is guilty of the crime as alleged in the bill of indictment, the jury should acquit. (Given, after striking out the concluding words, 'should acquit,' and substituting therefor the words, 'cannot find the defendant guilty of robbery.')

"(5) That 'convinced beyond a reasonable doubt' means that every hypothesis founded upon reason, and consistent with the innocence of the defendant, has been excluded from the minds of the jury by the evidence. (Given.)

"(6) That it is not necessary that such reasonable doubt should exist in the minds of all or a majority of the jurors, but, if any of them entertain such doubt, the jury should give the defendant the benefit of it. (Not given, except as embraced in the charge.)

"(7) That, if the jury believe the evidence, they will render a verdict of not guilty. (Refused.)

"(8) That, in order to convict of the crime alleged, the jury would have to find that the parties were not gambling, and that the title to the property had not thereby passed from Lowery to defendant at the time the force was applied, and this beyond a reasonable doubt. (Not given, except as embraced in the charge.)"

The court instructed the jury, after reading notes of the evidence, as follows:

"(1) Defendant is charged with the crime of highway robbery. If the jury find from the evidence beyond a reasonable doubt, under the court's instructions, that, in or near the public highway, the defendant assaulted Lowery, and put him in fear, and he surrendered his pistol, watch, and money through fear of bodily injury to defendant, and that defendant took, through fear, from the possession of Lowery, the said pistol, watch, and money, the property of Lowery, and carried them away, and that defendant did this feloniously,—that is, with the intent to deprive the owner of the goods and appropriate them to defendant's own use,—the jury will find the defendant guilty of robbery as charged in the indictment.

"(2) The fear necessary as an element to constitute the crime of robbery need not amount to great terror, but, if the prosecuting witness surrendered his goods on account of threats or gestures which made him apprehensive of danger, this is sufficient, so far as the element of fear is concerned.

"(3) If the jury fail to find the defendant guilty of robbery as charged, still they may, under this indictment, find him guilty of larceny, provided the evidence, under the court's instructions, warrant the jury in so finding.

"(4) If they fail to find defendant guilty as charged, but find from the evidence, beyond a reasonable doubt, that defendant, W. W. Nicholson, took from the person of the prosecuting witness, against the will of the prosecuting witness, a watch, pistol, and

money, the property of the prosecuting witness, H. A. Lowery; that defendant carried the said property away, and did this feloniously,—that is, with the intent to deprive the owner of his property, and to appropriate it to defendant's own use,—then the jury will return for their verdict that they find that the defendant is not guilty of the crime of robbery, but guilty of the crime of larceny.

"(5) Defendant contends that he is not guilty of any crime; that he and prosecuting witness were playing cards, and he won the watch, pistol, and money, and the prosecuting witness became angry, and was about to strike defendant, and defendant shot him; and he contends that under this indictment he cannot be found guilty, and the jury are instructed that under this indictment they cannot find the defendant guilty of an assault on the prosecuting witness, even if the jury should so believe from the evidence.

"(6) The only question for the jury to consider is whether the defendant is guilty of robbery, and, if not, then whether he is guilty of larceny.

"(7) If the jury have in their minds a reasonable doubt, raised by the evidence, that defendant is guilty of robbery, also a reasonable doubt that defendant is guilty of larceny, then the jury will acquit.

"(8) If defendant won the property in question playing cards, and did not take the property in a felonious manner, he could not be found guilty under this indictment.

"(9) Reasonable doubt must be such doubt as is raised by the evidence in the case, or by the want of evidence, and each juror and all the jurors must be satisfied from the evidence, beyond a reasonable doubt, that defendant is guilty, before they can agree upon a verdict of guilty; that is, if a juror has in his mind a reasonable doubt, it would be the duty of such juror not to agree to a verdict of guilty. This does not mean, however, that if some of the jurors are satisfied beyond a reasonable doubt that defendant is guilty, that such jurors so satisfied must agree to a verdict of acquittal.

"(10) The state contends that defendant is guilty, and that he procured possession of the prosecuting witness' pistol on the pretext of wanting to swap pistols, and that when the witness was without arms the defendant presented the pistol, and demanded his watch and money, and that the witness, being put in fear or danger of his life, surrendered his watch and money; and the state contends that this was near a public highway, that it was in 40 or 50 yards of a public highway, and that defendant took and carried away the property of the witness, and did this feloniously, and that the jury should find him guilty as charged; and the state further contends that, if the jury fails to find him guilty of robbery as charged, the evidence should satisfy them beyond a reasonable doubt that he is guilty of larceny; and contends that defendant procured possession of

the pistol by an artifice or trick, and then used it to secure the watch and money of the witness, through fear and against his will, and that defendant took the property feloniously; that he is guilty of larceny.

"(11) The jury will consider carefully all the evidence, and, if they find beyond a reasonable doubt that the defendant is guilty of robbery as charged, the jury will so find.

"(12) If the jury fail to find defendant guilty as charged, but find beyond a reasonable doubt that he is guilty of larceny, then they will return for their verdict that they find the defendant not guilty of robbery, but guilty of larceny.

"(13) If the jury have any reasonable doubt of defendant's guilt, they will acquit.

"(14) Where a witness testified to a certain state of facts on the witness stand, and a similar statement of facts made by the witness out of court is put in evidence, the statement out of court cannot be considered by the jury as substantive evidence, but the jury may consider such statement made out of court as tending to corroborate the testimony of such witness in court. So, where a witness testifies to a state of facts in court, and a statement of facts made by the witness out of court contradicting, or tending to contradict, what the witness testifies to in court, is put in evidence, the jury cannot consider such statement made out of court as substantive evidence, but only as diminishing, or tending to diminish, the credit of the witness on the witness stand."

Verdict of guilty. Motion for new trial by defendant, on the ground that the instructions above set out were not given as prayed, and that the court erred in failing to charge as to the law touching forcible trespass, and draw the distinction between robbery and forcible trespass, and erred in admitting evidence excepted to by defendant. Motion overruled. Defendant excepted, and appealed from the judgment pronounced.

In addition to the above, the defendant assigns errors as follows: "For error in that part of the first paragraph of the charge which defines 'feloniously' as 'with the intent to deprive the owner of the goods and appropriate them to defendant's own use'; for error in second paragraph of the charge, and in that part of the charge submitting the question of larceny to the jury; and for error in that the court failed to instruct the jury as to the law touching forcible trespass and trespass, and failed to explain the difference between forcible trespass and robbery and trespass and larceny; and that the court overruled defendant's motion for a new trial."

T. L. Caudle and Iredell Hilliard, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. In State v. Bradburn, 104 N. C. 881, 10 S. E. 526, the indictment was robbery "near the highway." The facts were that defendant and prosecutor went up

the railroad, and took a path to a point 20 steps from the railroad and 30 steps from the county road, running parallel to the railroad. At that point the jury found that the robbery was committed. This was held to be robbery. In the present case the indictment was robbery "at and near a certain highway." The facts are that the defendant and prosecutor walked on the railroad some distance, when defendant stepped off 40 or 50 yards, and called prosecutor to him, at a point 50 or 75 yards from the county road, and in plain view of the road, running parallel to the railroad. At that point the jury find that the robbery was committed. The facts and finding in the two cases are, in substance, the same, and upon that authority we hold that the present is a case of robbery. We can find no error in the charge of the court. We were favored with some discussion as to whether a railroad is a public highway, but that is outside the case, as we have a case of robbery with reference to the county road. Affirmed.

BROWN et al. v. BANK OF SUMTER et al.
(Supreme Court of South Carolina. April 22, 1896.)

EQUITABLE MORTGAGES—INTENT—CONSIDERATION—EVIDENCE—PLEADING—DEMURRER—APPEAL.

1. On an appeal from an order overruling a demurrer, the court will not consider facts not set out in the pleadings, though admitted by counsel.

2. In an action to have a deed absolute declared a mortgage, when the complaint alleges that the deed was intended as security for payment of a debt, and that allegation is not only denied in the answer, but it is averred that it was expressly understood to be a bona fide purchase of the absolute title, a material issue is raised, and the answer is not demurrable as not stating a defense.

3. Where a creditor who holds mortgages on several tracts, given to secure a debt, purchases the lands, or some of them, from the mortgagor, at a price less than the amount of the debt, and takes from the debtor a deed absolute on its face, a new consideration is not necessary to the validity of such deed, the mortgage being extinguished in whole or in part; and the deed will not be considered a mortgage, but an absolute conveyance.

4. Where a creditor, who holds mortgages on several tracts, given to secure a debt, purchases the lands, or some of them, and takes from his debtor a deed absolute on its face, and, in part consideration for the conveyance, agrees to, and does, satisfy a mortgage held by him on a tract not conveyed, on the payment of an amount less than the debt secured thereby there is a sufficient new consideration to sustain the deed as an absolute conveyance.

5. The insertion, in a deed conveying several tracts of land, which are subject to pre-existing mortgages given by the grantor to secure a debt owing to the grantee, of a provision that such mortgages shall be "left open to protect the grantee, its successors and assigns, against all incumbrances and dower," does not prove that such deed was intended to be a mortgage.

6. Where a mortgagor conveys several tracts of mortgaged land to the mortgagee by a deed

absolute on its face, and the mortgagee at the same time executes an agreement providing that, so long as he continues to be the "owner" of the lands, the mortgagor may "purchase" all of them "at a sum equal to [his] present indebtedness, * * * with interest and taxes and all costs and expenses added," allowing "credit for everything received in the meantime"; that, "as long as the same is owned by the [mortgagee, he] will convey any of said property to the [mortgagor, his] heirs, executors, or administrators," at specified sums, "adding interest as if said credits had not been made, taxes, costs, and expenses, and giving credit for rents and profits received and payments made, if any"; and "that the sum" stated in the deed as the consideration thereof "is to be entered as a credit as of" the date of the agreement on the mortgage indebtedness,—the deed is an absolute conveyance, and not a mortgage.

7. Where two persons own several tracts of land, which are subject to mortgages given to secure their indebtedness to a bank, and one of them executes a power of attorney to the other, authorizing him to sell and dispose of such lands on such terms as he may deem proper, and execute good and sufficient deeds of conveyance for same, a deed executed by him in his own behalf, and as attorney, conveying the lands to the bank, will be considered an absolute conveyance, and not a mortgage.

Appeal from common pleas circuit court of Sumter county; R. C. Watts, Judge.

Action by Lillie H. Brown and Robert O. Purdy as trustees and representatives of Albertus S. Brown, and W. Alston Brown individually and as surviving partner of the firm of A. S. & W. A. Brown, against the Bank of Sumter and Marion Moise. Demurrers to the separate answers of defendants were overruled, and plaintiffs appeal. Affirmed.

Following are the pleadings as set forth in the "case," viz.:

Complaint.

"The plaintiffs allege:

"First. That the defendant the Bank of Sumter is a corporation duly created under and by the laws of the state of South Carolina.

"Second. That at the times hereinafter mentioned the plaintiffs were, and now are, for the purposes of liquidation, co-partners doing business under the firm name of A. S. & W. A. Brown.

"Third. That the defendant Marion Moise was at the times hereinafter mentioned, and now is, one of the directors, and vice president, of the corporation, the Bank of Sumter.

"Fourth. That on the 26th day of March, 1895, the plaintiffs, under their firm name of A. S. & W. A. Brown, by their notes discounted in said bank or otherwise, were indebted to the Bank of Sumter in a considerable sum, the items of which they are unable to state, amounting to thirteen thousand five hundred dollars, and claimed by said bank to be fourteen thousand five hundred dollars. That said indebtedness was secured by several mortgages, to wit, one of the Providence place, the individual property of A. S. Brown; one of the Du Bose land, the joint property of Albertus S. Brown and W. Alston Brown; one of

the Rocky Pine place, the individual property of W. Alston Brown; one of the interest of Albertus S. Brown in certain lots of land in the city of Sumter; and a mortgage given by the said Albertus S. Brown to W. F. B. Haynsworth, and assigned to said bank.

"Fifth. That the said A. S. & W. A. Brown, as co-partners, being thus indebted to the said the Bank of Sumter, and heavily indebted to other creditors of the said firm, on the 20th day of March, 1895, and being desirous of securing said bank with their property above referred to, and on conditions hereinafter stated, executed a conveyance to the said the Bank of Sumter of the following described lands: (1) Those two parcels of land, one of which was conveyed to us by Wm. Robert Du Bose, by deed recorded in the office of the register of mesne conveyances for said county, in Book 2, at page 239, containing one hundred and thirty-six and one-half acres, more or less; the other of which was conveyed to us by Thomas Daniel Du Bose by deed recorded in the said office in said Book 2, at page 236, containing one hundred and thirty-six and one-half acres, more or less; said two parcels constituting together the land designated as lot No. 5 on the general plat made by S. H. Boykin, D. S., dated December 16, 1834, for Caleb Rembert, and being designated as lot No. 2 and lot No. 3 on a general plat of the estate of Dr. T. J. Du Bose, dated January 14, 1835, made by James D. McIlwain, D. S., reference being here made to the said deeds and plats for a more particular description of said premises. (2) All that tract of land of the individual property of W. Alston Brown, known as 'Rocky Pine Place,' containing five hundred and twenty acres, more or less, bounded on the north by lands of J. B. Lee, on the east by lands now or formerly of the estate of G. W. Cooper, deceased, on the south by lands of Mrs. Mary White, and on the west by land now or formerly of Jim James. (3) All that tract of land known as the 'Providence Place of Albertus S. Brown,' containing one thousand and seventy-five acres, more or less, bounded on the north by the land of Gaillard, by Carrigan's lands, and by lands formerly of the Spanns, now of A. B. Stuckey, on the east by lands of J. R. Phillips and by lands of Dr. S. C. C. Richardson, and on the west by lands said to belong to Scarborough and by lands of C. L. West. (4) All the right, title, and interest which Albertus S. Brown has in and to all of that lot or parcel of land in the city of Sumter, containing forty-five acres, more or less, being made up of several parcels, embracing the Dargan place, formerly owned by R. O. Purdy, part of lots of land formerly owned by R. O. Purdy, part of lots of land formerly owned by W. A. Brown, and a lot of land formerly owned by said Albertus S. Brown and R. O. Purdy, purchased by them of B. G. Piereson, and also a lot of land once owned by R. O. Purdy, which he purchased of W. F. B. Haynsworth, which said forty-five acres of land,

more or less, is bounded as follows: North by lands of Sumter Water Company and by lands of W. E. Brunson, east by Main street and by lands of W. H. Outhbert and others, south by lands of the home place of Albertus S. Brown, by lands of Marion Moise, E. W. Moise, R. M. Wilson, Mrs. P. P. Gaillard, and by the Stateburg road, and west by lands of J. N. Corbett, more fully represented on a map made by H. D. Moise, surveyor, in January, 1891. But some small lots that have been sold are not designed to be conveyed. The consideration mentioned in the deed was ten thousand dollars, but said land was conveyed and held as security for the whole indebtedness of the said A. S. & W. A. Brown to the said the Bank of Sumter; and by the express terms of the said conveyance the said mortgages above referred to were not satisfied, but were left open to protect the grantee and its successors and assigns against all incumbrances and dower.

"Sixth. That on the same day, to wit, on the 26th day of March, 1895, the defendant the Bank of Sumter executed a written agreement, under the seal of the corporation, through W. F. B. Haynsworth, its president, and through W. F. Rhame, its cashier, and by authority of the same, as follows, to wit: 'On the 26th day of March, 1895, the same as the date hereof, Albertus S. Brown and W. Alston Brown conveyed to the Bank of Sumter the following parcels of land, viz.: (1) Those two parcels of land, each containing 136½ acres, making one entire tract, known as the "Du Bose Land"; the same having been owned by the grantors together. (2) A tract known as the "Rocky Pine Place," the individual property of W. A. Brown, containing 520 acres, more or less. (3) A tract of land known as the "Providence Place of Albertus S. Brown," containing one thousand and seventy-five acres, more or less. (4) All the right, title, and interest of Albertus S. Brown in 45 acres of land in the city of Sumter, S. C. All of said lands are in the county of Sumter, state of South Carolina, and are fully described in the deed of conveyance dated the same as the date hereof; the consideration therein expressed being ten thousand dollars. At the same time as aforesaid the said Albertus S. Brown delivered and indorsed to the Bank of Sumter \$2,000.00 of a note made to him by Brown, Cuttino & Delgar, dated Jan'y 18, '95, for \$2,500.00, due Jan'y 1st, 1896, with interest at 7 per cent. And the said Albertus S. Brown and W. Alston Brown, as co-partners as A. S. and W. A. Brown, are largely indebted unto the Bank of Sumter, and they are contemplating making a deed of assignment for the benefit of their creditors; and the said Albertus S. Brown holds a rent obligation for the year 1895 against Scarborough & Raffield, payable in cotton, fifteen bales of which has been assigned to the Bank of Sumter, as well as all the rent for 1895 on the Du Bose land and Rocky Pine place.

Now, it is agreed by the Bank of Sumter as follows, in consideration of all the matters aforesaid, viz.: (1) That the sum of ten thousand dollars is to be entered as a credit as of this date upon the indebtedness of said A. S. & W. A. Brown to the Bank of Sumter for the lands so conveyed as of this date. (2) That the proceeds of the said 15 bales of cotton and the rents from the said two places shall, when realized, be entered as a credit upon said indebtedness of A. S. & W. A. Brown to said Bank of Sumter. (3) That when the said \$2,000.00 and interest is paid on the note of Brown, Cuttino & Delgar, the same shall be entered as a credit upon the said indebtedness of A. S. & W. A. Brown to the said bank, and when it is paid the Bank of Sumter is to release, satisfy, and discharge a mortgage made by the said Albertus S. Brown and W. Alston Brown to W. F. B. Haynsworth, dated the 8th day of December, 1893, and now held by the Bank of Sumter; the said mortgage covering the store and lot of land at the corner of Main and Liberty streets, in the city of Sumter, S. C., now occupied by Brown, Cuttino & Delgar. (4) That the Bank of Sumter is to participate in the assignment to be made by A. S. & W. A. Brown to the amount of \$2,000.00 of its claims against them, and apply any dividends to be received to the credit of their indebtedness to the bank, after deducting all costs and expenses. (5) That the said Albertus S. Brown and W. Alston Brown, or either of them, and the heirs, executors, or administrators of either of them, may at any time, as long as the same may be owned by the Bank of Sumter, purchase all the real estate so conveyed as aforesaid, from the bank, at a sum equal to their president indebtedness to the bank (before any of said credits hereinbefore mentioned were applied), with interest and taxes, and all costs, expenses added, the bank to allow credit for everything received in the meantime; and, as long as the same is owned by the bank, it will convey any of said property to the said Albertus S. Brown or W. Alston Brown, the heirs, executors, or administrators of either of them, at the following sums, respectively, adding interest as if said credits had not been made, taxes, costs, and expenses, and giving credit for rents and profits received and payments made, if any, viz.: The Providence place at \$8,000.00, the Du Bose lands at \$1,500.00, and the Rocky Pine place at \$2,000.00, and the interest of Albertus S. Brown in the lots of land in the city of Sumter at \$1,000.00. That, should none of said lands be so purchased, the Bank of Sumter, in any event, agrees to pay to the said Albertus S. Brown, or his heirs, executors, or administrators, as to the land conveyed by him, and to W. Alston Brown, his heirs, executors, or administrators, as to the land conveyed by him, and to Albertus S. Brown and W. Alston Brown, their heirs, executors, or administrators, as to the land conveyed by

them, any sum or sums of money that it may realize from a sale or sales of said land in excess of their indebtedness to the bank as aforesaid; giving credit for rents and profits and income and price or prices realized from lands, and deducting their indebtedness, interest, taxes, and all expenses. The interest referred to in this agreement, to which the Bank of Sumter is to be entitled, is to be on the indebtedness above specified and detailed, as if the said credits had not been made, calculated with quarterly or quarter-yearly rests, at the rate of eight per centum per annum on the principal and interest when due; said expenses to include attorneys fees paid by or charged to the Bank of Sumter aforesaid. In witness whereof, the Bank of Sumter has, by its president and cashier, and under its seal, signed, sealed, and delivered this agreement. [Signed] The Bank of Sumter, per W. F. B. Haynsworth, president, and per W. F. Rhame, Cashier. [L. S.] Signed, sealed, and delivered in presence of (the words "as if said credit had not been made," and the words and figures at \$1,500.00 and at \$2,000.00, first interlined, and the words and figures each at "\$1,500" quarterly first interlined) G. D. Rick-er."

"Seventh. That the said conveyance and agreement executed on the 26th day of March, 1895, constitute a mortgage to secure the indebtedness of the plaintiffs to the defendant the Bank of Sumter; and, if the court shall hold that a power of sale is conferred on the mortgagee by said instruments, these plaintiffs allege that the amount of the debt has not been established by a court of competent jurisdiction, nor has the amount of the debt been consented to in writing by the debtor subsequent to the maturity of the debt.

"Eighth. That the said two thousand dollars of the note of Brown, Cuttino & Delgar referred to in said agreement has been paid to the said the Bank of Sumter, and the mortgage to W. F. B. Haynsworth given up.

"Ninth. That the said A. S. & W. A. Brown executed a deed of assignment on the 28th day of March, 1895, in which Moultrie R. Wilson was appointed assignee, and I. C. Strauss was made agent of creditors, and the said the Bank of Sumter duly executed and filed an acceptance of its terms, and a release of two thousand dollars of their debts; and said acceptance and release extinguished two thousand dollars of said indebtedness, and the same is no longer a charge upon the mortgage premises, or against these plaintiffs.

"Tenth. That the defendant the Bank of Sumter received as rent on said lands for the year 1895 the sum of eleven hundred and thirty-two dollars, and as rent on said land for the year 1896 the sum of eleven hundred and eighty dollars, as plaintiffs are informed and believe.

"Eleventh. They allege, on information and belief, that on the 5th day of November, 1896, the Bank of Sumter conveyed to its co-defend-

ant, Marion Moise, the four parcels of land above described, by a deed in which the consideration was alleged to be twelve thousand dollars; that, for some time previous to the said last-mentioned conveyance, negotiations had been going on with H. T. Edens for a sale of the Providence place at and for a consideration of ten thousand dollars; that the defendant Marion Moise had notice of the terms and conditions on which the said the Bank of Sumter held title to said land; that on the 10th day of November, 1896, the said Marion Moise conveyed said Providence place to the said H. T. Edens for the sum of ten thousand dollars, and the said Marion Moise still holds the other three parcels of land, claiming them as his own.

"Twelfth. These plaintiffs allege that the sums of money paid to the said the Bank of Sumter and Marion Moise have paid all the said indebtedness of the said A. S. & W. A. Brown to the said Bank of Sumter, and said debt secured by the said mortgage is paid in full, and said mortgage is satisfied. But, if any amount is found due thereon, these plaintiffs are ready to pay the same. Wherefore the plaintiffs demand judgment: (1) That said conveyance and agreement may be adjudged a mortgage. (2) That the defendant the Bank of Sumter may establish its mortgage debt, and account for the rents and profits of said several parcels of land. (3) That, if said mortgage debt has been paid, this court shall order that the said Marion Moise shall reconvey to the plaintiffs, according to their respective rights, the several parcels of land held by him, and, if any portion of the mortgage debt remains unpaid, that these plaintiffs may be allowed to pay the same, or, in default thereof, that the same shall be sold by the master, and the proceeds applied to the mortgage debt, and any portion not thus sold be conveyed to the plaintiffs. (4) If the court shall hold that the conveyance made to the defendant Marion Moise is a valid conveyance, then that the said the Bank of Sumter shall account for and pay over to the plaintiffs any amount it may be found to have received over the mortgage debt. (5) That the plaintiffs may have such other and further relief as to the court may seem just, and for their costs.

"T. B. Fraser, Jr.,

"Plaintiffs' Attorney.

"T. B. Fraser,

"Of Counsel."

This complaint duly verified. Verification omitted.

Answer of the Bank of Sumter.

"The defendant the Bank of Sumter, answering the complaint herein, admits the allegations to be true which are contained in the paragraphs of the complaint designated 1, 2, 3, 6, 8, and all of paragraph 4, except the allegation therein contained that the plaintiffs were indebted to the Bank of Sumter, at the

time alleged, only in the sum of thirteen thousand five hundred dollars. This defendant, on information received from its cashier, and belief, alleges that at that time the indebtedness of the plaintiffs to this defendant amounted to the sum of fourteen thousand five hundred dollars, and was secured by the mortgages referred to in said paragraph 4. This defendant admits the allegations in paragraph 5, except the allegation therein that the land therein referred to 'was conveyed and held as security for the whole indebtedness of the said A. S. & W. A. Brown to the said the Bank of Sumter,' which allegation this defendant denies, and alleges, to the contrary thereof, that the said conveyance was not intended or accepted by this defendant as or to be a security for said indebtedness, but was regarded and accepted by this defendant as a bona fide sale and conveyance to this defendant of said lands in fee-simple absolute. This defendant admits the truth of the allegations in paragraph 7 of the complaint, except the allegations therein 'that the said conveyance and agreement executed on the 26th day of March, 1895, constituted a mortgage to secure the indebtedness of the plaintiffs to the defendant the Bank of Sumter,' which allegation this defendant denies. This defendant admits that, as stated in paragraph 9 of the complaint, the said A. S. & W. A. Brown executed a deed of assignment, and that, in compliance with a clause of the agreement set out in the complaint in paragraph 8, this defendant participated in the assignment by presenting a claim for two thousand dollars against the assigned estate. But this defendant alleges that, by the express terms of said agreement, only the dividends to be received therefrom were to be applied to the credit of the indebtedness of the plaintiffs to this defendant, after deducting all costs and expenses; and this defendant denies that two thousand dollars of said indebtedness was thereby extinguished, and denies that the said two thousand dollars is, as alleged in paragraph 9, no longer a charge upon the mortgaged premises against the plaintiffs. This defendant alleges, upon information and belief, that only about the sum of one hundred and thirty-six dollars and sixty-six cents has been received by this defendant as dividends from the said assigned estate. This defendant denies, on information and belief, that the sums of money alleged in paragraph 10 of the complaint to have been received by this defendant for rents of said lands were received. This defendant, on information and belief (having been so informed by its cashier), alleges that the rents received for said lands were smaller than the sums stated in the said paragraph 10. This defendant, on information and belief (having been so informed by its cashier), denies that the amount of the proceeds of the sale by this defendant of the said lands, and of the rents and dividends received by this defendant, and of the two thousand dollars on the note of Brown, Cuttino & Delgar, referred to in com-

plaint, did altogether equal the amount of the indebtedness of the plaintiffs to this defendant.

"Haynsworth & Haynsworth,
"Attorneys for the Defendant the Bank of Sumter."

This answer verified. Verification omitted.

Answer of the Defendant Marion Moise.

"The defendant Marion Moise, by his answer, which is hereby amended as of course, answering the complaint herein: For a first defense: (1) Denies each and every allegation of the same, except such as may be hereinafter admitted. For a second defense: (2) The said defendant, further answering said complaint, admits the allegations contained in paragraphs numbered 1, 2, 3, 6, 8, and all of paragraph 4 except the allegation therein contained to the effect that the plaintiffs were only indebted to the Bank of Sumter, at the time alleged, in the sum of thirteen thousand five hundred dollars. This defendant alleges, on information and belief, that the said plaintiffs were indebted to the said bank at that time in the sum of fourteen thousand five hundred dollars. And this defendant admits all of paragraph 5, except the allegation therein contained to the effect that the conveyance referred to was taken and held by the bank as security for the whole indebtedness of the plaintiffs to the bank, which statement this defendant alleges to be untrue. And this defendant admits all of paragraph 11, except so much of the allegations therein contained as alleges that, for some time previous to the execution of the conveyance by the plaintiffs to the bank, negotiations had been pending with one H. T. Edens for a sale of the Providence place. This defendant admits all of paragraph numbered 7, except the allegation to the effect that the conveyance and agreement therein referred to constituted a mortgage. And this defendant, answering paragraph 9 of said complaint, admits that the plaintiffs executed a deed of assignment as therein alleged, but he alleges that the bank has only received a dividend, as he is informed and believes, of about eight and one-third per cent., amounting to about one hundred and sixty-six dollars and sixty-six cents; and he denies that the balance of the amount proven against said assigned estate has been extinguished, but, on the contrary, he alleges that the balance of said debt is a valid and subsisting obligation due to the bank by the plaintiffs, and that the plaintiffs are not entitled to a credit of two thousand dollars, as alleged. This defendant admits that the consideration expressed in his deed to H. T. Edens is ten thousand dollars, but he alleges that the true consideration of said deed was an exchange of the Providence place for a tract of land in Marlboro county, and that the consideration actually received was considerably less than that expressed in said deed. (3) This defendant alleges that the

conveyance by the plaintiffs to the Bank of Sumter, referred to in paragraph 5 of the complaint, represents a bona fide sale and conveyance of all of the premises described therein, in fee simple absolute, to the bank; that at the time of said conveyance the said bank held bona fide mortgages executed by the plaintiffs to the bank, covering all of the lands described in said conveyance, and in addition thereto one of the mortgages executed by the plaintiffs to W. F. B. Haynsworth for the benefit of the bank, covering the storehouse and lot in the city of Sumter then occupied by Brown, Cuttino & Delgar. This defendant alleges that it was expressly agreed that said city lot should not be sold and conveyed to the bank, but that the bank should release and satisfy its mortgage aforesaid upon said lot of land, upon the payment to it of the sum of two thousand dollars, and interest from the day of the date of said conveyance; that the negotiations and sale by the plaintiffs to the bank were conducted with this defendant, and it was not intimated or contemplated by either of the said parties that the bank was taking a security for a debt, but, on the contrary, it was expressly understood that the bank was making a bona fide purchase; and to that end the liens of the various mortgages covering the lands described in said deed were left open, to perfect the title against dower and all other incumbrances, and thereby make said conveyance effectual. (4) This defendant alleges that in the fall of 1895 the said bank received an offer of purchase for the Providence place, and, as a courtesy to the plaintiff A. S. Brown, notified him of the intended sale, whereupon he asked an option on the place, which the bank granted, and subsequently lost the sale by reason of the urgent request of the said A. S. Brown to the bank to hold the property until he (A. S. Brown) could realize the money with which to make the purchase; that in the spring of 1896 the plaintiff A. S. Brown made an offer of purchase to the bank of one thousand dollars for the interest he had conveyed the bank in a lot of land in the northwest section of the city, covered by the deed aforesaid, but the bank declined to make the sale because the said A. S. Brown offered ten shares of the capital stock of said bank in payment, instead of the money, which the bank did not think proper to accept, as it was not buying up its own stock; that on the 18th day of August, 1897, the plaintiff W. A. Brown requested this defendant to sell him a portion of the Rocky Pine place, but the offer was declined because the defendant was unwilling to sell the part wanted, for the reason that the sale of that portion of the premises would have rendered the balance of the tract unremunerative. (5) This defendant alleges that his principal reason for purchasing the real estate from the bank was to rid it of that class of property, which the bank did not want, could not manage, and could not make yield eight per cent. net income with-

out making large expenditures in ditching and draining the land and erecting tenant houses; that all of the tenants on the Rocky Pine and Du Bose tracts had notified the bank that they could not continue to rent the premises unless new houses were erected, as all of the old ones were in a dilapidated condition. This defendant alleges that the city lot was at the time of the purchase by the bank, and still continues to be, unimproved and unremunerative. This defendant further alleges that in 1895 the tenants upon the Providence place notified the bank that it would be necessary to expend a large sum of money to ditch and drain the plantation, as it was then unhealthy, by reason of the lack of proper drainage, which was causing much sickness at the time. (6) This defendant alleges that he purchased the property referred to, believing at the time that he was receiving a good title in fee simple; that he has expended considerable sums of money in ditching and draining the lands and building tenant houses upon the Du Bose and Rocky Pine places, believing that his title thereto was good in fee, and that he is entitled to be fully reimbursed for such expenditures, in case the court should hold that the bank is liable to an accounting to the plaintiffs. This defendant further alleges that he has seen and talked with the plaintiffs frequently since he purchased said property, and that neither of them either said or intimated in any way that his title was not good in fee simple to the premises, but, on the contrary, they stood by and saw this defendant erect improvements upon said property, and have made offers of purchase of the property aforesaid.

R. D. Lee,

"Attorney for Marion Moise."

This answer verified. Verification omitted.

A copy of the reply and demurrer was served on March 17, 1898, which copy, however, did not contain the certificate of counsel that the demurrer was meritorious, and not intended merely for delay. At the hearing the defendants' counsel contended that the demurrer should be disregarded, for the want of such certificate in said copy; and plaintiffs' counsel contending that such certificate was not required, by law, upon the copy served. The demurrer, when served, was not returned, or otherwise objected to.

The following are the reply and demurrers:

"The plaintiffs above named, replying to the answer of Marion Moise, one of the defendants herein, allege:

"First. (1) That they deny that they or Albertus S. Brown stood by and saw the defendant Marion Moise erect improvements upon said property. (2) That they deny that they had any information that said defendant was erecting improvements on said land until after said improvements had been erected.

"Second. That they demur to the answer of the defendant Marion Moise for the following reasons: (1) Because said answer does not

holding that when the answer of the defendant Marlon Moise admitted that he was vice president and director of the corporation the Bank of Sumter, and had knowledge of all the facts connected with the deed and agreement, it thereby admitted that said defendant could hold no title against said bank or the Browns. (5) Because his honor erred in not sustaining the demurrer of the plaintiffs to the counterclaim of the defendant Marlon Moise for betterments, in that (a) said counterclaim does not state the value of said improvements, as required by the statute; (b) because the said answer does not allege that the owners of said land neglected to fulfill on their part the contract under which the defendant entered upon said lands. (8) Because his honor erred in holding, 'It appears from the pleadings that the deed of 26th March, 1895, was not a mortgage, but an absolute conveyance, fairly, intelligently, and voluntarily made by the plaintiffs themselves for a consideration fixed by themselves, and it was a transaction disconnected with the mortgage contract,' in that there was no allegation in any of the pleadings to support said findings, and no evidence at all before the court.

"T. B. Fraser, Jr.,

"Appellants' Attorney.

"T. B. Fraser,

"Of Counsel for Appellants."

"The respondents' counsel will move the supreme court, upon this appeal, to sustain the order of the circuit judge upon the following grounds, in addition to those mentioned in his order: (1) Because the demurrer to the answers of defendants did not distinctly specify the grounds of objection to the same, as required by section 166 of the Code, and was therefore properly overruled. (2) Because the demurrer, as served upon defendants' attorneys, was not accompanied by certificates of counsel that the same was meritorious, and intended merely for delay, as required by section 18 of the circuit court. (3) Because the answers of the defendants contain general and specific denials of each material allegation of the complaint, as required by section 170 of the Code, and hence the same are not demurrable. (4) Because the answers of the defendants did not contain a statement of any new matter constituting a defense or counterclaim, and hence there was no warrant of law, under section 174 of the Code, or elsewhere, for the demurrer of the plaintiffs.

Haynsworth & Haynsworth and R. D. Lee,
"Defendants' Attys."

T. B. Fraser, for appellants. Haynsworth & Haynsworth and R. D. Lee, for respondents.

McIVER, C. J. The action was originally commenced by Albertus S. Brown and W. Alston Brown, as individuals, and as co-partners under the firm name of A. S. & W. A. Brown, plaintiffs, against the above-named defendants, on the 22d of November, 1897. Owing to the death of A. S. Brown, one of

said plaintiffs, shortly after the answers were filed, an order was granted substituting the persons named in the title of this opinion as plaintiffs, other than W. A. Brown, in the place of A. S. Brown, deceased, and continuing the action under said title. The defendants answered separately, and the plaintiffs demurred to both answers, upon grounds which were reduced to writing, and are set forth in the "case." The questions presented by the demurrers came before his honor, Judge Watts, who, after argument, granted an order overruling the demurrers. From this order plaintiffs appeal, upon the several exceptions set out in the record. Inasmuch as the primal and controlling question raised by this appeal is whether the facts stated in the answers are sufficient to constitute a defense to the action, all the pleadings should be reported, together with the order of the circuit judge, and the exceptions.

It is stated in the "case" that: "At the conclusion of the argument the presiding judge announced orally his decision that the demurrers should be overruled, and further stated that, in his judgment, the transactions mentioned in the pleadings were never intended to, and did not, constitute a mortgage, but that the same were intended to, and did, constitute an absolute sale in fee simple by the Browns to the bank, the grantors, by the terms of the accompanying written agreement, simply reserving the right to repurchase said lands, at certain fixed prices, at any time whilst the bank remained the owner of the same. Upon the order being handed up for his signature, the presiding judge stated that he would strike out all of the same after the word 'overrule,' because, whilst the remaining words therein expressed his judgment, yet he was not sure that said words properly belonged to an order of the kind, but that, if there was no objection, he would allow them to remain in the order. To this the counsel for the plaintiffs replied that, whilst he was not to be regarded as, in any sense, consenting, yet he had no objection to said words remaining in the order, beyond his general objection to the order as a whole; and thereupon his honor signed the order as prepared."

It seems that the deed in question was executed by A. S. Brown, through his attorney in fact, under a power of attorney, a copy of which is set out in the "case," which, as part and parcel of the deed, was before the circuit judge when he heard the case on demurrer. It also appears that during the argument counsel for defendants moved the court, in case the demurrers were sustained, to allow them to amend their answers by alleging certain additional facts not set forth in their answers, which additional facts are stated, substantially, in the "case." By agreement the following was added to the "case": "The appellants contend that the action should be determined upon the pleadings, the construction of the deed, the power of attorney, and the written agreement accompanying the deed, and

that all parol testimony is irrelevant. But, if the court deems the statements therein made to be relevant, then we agree that the same may be considered by the court in its decision herein, with a view of allowing the defendants to amend by setting them up in their answers." Exactly what this means, we do not know that we fully comprehend; but, in the view which we take, that is immaterial. As we understand it, the circuit judge heard the case in the only way in which he could properly have heard it, when presented by demurrer; that is, upon the pleadings, including the deed therein mentioned, with the accompanying power of attorney under which the deed was executed by one of the grantors, and not including the additional facts which defendants desire to insert in their answers, which facts were not properly before the circuit judge, and could not be, and, so far as appears, were not, considered by him, for he expressly declares in his order that his judgment was based upon what appears in the pleadings. The only question before the circuit judge was whether the facts stated in the answers were sufficient to constitute a defense, and that question could only be determined by an examination of the pleadings; and the only question before this court is whether there was any error in the conclusion reached by the circuit judge, and this court, being an appellate tribunal, has no power to go outside of the case as made in the court below. We must therefore decline the request of counsel to consider the additional facts above referred to, and confine our attention to the case as made before the circuit judge when he rendered the judgment appealed from, without regard to the additional facts mentioned in the "case," which counsel for defendants stated they were then ready to prove,—not, however, because we consider that parol evidence was either incompetent or irrelevant in a case like this, but simply because this court, being an appellate tribunal, is limited to a review of what occurred in the court below. In the case of *Birmingham v. Forsythe*, 26 S. C., at page 363, 2 S. E. 289, grave doubts were expressed as to the power of this court to consider any fact, even though admitted by counsel, which was not before the court below when the judgment appealed from was rendered; and although the point was not then decided, inasmuch as it was not necessary to do so in that case, yet subsequent reflection and examination have only served to increase the doubt there expressed, and we are now satisfied that this court, if it should undertake to consider any facts not properly before the circuit court, would be assuming original jurisdiction, at least so far as such facts are concerned, which, under the constitution, this court has no power to exercise, except in certain specified classes of cases, of which the present case is not one. The question here presented arises on a demurrer, and, in the determination of such a question, neither this court nor the circuit court can consider any

fact not appearing in the pleadings. If, however, the judgment overruling the demurrer is sustained, as it will be presently seen it must be, then the defendants may, if so advised, amend their answers by inserting the additional facts which they claim will show that the deed in question was not intended to be a mortgage, but is in fact what it appears to be on its face,—an absolute conveyance; for when the demurrers are overruled the plaintiffs will still be at liberty to have the issues presented by the pleadings tried upon their merits.

We will now proceed to the consideration of what we regard as the controlling question in this case; waiving, for the purposes of this inquiry, what may be termed the formal objections to the demurrers. The real question is whether the facts stated in the answers are sufficient to constitute a defense to the action. The main object of the action is to have the deed mentioned in the complaint, which appears on its face to be an absolute conveyance, declared to be a mortgage; and the question is narrowed down to the inquiry whether the facts stated in the answers are sufficient to show that such deed is in fact what it purports to be on its face,—an absolute conveyance,—and also whether the denials in the answers of certain allegations in the complaint are sufficient to raise the issue as to whether such deed was intended to be, and is in fact, a mere security for the payment of a debt. For while it is undoubtedly true that a deed, which appears on its face to be an absolute conveyance, may in equity be declared to be a mortgage, if the evidence be sufficient to show that such was the intention of the parties, yet it is equally true that the presumption is that the deed is what on its face it purports to be,—an absolute conveyance; and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. 3 Pom. Eq. Jur. § 1196; *Arnold v. Mattison*, 3 Rich. Eq. 153; *Petty v. Petty* (S. C.) 29 S. E. 406. Whether any particular transaction amounts to a mortgage, or to an absolute sale, with an agreement allowing the vendor to repurchase the land at a specified price, and within a time limited, "must, to a large extent, depend upon its own special circumstances; for the question finally turns, in all cases, upon the real intention of the parties, as shown upon the face of the writings, or as disclosed by the extrinsic evidence." 3 Pom. Eq. Jur. § 1195.

It appears from the pleadings that the Browns were indebted to the Bank of Sumter in a large sum of money (\$13,000, as alleged in the complaint; \$14,500, as alleged in the answers), which indebtedness was secured by several mortgages on real estate,—one on the Providence place, one on the Du Bose land, one on the Rocky Pine place, one on the interest of A. S. Brown in certain lots in the city of Sumter, and another mortgage on a lot at the corner of Main and Liberty streets, in

the city of Sumter, occupied by Brown, Cuttino & Delgar. When these several mortgages were executed, or when the debts which they were given to secure arose, does not appear. On the 26th day of March, 1895, the Browns executed a deed, absolute in form, to the Bank of Sumter, for all the real estate covered by the said mortgages, except the city lot occupied by Brown, Cuttino & Delgar. The consideration stated in said deed was the sum of \$10,000, and the deed contained a provision that said mortgages were to be "left open to protect the grantee and its successors and assigns against all incumbrances and dower." This deed was executed by A. S. Brown, through an attorney in fact, under a power of attorney attached to the deed, the terms of which will hereinafter be referred to. On the same day, to wit, the 26th of March, 1895, the Bank of Sumter executed an agreement in writing, the terms of which are fully set forth in the complaint, and admitted in the answers. It seems that the Bank of Sumter immediately went into possession of the lands conveyed to it, and on the 5th of November, 1896, sold and conveyed the same to its co-defendant, Marion Moise, Esq. (the consideration mentioned in the deed being the sum of \$12,000), and that said Moise shortly afterwards sold and conveyed the Providence place to H. T. Edens (the consideration mentioned in the deed being the sum of \$10,000, though Moise, in his answer, alleges that the true consideration of said deed was an exchange of the Providence place for a tract of land in Marlboro county, and that the consideration actually received was considerably less than that expressed in the deed). The plaintiffs, in their complaint, allege that the true object and real intent of the deed to the Bank of Sumter were to secure the indebtedness of the Browns to said bank, and not to convey the land therein mentioned absolutely, and that such conveyance really constitutes a mortgage. This allegation is distinctly denied in both answers, and, on the contrary, it is there alleged that the real object and true intent of said deed were just what it purports on its face to be,—an absolute conveyance; and Mr. Moise, in his answer, alleges specially "that at the time of the said conveyance the said bank held bona fide mortgages executed by the plaintiffs [meaning the Browns] to the bank covering all of the lands described in said conveyance, and in addition thereto one of the mortgages executed by the plaintiffs to W. F. B. Haynsworth for the benefit of the bank, covering the storehouse and lot in the city of Sumter then occupied by Brown, Cuttino & Delgar. This defendant alleges that it was expressly agreed that said city lot should not be sold and conveyed to the bank, but that the bank should release and satisfy its mortgage aforesaid upon said lot of land, upon the payment to it of the sum of two thousand dollars, and interest from the day of the date of said conveyances; that the negotiations and sale by the plaintiffs to the bank were conducted

with this defendant, and it was not intimated nor contemplated by either of the said parties that the bank was taking a security for a debt, but, on the contrary, it was expressly understood that the bank was making a bona fide purchase; and to that end the liens of the various mortgages covering the lands described in said deed were left open to perfect the title against dower and all other incumbrances, and thereby make said conveyance effectual."

Now, if, as said by Pomeroy in the passage quoted above, "the question finally turns, in all cases, upon the real intention of the parties, as shown upon the face of the writings, or as disclosed by the extrinsic evidence," it would seem to be clear that where, as in this case, it is alleged in the complaint that the deed in question, though absolute on its face, was really intended as a mere security for the payment of a debt, and that allegation is not only distinctly denied in the answer, but, on the contrary, it is positively averred that it was never even intimated that the deed was to be a mere security for the payment of a debt, but that it was expressly understood to be a bona fide purchase of the absolute title, a direct and material issue is raised by the pleadings; and the answer could not be regarded as amenable to a demurrer upon the ground that the facts therein stated are not sufficient to constitute a defense. But, in addition to this, when the pleadings show, as they do in this case (for it must be remembered that facts alleged in the complaint, which are admitted by the answer, become a part of the answer, and may be referred to in testing the sufficiency of such answer), that the bank already held mortgages, not only upon all the property covered by the deed, but also upon an additional piece of property (the city lot occupied by Brown, Cuttino & Delgar) not conveyed by the deed, it seems impossible to conceive that the bank would take another mortgage upon only a portion of the property already covered by mortgages in favor of the bank; and yet the contention of plaintiffs rests upon that theory.

But, as we understand it, the contention of appellants rests, not so much upon the omission of allegations in the answers to constitute a defense to the action, as upon the admission of certain facts alleged in the complaint, which, it is claimed, defeat the defense sought to be set up by the answers. In subdivision (a) of exception 1, the point is made that the answers having admitted the allegation in the complaint that the relation of mortgagor and mortgagee originally existed between the parties, and alleged no new consideration for the deed of 26th March, 1895, they thereby admitted that said deed was a mortgage. If that deed had been an agreement that the original mortgages should be converted into absolute conveyances, we can well understand how a new consideration would be necessary to the validity of such agreement. But where, as in this case, a creditor holding mort-

gages on several parcels of real estate to secure the payment of a debt purchases the mortgaged premises, or, rather, a part thereof, at a price less than the amount of his debt, and takes from his debtor an absolute conveyance, we are not prepared to admit that any new consideration is necessary to the validity of such conveyance; for it is well settled that, where the mortgagee purchases the mortgaged premises at a sale other than for foreclosure of the mortgage, the mortgage debt is thereby extinguished. *Devereux v. Taft*, 20 S. C. 555, and the cases therein cited. And the same principle applies, pro tanto, where only a portion of the mortgaged premises is purchased. *Trimmer v. Vise*, 17 S. C. 499. If, therefore, any "new" consideration, as it is called, be necessary, it would be found in the extinguishment of the mortgage debt, either in whole or in part, according to the fact whether the purchase was in whole, or only in part, of the mortgaged premises. But, even if an entirely new consideration was necessary to the validity of the deed in question, as an absolute conveyance, it can be found in the fact that the bank agreed to satisfy the mortgage on the city lot, occupied by Brown, Cuttino & Delgar (which is not a part of the premises conveyed), to secure a note for \$2,500, upon the payment of \$2,000 and interest to the bank, which agreement, it is alleged in the complaint, and admitted in the answers, has been complied with. It seems to us, therefore, that subdivision (a) of the first exception cannot be sustained.

In subdivision (b) of that exception, the point is made that the admission in the answers that the deed contains a provision that the original mortgages were to be "left open to protect the grantee and its successors and assigns against all incumbrances and dower" amounts to an admission that said deed was intended to be a mortgage. It seems to us that the insertion of this provision in the deed has precisely the contrary effect to that contended for by appellants; for, while it has a very appropriate place in an absolute conveyance from a mortgagor to a mortgagee of the mortgaged premises, and serves a very important purpose in such a conveyance, we do not think it has any place or serves any purpose in a new mortgage. In an absolute conveyance its function is to protect the grantee against the claim of dower by the wife of the mortgagor, or any incumbrance subsequent to the original mortgage, and it has been made to serve that purpose in *Agnew v. Railroad Co.*, 24 S. C. 18; and that is its sole purpose here, as declared by the express terms of the provision. It does not keep the original debt alive, as against the mortgagor; for that, as we have seen, is extinguished by the conveyance. On the contrary, its sole purpose, and its only effect, is to protect the grantee against subsequent incumbrances. The test of this is that the grantee never could enforce his original debt against the mortgagor. It seems to us, therefore, that the insertion of this provision in

the deed under consideration, instead of showing that such deed was intended to be a mortgage, shows that it was intended to be just what it purports on its face to be,—an absolute conveyance.

The second exception imputes error to the circuit judge in not construing the deed of the 26th of March, 1895, in connection with the agreement of the same date, fully set out in the complaint, and admitted in both answers, to constitute a mortgage. It seems to us that the provisions of that agreement show that the real object and true intent of the whole transaction were that the Browns should make an absolute conveyance of the lands described in the deed to the bank, and that they should be allowed the privilege of buying back the lands or parts thereof, as long as the bank continued to be the owner thereof, at certain specified prices. Take the terms of the fifth paragraph of the agreement, whereby the Browns, or either of them, are allowed the privilege, as long as the bank may continue to be the owner thereof, to "purchase all the real estate so conveyed as aforesaid, from the bank, at a sum equal to their present indebtedness to the bank [before any of said credits hereinbefore mentioned were applied], with interest and taxes and all costs and expenses added, the bank to allow credit for everything received in the meantime; and, as long as the same is owned by the bank, it will convey any of said property to the said Albertus S. Brown or W. Alston Brown, the heirs, executors, or administrators of either of them, at the following sums, respectively, adding interest as if said credits had not been made, taxes, costs, and expenses, and giving credit for rents and profits received and payments made, if any, viz.: The Providence place, at \$8,000.00; the Du Bose lands, at \$1,500.00; and the Rocky Pine place, at \$2,000.00." Now, observe the language used: The bank is spoken of as the "owner" of the property conveyed. The Browns are authorized to "purchase" the whole or any part of said property "as long as the same may be owned by the Bank of Sumter," which necessarily implies the right of the bank to sell or dispose of the property at any time and in any way it might see fit. Then the provision that the Browns, or either of them, as long as the bank continued to be the owner, might repurchase either of the parcels conveyed, at certain specified prices. Then, again, the provision in the first paragraph of the agreement "that the sum of ten thousand dollars is to be entered as a credit as of this date upon the indebtedness of" the said Browns to the bank, which is the amount mentioned as the consideration of the deed. These provisions, couched in such language, show that the real object and true intent of the deed were that it should be an absolute conveyance, and not a security for a debt, for which the bank already held mortgages on all the land conveyed, as well as on another parcel not embraced in the conveyance; for, if the intention had been

merely to give the bank security for the amount due it by the Browns, very different language would have been employed. The bank did not obligate itself to reconvey the property upon the payment of the amount due within a specified time, or even within a reasonable time. On the contrary, by the express terms of the agreement it was contemplated that the bank might, at any time it saw fit, sell or otherwise dispose of the property conveyed, just as an absolute owner could do; and the Browns were only allowed the privilege of buying back the property at certain specified prices, as long as the bank continued to be the owner. In addition to this, the allegation in the answer of Mr. Moise, who seems to have acted for the bank in this whole transaction, that W. A. Brown, the survivor of A. S. & W. A. Brown, on more than one occasion endeavored to buy from the bank portions of the property conveyed, upon terms other than those provided for in the agreement, serves to strengthen the conclusion that the intention of the parties at the time of the transaction was that the deed was an absolute conveyance, and was not intended to be a mere security for the payment of a debt. Again the terms of the power of attorney attached to the deed, under which the same was executed by one of the grantors, tend to show that the intention was to execute an absolute conveyance, and not a mere mortgage. By that paper one of the original plaintiffs (Albertus S. Brown) appoints the other plaintiff (W. Alston Brown) his true and lawful attorney in fact "to sell and dispose of any and all lands that I own, or have any interest in, in the state of South Carolina, and particularly in Sumter county, upon such terms as he may deem proper, and to sign, seal, make, and deliver good and sufficient deeds of conveyance for the same." This language, while very appropriate to create a power to sell and convey by absolute deeds, does not imply a power to mortgage. This power of attorney was executed a short time before the deed in question was executed, and, of course, both the donor and donee of the power knew that they were then largely indebted to the bank, which indebtedness was already secured by mortgages on their property; and if it was in the contemplation of the parties to give another mortgage, or a deed intended to operate as such, it is inconceivable that they should have omitted from the power of attorney any words indicating such an intent. But, if their intention was to execute absolute conveyances, then the words used were just such as would express such an intention.

Counsel for appellants rely upon the words "dispose of" as expressive of an intention to authorize the execution of a mortgage, and

cite the case of *Platt v. Railroad Co.*, 99 U. S. 48. In that case congress, for the purpose of aiding in the construction of this transcontinental railroad, made a grant of lands to the company, and the act making such grant contained a provision that all such lands as were not "sold or disposed of" by the company before the expiration of three years after the completion of the entire road should be subject to settlement and pre-emption like other public lands. The company executed a mortgage covering these lands, with a view to raise money to continue and complete the construction of their road, and the question was whether the mortgage of these lands was such a disposition thereof as would relieve them from being subject to the right of pre-emption. It was held that the mortgage was such a disposition; but this conclusion was based upon the manifest object of the act of congress, which was to aid the company in raising the funds necessary to construct their railroad, and cannot be regarded as authority in this case. Even in that case there was a strong dissent by three of the justices. In 18 Am. & Eng. Enc. Law, 871, it is said, in speaking of the construction of powers of attorney, "The obvious meaning of terms is not to be extended by implication, in the absence of necessity." And again, at page 873, it is said, "Where authority to perform specific acts is given, and general words are also employed, such words are limited to the particular acts authorized." It seems to us that the terms used in this power of attorney—"to sell and dispose of" real estate, and to execute "good and sufficient deeds of conveyance for the same"—obviously mean to make absolute conveyances, and cannot be extended by implication so as to confer a power to mortgage. Indeed, in the case of *Ivy v. Caston*, 21 S. C. 583, it was doubted whether even a mortgage of personal property, which does operate as a transfer of title, after condition broken, could be regarded as a "disposition" of property, within the meaning of the terms used in the attachment act; and certainly a mortgage of real property, which does not operate as a conveyance of title, cannot be regarded as a "disposition" of such real estate.

Under the view which we have taken of the main question in the case, the points presented by the remaining exceptions do not properly arise, and need not, therefore, be considered. The judgment of this court is that the order of the circuit court overruling the demurrers to the answers of defendants be affirmed, and that the case be remanded to the circuit court for such other proceedings as may be necessary, with leave to the defendants, if they shall be so advised, to amend their answers as hereinabove indicated.

MEW v. CHARLESTON & S. RY. CO.

(Supreme Court of South Carolina. April 27, 1899.)

ELECTORS—QUALIFICATIONS—REGISTRATION—NEW TRIAL—DISQUALIFICATION OF JUROR—NEGLECT—PLEADING—VARIANCE—TRIAL—INSTRUCTIONS—MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTIONS FOR JURY—RAILROADS—BRAKES.

1. Const. art. 2, § 3, provides that every male citizen above 21, and possessing the qualifications required by the constitution, shall be an elector. Section 4 states the qualifications for suffrage, among which is registration. Id. subsec. c, provides that up to January 1, 1898, all male persons of a voting age, possessing certain qualifications, shall be entitled to register and become electors, and makes those so registering qualified electors for life, unless afterwards disqualified. Subsection f provides that a duly-registered elector, who still remains a qualified elector, may have his certificate renewed in certain cases. Section 2 provides that every qualified elector shall be eligible to any office. Article 16, § 1, provides that amendments shall be submitted to the qualified electors, and, if a majority of the electors qualified to vote for members of the general assembly shall vote in favor thereof, they shall be deemed adopted. *Held*, that registration was an essential qualification of an elector, though article 2, § 8, provides that the general assembly shall provide by law for the registration of all qualified electors.

2. Under Const. art. 5, § 22, providing that each juror must be a qualified elector, under the constitution, and article 2, which makes registration an essential qualification of an elector, a party in a civil action is not entitled to a new trial because a juror was not registered, though such fact was unknown to the party during the trial, since it could have been known by a search of the registration books, which are public records.

3. A complaint alleging as one cause of action that, because of insufficiency of brakemen, the conductor was obliged to act as such, and go on top of the train, which place was rendered unsafe by insufficient brakes, and that a defect in the roadbed caused the train to give a sudden lurch, throwing the conductor off and injuring him, is not uncertain, as stating distinct acts of negligence, each severally capable of producing the result, but shows the acts to be co-operating causes.

4. Such complaint is sufficient as connecting the alleged acts of negligence of the company with the injury.

5. Code Civ. Proc. § 190, provides that no variance shall be deemed material, unless it has actually misled the adverse party. Section 192 provides that, where an allegation of the cause of action is not proved in its entire meaning, it shall be deemed a failure of proof. Section 194 allows the court, before or after judgment, to amend any pleading, when it does not change substantially the claim, by conforming it to the facts proved. A complaint against a railroad company for injuries alleged that the track was so constructed as to make a decided curve at a point where there was the highest grade, with low grades immediately before and after, causing a long train to jerk suddenly. The evidence showed that the injury occurred near to, but not at, the curve. *Held* a mere variance, and the court could allow an amendment striking out the reference to the curve; counsel for the company stating that he had not been surprised.

6. A party cannot complain that a charge was not given as requested, when its substance was given in another place.

7. A charge that if a conductor, after starting with the train, and before reaching his des-

tinuation, objected to taking on additional cars without additional hands. It was for the jury to determine whether he waived the obligation of the company to furnish sufficient hands, is not a charge as to the facts.

8. Gen. St. § 1499 (1 Rev. St. § 1681), requiring railroads to cause a sufficient brake to be attached to every freight car, except those having four wheels, requires such brake to be attached to gondola cars used to haul gravel, and to flat cars loaded with lumber, which cars have eight wheels.

9. A conductor, having protested to the train dispatcher that his force of brakemen was inadequate, was told to go on anyhow. He claimed that it became necessary for him to act as brakeman on the top of a car, and that a defect in the roadbed caused the train to jerk suddenly, throwing him off. *Held*, that it was for the jury to determine whether, by running the train without sufficient help, and with knowledge of the defect in the roadbed, the conductor assumed the risk.

Appeal from common pleas circuit court of Charleston county; R. O. Watts, Judge.

Action by Elliott L. Mew against the Charleston & Savannah Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mordecai & Gadsden, for appellant. Legare & Holman, for respondent.

JONES, J. The defendant company appeals from a judgment rendered against it in favor of the plaintiff for personal injuries received through the alleged negligence of defendant in the management of its train. A preliminary motion, however, was made to suspend the appeal for the purpose of allowing defendant to move the circuit court for a new trial on the ground that one of the jurors who sat in the case was not a qualified elector, under the constitution, for want of registration, and therefore not a legal juror. The affidavits submitted in support of the motion are quite sufficient to make a prima facie showing that the juror Gorse was not at the time of the trial registered in the county of Charleston as an elector, and that such fact was not actually known to defendant or its counsel at the trial. An examination of the books of registration after the trial disclosed the fact that said Gorse was not registered. Will this showing justify us in suspending the appeal for the purpose named? We think not, for the reasons now stated:

Article 5, § 22, of the constitution, provides, " * * * Each juror must be a qualified elector under the provisions of this constitution, between the ages of twenty-one and sixty-five years, and of good moral character." By article 2, §§ 3, 4, registration is made one of the qualifications of an elector. This is controverted by the other side, who contend that the constitution makes a distinction between "qualified electors" and "registered qualified electors." We cannot agree with this latter contention. Article 2, § 3, provides: "Every male citizen of this state, and of the United States, twenty-one years of

age and upwards, not laboring under the disabilities named in this constitution, and possessing the qualifications required by it, shall be an elector." Then section 4 proceeds to state the qualifications for suffrage: (a) Residence; (b) registration; then (c) the qualifications for registration of those who apply therefor up to January 1, 1898, making those so registered "qualified electors" for life, unless disqualified by other provisions of the constitution; then (d) the qualifications for registration of those who apply therefor after January 1, 1898; (e) directing what managers of election shall require of every elector offering to vote. Then follows subdivision f, as follows: "The general assembly shall provide for issuing to each duly registered elector a certificate of registration, and shall provide for the renewal of such certificate when lost, mutilated or destroyed if the appellant is still a qualified elector under the provisions of this constitution, or if he has been registered as provided in subsection (c)." The argument, as we understand it, is that the above section 4 does not provide the qualifications of an elector, but the qualifications for suffrage, or the act of voting. But suffrage is the right to vote, not the act of voting; and it seems untenable to argue that "qualifications for suffrage" does not also mean qualifications for elector, especially when the constitution, immediately preceding, defines an elector (among other things) as one "possessing the qualifications required by it" (the constitution). Where else in the constitution must we look to ascertain the qualifications of an elector? We find in section 6 of this article who are disqualified for crime, etc., who come within the class of those "laboring under the disabilities named in the constitution"; but where shall we ascertain the "qualifications required," unless it be in this section? The qualifications of an elector, under the constitution, are citizenship, age, residence, and registration, subject to disqualification for certain crimes unpardoned, insanity, pauperism, and imprisonment, and subject to certain regulations in reference to the certificate of registration, and in reference to proof of payment of taxes when the elector offers to vote. If any distinction among qualifications is permissible, registration must have been deemed pre-eminent. The matter of reading any section of the constitution, or understanding and explaining it when read, previous to January 1, 1898, and of reading and writing any section of the constitution, or the ownership of property assessed at \$300 by those applying for registration after January 1, 1898, are qualifications for registration, not qualifications for suffrage, except as the right of suffrage depends upon the qualifications of registration. The term "qualified elector" is frequently used in the constitution, and in every instance except one it means "registered elector." Take the article under discussion. In section 2, "every

qualified elector shall be eligible to any office," etc.; section 4, subsec. c, where it is provided that those who are registered previous to January 1, 1898, "remain during life qualified electors unless disqualified," etc.; in section 4, subsec. f, where a duly-registered elector, still remaining a "qualified elector" (i. e. not disqualified under the constitution), may have renewal of registration certificate in certain cases. The excepted case referred to above is in section 8 of this article, where it is ordained: "The general assembly shall provide by law for the registration of all qualified electors," etc., from which it is argued that this implies that there may be qualified electors who are not registered, but for whom registration is to be provided. We grant that the language used is not strictly apt or accurate, but, construed in the light of the constitution as a whole, the meaning is manifest, viz. that the general assembly shall provide by law for the registration of all persons qualified for registration as electors. This is made very clear by reference to subsection c of section 4 of this article, where it is provided, "up to January 1st, 1898, all male persons of voting age applying for registration who can read any section in this constitution submitted to them by the registration officer, or understand and explain it when read to them by the registration officer shall be entitled to register and become electors." We will not prolong this opinion by reference to the numerous places in the constitution where the words "qualified electors" are used in order to show that the words mean registered electors, but we note one other instance. In article 16, § 1, providing for amendments to the constitution: " * * * And the same shall be submitted to the qualified electors of the state at the next general election thereafter for representatives; and if a majority of the electors qualified to vote for members of the general assembly, voting thereon shall vote in favor," etc. Here we have a definition of "qualified elector" as an elector qualified to vote for members of the general assembly, and it could not be contended that one is qualified to vote without registration.

But for the earnestness with which the contrary view was pressed, we would not have deemed it necessary to say more than that we agree with counsel for the moving party that registration is an essential qualification of an elector. It follows that one who has not been registered as an elector in the county when the court sits is not qualified to serve as a juror in said court. Still it does not follow that movant must be allowed to suspend this appeal, to move for a new trial on circuit. Previous to the constitution of 1895 the rule had long prevailed in this state that what was cause for challenge to a juror could not, after verdict, be made a ground for new trial. *State v. Quarrel*, 2 Bay. 150; *State v. O'Driscoll*, Id. 153; *State v. Fisher*, 2 Nott & McC. 261; *State v. Billis*, 2 McCord, 12; *Josey v.*

Railroad Co., 12 Rich. 184. In the case of *Garrett v. Weinberg*, 54 S. C. —, 31 S. E. 341, this court held, under the constitution of 1895, that a new trial should be granted if a juror disqualified by conviction for hog stealing sat on the case, if neither the party nor his counsel knew of the disqualification until after verdict. This case was grounded on the finding of fact by the circuit judge "that none of the parties to this action, or their respective counsel, had knowledge of the conviction of Ardis, during the trial of the case." Such fact this court was bound to act upon, and could not impute to any one knowledge, actual or constructive, in conflict therewith. But in the later case of *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, the rule stated in *Garrett v. Weinberg*, supra, was qualified in this language by the chief justice, who also wrote the opinion in *Garrett v. Weinberg*: "For while it is true that in the cases of *Kennedy v. Williams*, 2 Nott & McC. 79, and *Garrett v. Weinberg*, supra, some stress is laid, and, in a proper case, properly laid, on the fact that the disqualification of the juror was not known to the party or his counsel until after the trial, yet we think this should be qualified by the proviso that such ignorance is not due to the want of diligence; for, where the disqualification relied on might have been discovered by the exercise of ordinary diligence, it affords no excuse for failing to make the objection in due season, for, as was said in *State v. Fisher*, supra, a party 'should not be permitted to take advantage of his own negligence.' In this case, as we have seen, appellant failed to make use of the means afforded by the law to enable him to ascertain the qualifications of each juror presented, and he must take the consequences of his own default." In this case the books of registration, which are public records in Charleston county, would have disclosed the juror's disqualification; and defendant's negligence in not consulting the same should prevent us from suspending this appeal now for the purpose named. The motion is therefore refused.

The first, second, and third exceptions impute error to the order of Judge Benet, made at chambers, Winnsboro, S. C., September 29, 1897, refusing defendant's motion to make the complaint more definite and certain, exceptions to which having been previously duly noticed. We think the motion was properly refused. The complaint, pursuant to the practice existing at the time it was filed, which was previous to the act of February 21, 1898 (22 St. at Large, p. 693), to regulate the practice in actions ex delicto, alleged three separate causes of action, each based primarily on a specific act of alleged negligence; the first being insufficiency of brakemen, the second, failure to provide brakes on all freight cars not four-wheeled; the third, defective track, by improper grading at the place of the injury. In the first cause of action it was alleged that plaintiff,—who was conductor of the train,—in conse-

quence of the failure to supply a sufficient number of brakemen, had to perform, also, the duties of a brakeman on the top of the train, and, while so acting, the train gave a sudden jerk, and caused plaintiff to be thrown to the ground from the moving train and injured. In the second cause of action it was alleged that while performing, also, the duties of a brakeman on top of the train, rendered necessary by the failure to supply sufficient brakemen, which position was also rendered unsafe and insecure by the failure to supply each car with good and sufficient brakes, by reason of such negligence and the sudden jerk of the train he was thrown off and injured. In the third cause of action it was alleged that the defective roadbed caused the long train of cars (37 in number) to give a sudden lurch and jerk, which threw plaintiff off and injured him, while performing the duties of brakeman on top of the train, rendered necessary by the failure to supply a sufficiency of brakemen. Appellant's objection to the first cause of action is that it contains allegations of two acts of negligence,—insufficiency of brakemen, and the sudden jerking of the train; to the second cause of action, that it contains allegations of three acts of negligence,—insufficiency of brakes, insufficiency of brakemen, the sudden jerking of the train; and to the third cause of action, that it contains allegations of the defective construction of the track which caused the sudden jerking which threw plaintiff off, and then repeats the allegations in the first cause of action as to insufficiency of brakemen, and the allegation in the second cause of action as to failure to provide brakes on each car. We think the causal relation among the alleged negligent acts (defective construction of track, causing a long train of cars to make a sudden jerk, which threw plaintiff from his post of hazard, rendered more dangerous by the failure to supply each car with brakes, in which position he was placed by the failure to provide a sufficiency of brakemen) shows co-operating causes leading to the result, instead of any single cause sufficient of itself to produce the result; and such acts of negligence might very properly have all been alleged in a single cause of action. It was only when the alleged acts of negligence were distinct and independent, and capable severally of producing the result complained of, that it was necessary, previous to the act, supra, that each such act of negligence should be stated as a separate cause of action. But where the act complained of is resultant of several co-operating acts of negligence, manifestly, the cause of action is single. Therefore, whatever else might have been urged in reference to the pleading before us, it cannot be said that it is objectionable for lack of definiteness and certainty.

The next question presented is whether Judge Watts, on the trial of the case, erred in overruling defendant's demurrer to the first, second, and third causes of action, on the

ground that the said complaint, in alleging each of said causes, did not allege facts connecting the alleged negligence of the defendant with the injury which resulted. It appears from the allegations of the complaint that the injury resulted by reason of the acts of negligence alleged in each cause of action. This being admitted, it is clear that the demurrer was properly overruled.

The fifth, sixth, seventh, and eighth exceptions allege error in allowing plaintiff to amend his complaint as to the third cause of action during the trial, after the close of the evidence. The amendment allowed was to strike out of the third paragraph of the third alleged cause of action the words, "curve at a point where there was the highest," which appear below in capitals and in brackets: "(3) That yet the defendant, not regarding its duty, conducted itself so carelessly, negligently, and unskillfully in this behalf that at the place hereinafter mentioned on said railroad the track was so constructed as to make a decided [CURVE AT A POINT WHERE THERE WAS THE HIGHEST] grade, with low grades immediately before and after said high grade, whereby a long train was caused to give a sudden lurch and jerk, which rendered the said track and roadbed unsafe, and made it extrahazardous for the employes of said defendant in the performance of the duties necessary and proper in the operation of said train, all of which was well known to the defendant." It appears that defendant offered no testimony, and so secured the right to open and reply. Mr. Gadsden, for defendant, addressed the jury, and was followed by Mr. Legare, for plaintiff. At the close of Mr. Legare's argument, Mr. Murphy, for plaintiff, asked leave to make the amendment. After argument on the question, the amendment was allowed. Then the circuit judge asked Mr. Gadsden if he was taken by surprise, and if he had any motion to make. To which Mr. Gadsden replied, "No," that he did not think the circuit judge had power to allow the amendment at that stage of the proceedings. Whether he had such power is the question before us. We think the amendment was clearly within the power of the court. Sections 190-192, 194, Code Civ. Proc.; *Booth v. Manufacturing Co.*, 57 S. C. 415, 29 S. E. 204. In this last-mentioned case it was held to be within the power of the circuit court, during trial, to amend a complaint alleging injury by a spinning frame at which plaintiff was working, so as to allege injury by a different spinning frame, at which another was working, so as to conform to the proof. So the case here was not a total failure of proof, but a mere variance, within the court's power of amendment. The evidence was to the effect that the injury occurred on defendant's track, near Berry Hill, by reason of a defective grade or depression, which caused a long train of cars to jerk, and that the place of injury was near to, but not at, the curve referred to in the complaint. The place of injury and the general nature of the cause

of injury (defective road construction) were not so materially different as to change substantially the cause of action.

Defendant's fourth request to charge was as follows: "Fourth. A railroad company must furnish a sufficient number of hands for the train. If there are not enough, the conductor may refuse to run the train. If he runs a train without a proper number, he waives the obligation of the company, and it is at his own risk; and, in case of injury from such running of the train, he cannot claim damages from the company." In response to which the circuit judge said: "I refuse to charge you that in that language. I charge you that a railroad company must supply a sufficient number of hands, and a conductor may refuse to take a train out without sufficient hands to run it. If the testimony satisfies you that there were not a sufficient number of hands when this conductor started with that train, it was his duty at that time to refuse to take out that train; and, if he did take it out, he waived the obligation of the company, and ran it at his own risk. But if he had already taken the train out, and somewhere between where he started and his destination he protested against taking on additional cars without having additional hands, I charge you that it is a question of fact for you to determine whether he waived his rights and the obligation of the company. In other words, it is a question for the jury to say whether he waived the obligation of the company, and took the risk himself, in going on without more train hands." This is made the basis of exceptions 9 and 10; the ninth exception assigning error in general terms to the refusal to charge, and the tenth exception assigning as specific error to the charge that it was in respect to matters of fact, in violation of article 5, § 26, of the constitution. The charge was substantially as requested, and so appellant has no cause for complaint. The qualification placed by the circuit judge on the general language of the request was proper, in view of the evidence,—which was not disputed,—that the train, leaving Blakes, going towards Charleston, having 12 cars, had one brakeman, which was sufficient, but at Pon Pon, where the cars in the train numbered 37 or 38, plaintiff communicated with the train dispatcher that it was impossible for him to handle these cars, and that the train dispatcher ordered him to take them anyhow. The charge was not a charge in respect to the facts, but was upon a hypothetical statement of facts, rendered necessary to explain the law applicable to the particular case before the court. The charge, too, was in accord with the rule in this state, that, when the evidence is capable of more than one inference, the jury must determine whether the servant's remaining in the service of the master, after knowledge of a risk or danger within the obligation of the master to provide against, is a waiver of the master's obligation, and at the servant's risk. *Bussey v. Railroad Co.*, 52 S. C. 438, 30 S. E. 478.

Error is assigned for refusal to charge appellant's sixth request to charge, viz. that section 1490, Gen. St. (section 1681, 1 Rev. St.), requiring brakes to be placed on every freight car, other than four-wheeled freight cars, does not apply to gondola or flat cars. The language of the statute is, "Every railroad corporation shall cause a good and sufficient brake to be attached * * * to every car used for the transportation of freight, except four-wheeled freight cars used only for that purpose," etc. There was evidence that there were 17 gondola cars used to haul gravel, and some flat cars loaded with lumber, in the train, and that these were eight-wheeled cars, without brakes. The circuit judge was correct in refusing this request, as there is no authority in the statute for excepting such eight-wheeled cars, if they are used in the transportation of freight.

The last ground of appeal is as follows: "(12) Because his honor erred in refusing to charge the twelfth request to charge of the defendant, to wit: 'If the jury find by the preponderance of the testimony that the plaintiff had traveled over the road of this defendant for a considerable period, and knew of the defects in the construction of the track at Berry Hill, as is set out in his complaint, and did not complain or protest against same to the officers of the company, but continued voluntarily in their service as conductor, knowing of such alleged defect in the construction of its track at that point, then the jury is justified in concluding that the plaintiff had assumed the risk incident thereto, and he cannot recover on that ground.'" The remaining in the master's service by an employé after knowledge of an alleged defect in the instrumentalities to be furnished by the master is not, as matter of law, an assumption of the risk by the employé. Whether the employé assumed the risk is a question for the jury, to be determined from all the circumstances of the case. If the undisputed evidence is such as to be capable of but one inference, viz. voluntary assumption of the risk by the employé, then the jury could be rightfully instructed that the employé could not recover. *Bussey v. Railroad Co.*, supra. In the case here, there was evidence to the effect that plaintiff protested to the train master, that his force of brakemen was inadequate to manage his long train, and that he was ordered by the train master: "Take them anyhow. Let me hear nothing more from you. Take the cars, and bring them on to Charleston." Was this order of the train master an assurance that the force of brakemen was adequate for the safe handling of the train, or was it a request to plaintiff to continue in defendant's service notwithstanding the risk from an inadequate supply of train hands, or was it an assumption by the defendant company of the risk? These were matters for the jury, in determining whether plaintiff assumed the risk by remaining in defendant's service after knowledge of the alleged defect. Then the

causal connection between the alleged negligence in failing to supply sufficient brakemen, which, as alleged, rendered it necessary for plaintiff, though conductor, to also assume the duties of brakeman, which placed him on top of the train, and thus exposed him to the danger of the sudden jerk arising to a long train by reason of the alleged defect in the track, must be remembered. We have, then, in this case, evidence of a protest by plaintiff against one alleged act of negligence, which operated with the alleged defect in the track to bring about the injury, and an order by the defendant company to the plaintiff to serve notwithstanding. In 14 Am. & Eng. Enc. Law, 857, the doctrine is laid down: "If a master or superior orders an inferior into a situation of danger, and he obeys and is injured, the law will not charge him with assumption of the risk, unless the danger was so glaring that no prudent man would have entered into it,"—which is supported by citation of cases. Here, then, was another question for the jury: Was the danger or risk in this case so obvious as that no prudent man ought to have entered it? The case of *Thorpe v. Railway Co.*, 89 Mo. 650, 2 S. W. 3, is in point. In that case it was held that an employé of a railroad company, who had complained to the yard master that the work on which he was engaged was unsafe, because hands were not furnished to perform it, and who, without any promise from the company to furnish more, continued in the service and was injured, was not negligent, as matter of law. To the same effect in *Patterson v. Railroad Co.*, 76 Pa. St. 389. Whether the matter of assumption of risk by an employé is to be tested by the law of waiver (*Hooper v. Railroad Co.*, 21 S. C. 541), or the law of negligence (*Bussey v. Railroad Co.*, supra), in either case it is a question of fact for the jury. Under these views, there was no error in refusing the request to charge. The judgment of the circuit court is affirmed.

McIVER, C. J. While I concur in the conclusions reached by Mr. Justice JONES in this case, I do not agree with him in one of the reasons which he assigns for his conclusion that the motion to suspend the appeal for the purpose of enabling the appellant to move before the circuit court for a new trial upon the ground that one of the jurors who sat on the trial of the case was not a qualified elector, under the constitution, for want of registration, and therefore not a legal juror. I am not prepared to assent to the proposition that registration is necessary to constitute a qualified elector. It seems to me that, under the various provisions of article 2 of the constitution, a qualified elector is entitled to at least two rights: (1) Eligibility to office; (2) the right to vote. Hence a person may be eligible to office, if he is a qualified elector; but he may not have the right to vote, because he may lack some one of the qualifications prescribed by section 4 as necessary to exercise the right of suffrage, one of which is registra-

tion. Section 2 provides that "every qualified elector shall be eligible to any office to be voted for, unless disqualified by age as prescribed in the constitution." Then section 3 prescribes what shall be the qualifications of an elector, in the following language: "Every male citizen of this state and of the United States twenty-one years of age and upwards, not laboring under the disabilities named in this constitution and possessing the qualifications required by it, shall be an elector." Now, the disabilities named in the constitution (section 6) consist of only two classes of persons: (1) Persons who have been convicted of certain offenses therein specified, unless pardoned by the governor; (2) persons who are idiots, insane, paupers supported at the public expense, and persons confined in any public prison. I do not find any clause in the constitution which can be construed as prescribing registration as one of the qualifications of an elector; but I do find several clauses, cited in the opinion of Mr. Justice JONES, prescribing registration as a prerequisite to the exercise of one of the rights of an elector, to wit, the right to vote. On the contrary, I find in section 8 the following provision: "The general assembly shall provide by law for the registration of all qualified electors." This language necessarily implies that a person may—in fact, must—be a qualified elector before he is entitled to registration, and hence registration cannot possibly be one of the requisites necessary to constitute one a qualified elector. From this it follows that the fact, if it be a fact, that the juror named was not a registered voter, does not disqualify him from serving as a juror, for the provision in section 22 of article 5 of the constitution is that "each juror must be a qualified elector," not a qualified voter. It seems to me that the provisions of the constitution in regard to registration were designed to afford conclusive evidence that a person who had been registered is a qualified elector, and as such entitled to exercise one of the rights of such an elector, to wit, the right to vote, so as to avoid the waste of time and confusion incident to an investigation of his right when he offers to cast his ballot. For this reason I concur in the conclusion that the motion to suspend the appeal for the purpose indicated should be refused.

But there is another reason why such a motion should be refused. A motion of this character is addressed to the discretion of this court, and such discretion should not be exercised when it appears from the showing made that the moving party has been negligent in claiming his rights. Where a party has failed to make any objection to a juror at the proper time, he should not, after verdict, be allowed to raise any objection to the qualifications of any juror who sat upon the trial, until he first satisfies the court, not only that he did not know the facts upon which he bases his objection in time to make the same in due season, but also that he could not by

due diligence have discovered the facts upon which he proposes to rely in time to make his objection in due season.

GUNN et al. v. BYROM.

(Supreme Court of Georgia. March 21, 1890.)

ACCOUNTING—REOPENING DECREE.

A decree rendered on a petition filed for a general accounting between the plaintiff and defendant will not be reopened in order to allow the plaintiff to charge the defendant with additional items, unless it be shown that the plaintiff had no knowledge of the existence of such items before the rendition of the decree, and that such knowledge could not have been obtained by the exercise of ordinary diligence.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by J. S. Byrom, guardian of Julia Gunn, against U. M. Gunn and Hattie Gunn. Judgment for plaintiff. Defendants bring error. Reversed.

Hill, Harris & Birch and Hardeman & Moore, for plaintiffs in error. Guerry & Hall, for defendant in error.

COBB, J. On July 9, 1897, John S. Byrom, as guardian of Julia Gunn, presented to the judge of the superior court of Bibb county a petition, in which he alleged, in substance, that he had at the April term, 1894, of Bibb superior court, filed an original petition against U. M. Gunn and Hattie A. Gunn, in which he alleged that he had been appointed guardian of Julia Gunn, a lunatic, as successor to Hattie A. Gunn, who had been removed, and that Hattie A. Gunn was the successor of U. M. Gunn, who had formerly been the guardian of Julia Gunn. Petitioner sought in that petition to recover and have an accounting and settlement with U. M. Gunn and Hattie A. Gunn on account of their trusts as former guardians of his ward, Julia Gunn. Petitioner further set forth in his original petition that the defendants had confederated together for the purpose of defrauding Julia Gunn; that by reason of this fraud Hattie A. Gunn had procured from the superior court of Bibb county a decree conveying to her a large amount of real estate, which was liable for the payment of whatever judgment might be procured by petitioner against her and U. M. Gunn on account of their trust as guardians. It is further alleged in the petition that this case was referred to a master in chancery, who filed a report finding in favor of the plaintiff, and subjecting the property in the hands of Hattie A. Gunn to the payment of the amount found in favor of plaintiffs; that on exceptions to the master's report the court sustained the findings of the master as to certain of the property, and overruled certain others, all of which appears by the final decree of the court in the case; that upon a writ of error the supreme court overruled so much of the de-

of plaintiff, which judgment has been made the judgment of the superior court. Petitioner further alleges that at the time of filing the original bill, and at the time of the hearing before the master, and at the time of the final decree, he did not know of any amounts due by either of the defendants as guardian for his ward, except those shown by the returns of U. M. Gunn, but that since the final decree he has learned that U. M. Gunn received from the sale of certain lands in Jones county, in which Julia Gunn had a one-third interest, the sum of \$8,000; that this money was received from one J. W. Smith on the 1st day of November, 1881; that U. M. Gunn, instead of charging himself with the full amount received on account of Julia Gunn, only charged himself with the sum of \$671.66, the balance of the amount due Julia Gunn having been by U. M. Gunn mingled with other funds of himself and his wife, Hattie A. Gunn, and converted to his own use. The prayers of the petition were that petitioner be allowed to file his petition as supplemental to the original petition filed in the case; that the original petition, master's report, and original decree as amended by the judgment of the supreme court be made a part of the supplemental petition, and that petitioner have judgment against U. M. Gunn for the sum of \$1,330, with interest, which he prays may be declared to be a lien upon all of the property in the hands of Hattie A. Gunn involved in the original case, and for an accounting against U. M. Gunn. Upon this petition the court passed the following order: "Ordered by the court that the plaintiff have leave to file the above petition as supplemental to the said original petition, and that process be attached to said supplemental petition, and that defendants be served with copies of said petition and process." On May 6, 1898, an amendment to the petition was allowed and filed, which alleged, in substance: The money received by Gunn from Smith was received by him as guardian, and mingled with his own funds, and was invested as set forth in the original decree. The amount now sued for was not included in the original petition by reason of the fraud perpetrated upon petitioner's ward by U. M. Gunn and Hattie A. Gunn by concealing from both petitioner and his ward that the money had been collected. Petitioner alleges that he had no means whatever of ascertaining the condition of the estate except from the returns made by U. M. Gunn and H. A. Gunn to the court of ordinary; that at the time petitioner was appointed guardian his ward was a hopeless lunatic; and that by the most diligent effort to discover the true condition of the estate he was unable to do so because defendant concealed the facts from him; and that by mere chance one of his attorneys discovered, after the final decree, that Gunn had

Hattie A. Gunn, which is referred to in the petition in the present case, prayed for an injunction and the appointment of a receiver; that petitioner might have a decree vesting the title to certain property alleged to have been converted by defendants to their own use; that he might have judgment against defendants for "whatever sum may be found to be due the said Julia upon a final accounting with them in their capacity as her trustees," and that, if title to the property converted by defendants could be vested in Julia Gunn, that petitioner might have a special lien upon such property as the property of defendants for the amount for which judgment would be rendered; that he have a decree against Hattie A. Gunn for the amount of the trust fund of his ward which she acknowledges to have received from U. M. Gunn, and for the rents, issues, and profits which she admits have come into her hands since her appointment as guardian, with interest thereon. From the returns of U. M. Gunn to the ordinary, which are contained in the record, of the original case, and are referred to in both the original and amended petition, there appears a credit to the estate of Julia Gunn of \$671.66 as the amount received from "J. W. Smith on Woolfork case." Attached to the return were receipts given to U. M. Gunn as guardian of Julia Gunn by various attorneys at law for services in the Woolfork case, referred to, and for the collection of the fl. fa. issued in that case; one of them reciting that it was for services in "representing him in the sale of the Jones county Woolfork lands." From an extract of the testimony of U. M. Gunn, which also appears in the record of the original case, it appears that the matter now in controversy was under investigation in that case. To the supplemental petition Hattie A. Gunn filed a demurrer as follows: (1) There is no equity in said petition. (2) There is no cause of action set forth in said supplemental petition, and there is no law which authorizes the filing of the same. (3) It appears from the face of the petition that the subject-matter of said suit has been adjudicated and determined between the same parties by the final judgment and decree of this court. (4) It appears upon the face of the supplemental petition that the original petition, which the petition in this case seeks to supplement, was finally disposed of by a final decree of this court before said supplemental petition was filed. The court overruled the demurrer, and Hattie A. Gunn excepted.

It is not necessary, under the view we take of the present case, to determine whether, under any circumstances, a petition in the nature of a supplemental bill will be allowed to be filed in order to reopen a decree rendered on a petition filed for the purpose of an accounting between the parties, limited in its

and Hattie A. Gunn, as is clearly seen by reference to the prayer of the same above set out, was a petition for an accounting not only as to designated items, but it contemplated a general accounting between the parties as to all matters of liability to the plaintiff growing out of the relation of the defendants as guardians of the plaintiff's ward. Neither is it necessary to determine whether a petition in the nature of a supplemental bill will lie to reopen a decree rendered on a petition filed for a general accounting, where items in a fund considered in the accounting have been left out by accident, mistake, or the fraud of the parties sought to be charged. The facts as they appear in what is called the "supplemental petition" in this case, and as they appear in the record of the original suit in the same court, which, by appropriate allegations, is made a part of the supplemental petition, and therefore, as against the pleader making such allegations, will be considered as embodied therein, do not bring the case within the rules above referred to. It is therefore unnecessary for us to classify the petition in this case, or to attempt to name it. Under the law in this state we look at the substance, and not the form; and when this is done it is apparent that the plaintiff, upon the facts alleged, is not entitled to any relief under a petition of any name or a pleading of any form.

The decree on the original petition is conclusive upon the defendants on the question of their liability to the plaintiff as to all matters dealt with in the decree, and it is equally conclusive on the plaintiff that he has no other claim against the defendants growing out of the subject-matter of the liability litigation. This solemn judgment of a court of competent jurisdiction cannot be opened by one of the parties, even for fraud, accident, or mistake, unless it be shown that the facts now relied on to charge the defendants with additional liability was not only not known to the plaintiff before the rendition of the decree, but that the same could not have been discovered by the exercise of ordinary diligence. It may be that the allegations of want of knowledge in the petition in this case are sufficient. But are the allegations as to the exercise of diligence sufficient to authorize a reopening of the decree? Byrom, the guardian, the plaintiff in the original petition, as shown by its very averments, was, as he believed, dealing with persons who not only had used, but were still using, every effort to defraud his ward. He was on notice, therefore, that they must be watched at every point. Under such circumstances, would it be diligence on his part to rest satisfied with mere statements made by these parties in regard to the administration of the estate in their hands? The returns made by U. M. Gunn as guardian were nothing more than his declarations. It is true, they were under

who would not hesitate even at perjury to complete the fraud which it was alleged he was attempting to perpetrate. Such being the case, it does not lie in the mouth of the plaintiff to say that he was misled by the returns of this alleged faithless and unscrupulous guardian. In addition to this, the fund which was alleged to have been concealed arose from the sale of land in an adjoining county to that in which the suit was brought. The name of the alleged purchaser appears on the face of the return. Vouchers for fees and legal services rendered to the guardian by various attorneys in connection with the matter referred to in this item were attached to the return. It does seem that a person dealing with another whose character was such as that of U. M. Gunn was alleged to be should not have passed by these sources of information in regard to the good faith of Gunn in reference to this transaction. This view of the case is strengthened when we consider that this very item was directly under investigation in the former proceeding. We do not think that the pleadings make such a case as would authorize the reopening of the decree, and it was therefore error to overrule the demurrer filed by the defendant Hattie A. Gunn. Judgment reversed. All the justices concurring.

**MOORE v. BROWN, BRADBURY &
CATLETT FURNITURE CO. et al.**

(Supreme Court of Georgia. March 21, 1899.)

**EXECUTION SALE—DISTRIBUTION OF PROCEEDS—
INTERVENTION—BURDEN OF PROOF—LEVY.**

1. When the movant, in a rule against a sheriff to distribute a fund arising from the sale of personal property, alleging that by virtue of a process placed in the hands of the sheriff, under which the money was raised, such movant was entitled to have the same paid to him, and the sheriff's answer contained no denial of the allegations made in the petition for the rule; and where another creditor intervened, made himself a party, alleged that there were various other creditors who claimed prior liens on the fund but that the intervenor was entitled to priority over all, prayed that the other creditors be made parties, averred that the original movant had no lien on the fund because of the invalidity of the levy of his process, traversed the fact of the levy, and waived answer and discovery from all,—such intervening creditor held the affirmative of the issues tendered by him, and there was no error in ruling that the burden was on him to show the facts alleged in his intervention.

2. In order to constitute a levy on personal property, a seizure of such property must be made by the levying officer. The seizure may be actual or constructive. In the latter case, it is sufficient if the officer in fact has the custody or control of the property, personally or by an agent.

(Syllabus by the Court.)

Error from superior court, Fulton county; H. M. Reid, Judge.

Rule by the Brown, Bradbury & Catlett Furniture Company and others against the

ment rendered he brings error. Affirmed.

King & Anderson, for plaintiff in error.
Simmons & Corrigan, King & Spalding, and
Arnold & Arnold, for defendants in error.

LITTLE, J. The questions arising in this case grew out of a rule for the distribution of money. The rule was brought by the defendants in error against the sheriff, and alleged that a certain fund was in the hands of the sheriff, which had been raised by the sale of personal goods levied on by an attachment issued at the instance of the movants, and alleging that movants had recovered a judgment against the defendant, and were entitled to have the fund paid over to them. Pending this rule, the plaintiff in error intervened, and set up the fact that he had levied a distress warrant on the goods of the defendant in attachment, which goods had been sold by order of the court, and the proceeds were in the hands of the sheriff for distribution; that the movants had no valid lien upon the goods, nor the fund in the hands of the sheriff, because of the fact that the attachment issued by movants had never been levied on the goods. He traversed the entry of levy, and alleged that certain liens of laborers had been foreclosed, and that his lien on the fund was superior to those of the laborers. He waived discovery from all of the parties, and prayed that the court would award him the fund, in preference to the movants or the laborers. The court ruled that the affirmative of the issue and the burden of proof was upon Moore, administrator. To this ruling the plaintiff in error excepted.

1. By section 5160 of the Civil Code it is provided that the burden of proof generally lies upon a party asserting or affirming a fact, and to the existence of whose case the proof of such fact is essential. There was no issue between the original movant, who is the defendant in error here, and the sheriff. The administrator of Jackson, however, intervened, set up certain facts which attacked the validity of the attachment issued by movants, prayed that certain other creditors be made parties to the rule, and asserted that his lien was superior to those of other creditors whom he asked to be made parties, and that in fact the attachment on which the movants had founded their rule had never been levied on the property, and consequently had no lien thereon, and prayed that the whole fund should be awarded to him. A rule against the sheriff for the distribution of money is in the nature of an equitable proceeding. The original movants set out in their claim the fact that the money which arose from the sale of the property of the defendant in attachment was in the hands of the sheriff, and asked the court to award it to them. The facts set forth in the intervention of the plaintiff in error made him the moving party, to have the questions raised by

ants, who sought to have the money from the sheriff, in fact had no lien upon it, and he brought into the case the other creditors having a claim against the fund, and asserted the priority of his lien over all. Under these circumstances, it would seem that the plaintiff in error was the party moving and raising the issues of law and fact between himself and all the other creditors. We think there was no error on the part of the court in ruling that the affirmative of the issues raised, and the burden of proof to support the same, was on the plaintiff in error.

2. The only other question which we consider it is necessary to decide in this case is that of the validity of the levy alleged to have been made under the attachment; and it seems to be conceded that, if what was done under the attachment amounted to a valid levy, it was made prior to the time of the levy on the same property of the distress warrant, which had issued at the instance of the plaintiff in error. So that, if the levy of the attachment was good, then the plaintiff in attachment would be entitled to priority in payment over the distress warrant; if not good and valid, then the plaintiff in the distress warrant would be entitled to priority over the attachment in the distribution of the fund. If this position is not conceded, then, from the pleadings and proof in the record, we find that the question turns upon this point. In order to ascertain whether the levy made by the attachment was valid, it will be best, perhaps, to determine what constitutes a valid levy. In both instances, the levies alleged to have been made were upon personal property, and the same property, as belonging to the defendant in attachment, who was also the defendant in the distress warrant. It may be said, in the outset, that the statutes of the different states, in many instances, declare what acts of an officer, having possession of proper process, constitute a levy on personal property. Freeman, in his work on Executions (volume 2, § 260), in treating this subject from decisions expounding the principles of the common law, says: "It is not sufficient that the officer merely makes an inventory of the property, and indorses the levy upon his writ. He must go where the property is. He must have it within his view. It must be where he can exercise control over it, and he must exercise, or assume to exercise, dominion by virtue of his writ. Generally there must be a taking of the property into the possession of the officer, and a divesting of the possession of the owner. The officer must maintain his possession and control to such extent that the property could not probably be taken from his custody without his knowing it."

There is but one of the conditions embraced in this dictum to which we will call attention, and that is that the officer must have the property within his view. The authorities for this doctrine are a number of cases which are found in note 2. One of these is the case of

levy, the store being closed. He stood at one door, and put his companion at the other. No note or memorandum of the levy was made, nor was there any evidence that the officer knew what goods were in the store, or their description or value. These are the acts which, it was alleged, constituted a levy. It was, of course, properly ruled that it was, in law, no seizure of the property. Another case cited is that of *Wood v. Vanarsdale*, 3 Rawle, 401. In that case it was held that, if the property was within the power and control of the sheriff when the levy was made, it would be good, if followed up within a reasonable time by his taking possession in such a manner as others may know that they have been taken in execution. Another case cited is that of *Brown v. Pratt*, 4 Wis. 513. There the officer attempted to levy upon a quantity of saw logs, which were in different places, in a river, for a distance of more than a mile, and some in mill ponds covered with ice. In fact, he was never in the actual possession or control of any of the logs. It was held in that case that the logs were not all in view of the officer, and that no levy was in fact made. Another case is that of *Duncan's Appeal*, 37 Pa. St. 500. It was there ruled that, to constitute a valid levy under an execution, it is essential that the property levied be in the power, or in the view, of the sheriff at the time it was made. In the opinion the court say: "We have departed from the strictness required by the English courts to constitute a levy. We do not require the sheriff in all cases to take actual and exclusive possession of personal property, but it never yet has been held that a levy can be made upon property not in the power, or, at least, in the view, of the officer." The last case which we have examined to support the text referred to is that of *Minturn v. Stryker*, 1 Edm. Sel. Cas. 356. It does not appear in that case that the officer saw the property, or had it under his control; nor did he make it known that he had levied, but gave the plaintiff to understand that he did not mean to exercise any control over it. He did not take actual possession, the goods were not brought within his view, and all he seems to have done was to notify the president of the village. These are the authorities cited by the author to establish the doctrine that, to constitute a levy of personal property, the officer must have it within his view. The adjudications referred to do not sustain the literal meaning of the text. But, from all those cited, it is sufficient if the property be in the control and custody of the officer. So much for the elements which constitute a levy of personal property under the common law.

Our statute (Civ. Code, § 5452) provides that, to authorize a sale of personal property, there must be an actual or constructive seizure. Our own court has made many adjudications on this question. To some of these we will call attention. In the case of *Corniff v. Cook*,

an attachment against a private corporation, went to a house in which personal goods of the corporation were located, for the purpose of levying on the same, made an inventory of the goods (they being at the time under his view, in his immediate presence, and constructively in his possession), informed the only servant of the corporation present that he had levied upon the property, and thereupon immediately went to the president of the corporation, who, upon being informed of what had been done, agreed with the officer that, if the goods were not removed from the house, the same should be held subject to the order and control of the officer; the levy was sufficient, though the constable did not take manual custody of the goods, nor remove them from the house. In the case of *Roebuck v. Thornton*, 19 Ga. 149, the court, in the opinion, says: "What is the essence of a levy? It is the sheriff's getting power over the property,—such power as will enable him to sell it at the proper time and place. This he gets whenever he gets the property into his own hands, or into the hands of another as his agent. There is no law saying that the defendant in *fi. fa.* shall not be this agent. That this is the essence of a levy is, it seems to me, admitted, when it is admitted, as it is in many American cases, that a levy is good if the sheriff sees the property, although he does not touch it." In the case of *Sheffield v. Key*, 14 Ga. 528, the court, in delivering the opinion, says: "We would not be understood as holding that an absolute manucaption was necessary; but there should have been some sort of custody and control which would have served to designate the extent of the intention to seize and take possession, and definitely have marked the bounds of the sheriff's qualified property in the subject of levy. And then the entry on the *fi. fa.* should have corresponded." In the case of *Jones v. Howard*, 99 Ga. 451, 27 S. E. 765, in ruling on the question as to what the officer must do so as to make a valid levy, this court said: "He must do some act for which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ. Seizure, actual or constructive, and not the mere declaration of an intent to seize, is the final test of the completion of a levy." These adjudicated cases, together with the provisions of our Code, lay down the rule to be that, in order to constitute a valid levy on personal property, the officer, having possession of a proper process, must obtain the custody and control of the goods upon which he levies; that this custody may be either actual or constructive, but without such custody there is no seizure, and without a seizure there is no levy.

Tested by these rules, we are of the opinion that the levy of the attachment was a good and sufficient seizure of the property. The presiding judge, to whom questions of fact were submitted, so found. Some of the wit-

having possession of the attachment, accompanied by the attorney for the plaintiff in attachment and another person, went to the Jackson Hotel for the purpose of levying the attachment on the furniture contained in that hotel; that on their arrival there the manager of the hotel, the person in charge of the property and furniture, was informed that the officer had come for the purpose of making a levy on the articles described in the attachment; that a list of these articles, which consisted mainly of household furniture, was read over to the manager, and he was asked if they were in the building; that the manager replied that all the articles were in the building; that there was in his sight at that time the dining-room furniture and the office furniture, all of which was described; that the hotel had three entrances, and that the office, in which he stood, and the space in front of it, were the only methods of ingress and egress to the hotel; that just in front of the office was the stairway, leading to the floors above, and an elevator; that when the officer had explained to the manager the purpose for which he had come, the manager asked if the matter could not be held up until he could see his attorney; that he was informed it could not be done unless the manager agreed to hold the property for the sheriff. After such agreement, according to these witnesses, an entry of levy was written out and signed at half past 9 o'clock. The manager left to see his attorneys. The officer and plaintiff's attorney remained. Another witness testified that he took the attachment, and read over to the manager, item by item, a list of the articles of furniture on which the attachment was to be levied, and asked if these items of furniture were in the hotel. After going through this, and ascertaining from the manager that all were there, the manager was then told that the sheriff would make his levy. The manager was also told that no objection to delay would be made, provided he would relinquish charge of all the enumerated property, and turn it over to the sheriff, and allow him to make his levy. The manager then told the sheriff, "You can take charge." The officer then remained inside of the office, stepped into the rear and front dining room, and thereupon levied on and took control of what furniture was there. He remained in the office, near the only entrance to the upper stories of the hotel, until the list was prepared, when the entry of levy was made, as annexed to the attachment papers returned to court; and the officer remained in charge until the manager returned. After these things, which constituted the levy of the attachment, had been done, a constable, having possession of the distress warrant, came to the hotel, went through its various rooms, took an inventory of the same property, and entered his levy on the distress warrant. The deputy sheriff, having possession of the attachment, accompanied the constable to the upstairs rooms of the hotel, for the pur-

ture contained in the upper rooms, on which he claimed to have made a levy. Subsequently it was agreed between all the parties that the furniture should not be removed until necessary, so as to allow the hotel to continue business with the use of such furniture.

We have not, of course, attempted to refer to all of the evidence. On some points it was conflicting. It was the province of the trial judge, to whom the facts were submitted, to judge this evidence; and he having determined the levy of the attachment to be good, and the evidence (to which we have referred above) being sufficient to sustain that finding, we think, with him, that the acts of the officer, thus detailed, constituted such a constructive seizure of the property under the process of attachment as to make a good and valid levy. There was, consequently, no error in awarding the fund to the plaintiff in attachment, that having been first levied, in preference to the plaintiff in the distress warrant. All the justices concurring, except LUMPKIN, P. J., and COBB, J., disqualified. Judgment affirmed.

BATTLE v. BRASWELL et al.

(Supreme Court of Georgia. March 20, 1899.)

APPEAL—HARMLESS ERROR—SECONDARY EVIDENCE—SERVICE OF PROCESS—DOMICILE.

1. It is not reversible error for the judge to admit testimony before the jury which only tends to prove a fact admitted to be true in the pleadings of the party objecting to the evidence, although the ground of objection may, in itself, be good in law.

2. On the trial of a suit in which it is sought to cancel a sheriff's deed to land, made in pursuance of a levy and sale under a justice's court *fi. fa.* issued on a judgment against the plaintiff, upon the ground that he was not served with a copy of the summons issued by the justice, it was not error for the court, over objection of plaintiff's counsel, to admit in evidence the docket of the justice's court showing an entry of such service by the proper officer; it appearing that the original summons was lost, and the only objection to the evidence being that the original summons, or an exemplified copy thereof was the highest proof of service.

3. In such a trial, after the plaintiff had testified he had not been served with a copy of the summons, it was competent for the defendant to prove in rebuttal, by the officer, that he made such personal service.

4. There was sufficient evidence in this case to authorize the judge to give in charge to the jury the principle embodied in section 1825 of the Civil Code, and the verdict was not without evidence to support it on all the material issues involved.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Judge.

Action by Henry Battle, for himself and as next friend of Lucy Battle, against Green H. Braswell, and Jack Hancock, sheriff. Judgment for defendants, and plaintiff brings error. Affirmed.

Hardeman & Moore, for plaintiff in error. R. D. Smith, for defendants in error.

himself, and as next friend for his minor sister, Lucy Battle, against Green H. Braswell, and Jack Hancock, sheriff, for the purpose of enjoining the latter from ousting the petitioners from a certain tract of land which Braswell had bought at sheriff's sale under a fl. fa. issued upon a judgment in a justice's court against the petitioner, Henry Battle, and for the further purpose of cancelling a deed made by the sheriff to Braswell, which was alleged to be a cloud upon petitioner's title. The main ground upon which the petition was based was that the judgment was void—First, because the defendant fl. fa. had never been served with a copy of the summons; second, because at the time of the suit he was not a resident of the county, and hence the court had no jurisdiction of the case; and, third, because the levy was excessive. It was further alleged that the title to the property was in Henry Battle and Lucy Battle, as tenants in common. On the trial, it appeared that the property did not belong to Henry Battle alone, but was held in common by him and Lucy Battle, under a conveyance made prior to the judgment. The jury returned a verdict for the defendants as to Henry Battle, but set aside the deed as to Lucy Battle's interest in the property. A decree was entered accordingly. Henry Battle moved for a new trial, and assigns error on the judgment overruling his motion.

1. One ground in the motion for a new trial is that "the court erred in admitting in evidence, over the objection of movant, the docket of the justice of the peace showing the judgment in favor of Elkin against H. B. Battle; the objection being that a transcript, properly certified by the magistrate who had lawful custody of said docket, was the best and only legal evidence of the contents of said docket." It appears from the pleadings in this case that they presented no issue of fact as to whether or not the judgment had been rendered against the plaintiff. On the contrary, the petition itself attacks the judgment as being void on account of a want of service and a want of jurisdiction in the court to render a judgment against the plaintiff, he claiming to be a nonresident of the county when the suit against him was entered. Even then, if counsel for the plaintiff in error is correct in his assertion that the highest proof of the existence of the judgment would be an exemplification of the entry on the docket, and not the original entry itself, the error was harmless.

2. The next complaint in the motion is that the court erred in admitting in evidence, over the objection of plaintiff, the justice's court docket to show service by the constable on H. B. Battle of the suit in the justice's court, "the objection being that the original return of service entered on the original summons, or a properly certified transcript of the same from the magistrate," was the best evidence.

This court has, in effect, decided that the original summons is not the highest evidence of such service, but that the entry of service on the docket, as required by law, furnishes the best proof. In the case of *Gray v. McNeal*, 12 Ga. 425, it is held: "The docket of the justice of the peace in whose court a judgment is rendered ought to furnish the evidence of the service of a summons on the defendant, as required by the statute; but the next best evidence is the production of the summons, if that can be found; but if that cannot be found, after due search and inquiry, then parol evidence of proof of service is admissible." Warner, J., in his opinion in that case (page 430), says: "Our ruling on this point is extremely liberal, and is intended to apply to justice-court papers, because of the very loose manner in which the business of those courts is frequently transacted." Counsel for the plaintiff in error relies, in his brief, on the decision in *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 740 (syl., point 2). That case involved the question as to what was the proper method of proving proceedings in a court of record. But even if the principle decided is applicable to entries made on a justice's court docket, under sections 5214 and 5215 of the Civil Code, the answer is that the objection was not made to the docket, on the ground that a certified copy of its contents was the proper proof, but on the ground that the original summons, or a certified copy thereof, was the highest evidence. In point of fact, this was not the highest source of proof, as above seen, and, besides, it was shown the original summons was lost.

3. Another ground in the motion for new trial was alleged error in allowing the constable to testify, in behalf of the defendant, that he had personally served the plaintiff, H. B. Battle, with a copy of the summons issued against him in the suit in the justice's court. This was a direct issue between the parties. It appeared that the original summons had been lost, and that the docket of the justice of the peace was introduced in evidence, showing an entry of a copy of the service thereon, as required by law. The plaintiff in this case, H. B. Battle, had denied upon the stand that he had ever been personally served. There was no traverse of the officer's return, but, apart from these facts of the want of such traverse and the loss of the original summons, etc., we think it was clearly admissible to allow this parol testimony of the officer, in rebuttal of what the plaintiff had testified to. It was the very issue which the plaintiff had presented in his petition, and one which he sought to sustain by parol testimony, and by the testimony of the constable was simply contradictory of his statement.

4. Error is further assigned in the court's giving in charge to the jury section 1825 of the Civil Code, because not applicable to the

in examination of the trial of evidence, we think there was sufficient testimony to justify the court in giving in charge the principles of law embodied in said section. The above deals with all the errors of law complained of in the motion for new trial; the other grounds being the general ones, that the verdict was contrary to law, evidence, etc. We think the evidence was sufficient to sustain the verdict. Judgment affirmed. All the justices concurring.

SANDERS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. March 20, 1899.)

TRIAL—INSTRUCTIONS—INJURIES TO PASSENGER— DILIGENCE OF CARRIER—CONTRIBUTORY NEGLIGENCE.

1. A failure of the trial judge to instruct the jury on an issue not raised by the pleadings in the case is not error.

2. In an action to recover damages for personal injuries sustained by a passenger in alighting from a moving car, it was not error in the presiding judge to read to the jury section 2321 of the Civil Code, which provides that a railroad company shall be liable for damages done to persons, etc., by the running of locomotives or cars, unless the company makes it appear that their agents have exercised all ordinary and reasonable care; the presumption in all cases being against the company, when in immediate connection therewith, the judge instructs the jury that the duty of carriers to passengers is that of extraordinary diligence, and that the burden is on the carrier to show such diligence, when the injury has been made to appear.

3. In such a case it was not error for the court to charge that if, at the time, it was obviously dangerous for the passenger to alight, on account of the rapid motion of the train, without the direction of the conductor, or under the direction of the conductor, if the circumstances from such rapid motion would make it likely, or seemed likely to him, as an ordinarily prudent man, that it would be dangerous to do so, the plaintiff would not be entitled to recover.

4. Where the evidence showed, in the case above indicated, that the plaintiff lived near the place where it was alleged he received the injury in attempting to alight from the train, and was more or less familiar with the locality, it was not error to charge the jury to consider the question as to whether the plaintiff was familiar with this particular place, and whether or not his familiarity with the place was such as to make it dangerous for him to alight under the circumstances which he claimed surrounded him at the time. Such a charge was proper, and the knowledge which the plaintiff had of the locality should have been considered by the jury in determining the question of whether he himself was negligent.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Judge.

Action by M. M. Sanders against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Marion W. Harris, Chas. A. Glawson, and Harris, Thomas & Glawson, for plaintiff in error. Hill, Harris & Birch, for defendant in error.

with said grounds, we have examined the evidence in the record and the charge of the court, and our conclusion is that under the facts of this case the error complained of in the 8th, 9th, 10th, 12th, 13th, 14th, 15th, 18th, 19th, 20th, 21st, 23d, 25th, 26th, 27th, and 28th grounds of the motion need no especial elaboration. These contain principles of law given in charge to the jury, and some of them are clearly laid down in the Code, as the statute law of this state; others are familiar principles which this and other courts of last resort have ruled to be correct, and applicable to cases involving the same issues as were tried in the case at bar, and we find no legal objection to the principles of law covered in the charges of which complaint is made by these grounds of the motion. The sixteenth ground of the motion, as it appears in the record, is, we presume from copying, so confused as to be unintelligible, and we are not, therefore, able to pass upon it. The record does not contain any twenty-fourth ground, and we cannot, of course, say what was the complaint made therein. The twenty-ninth ground is an exception to the charge as a whole, and the court committed no error in overruling the motion on that ground. The complaints made in the thirtieth and thirty-first grounds of the motion necessarily involve questions which are referred to in other grounds of the motion. The first four grounds of the motion are based on allegations that the verdict is contrary to law, decidedly and strongly against the weight of evidence, and contrary to the charge of the court. We do not think there is merit in any of said grounds. It was the province of the jury to declare what the facts were, and, in our judgment, the jury was fully authorized, under the evidence, to arrive at the verdict which was rendered; and we have been unable to ascertain from the record any reason why that verdict is contrary to the law governing the case. Nor is the verdict contrary to the charge of the court. None of the charges complained of were, in our judgment, calculated to mislead the jury. On the contrary, the charge, as a whole, seems to be a fair and legal presentation of the law of the case.

1. Complaint is made because the court erred in giving to the jury the following charge: "The relation of carrier and passenger continues, where one is a passenger upon the train of a railroad corporation, until the passenger has reached his destination, and has had a reasonable opportunity to alight safely from the cars." The specific assignment of error to this portion of the charge is that the relation of passenger and carrier continued until the passenger had safely alighted from the train, and because this charge, in effect, instructed the jury that the plaintiff bore the relation of passenger to the defendant only to the time he alighted from the cars, and because it was the duty of the rail-

salary, but to leave him at a place where he would be safe after being landed. We can conceive of a case or circumstances which would make this charge error because of the principles contended for by the plaintiff in error. In order, however, to ascertain whether such charge was error in the case which was tried, the circumstances which are relied on to show negligence on the part of the carrier must necessarily be considered. It is not contested that the point at which the plaintiff in error desired to leave the train, and at which he did leave the train, was not either a regular or flag station of the railroad. It was at a point on the railroad near a drawbridge over the Ocmulgee river, at which, under the regulations of the company, all trains passing over the river were required to stop, as a matter of precaution. No arrangements had been made by the company for passengers to board or leave the cars at that point, although, under the evidence, persons frequently did so when the cars came to a stop. The railroad only used a right of way there, such as it had for the safe construction of the road and the passage of its trains. The petition filed by the plaintiff did not base his right to recover on the negligence of the company in failing to afford him a safe landing place from the cars, and a safe means of egress, at the point where he was put off on its right of way, nor negligence because they did not leave him at a place where he would be safe after he landed; but the allegations set out in the petition are "that, failing to obey the rules of the company, the persons in charge of the train did not bring it to a full stop at this particular point, but merely reduced the speed of the train at its immediate approach to the bridge, and while the train was moving at such reduced speed the conductor directed the petitioner to jump from the train, which he did under such direction, and in so jumping, while he exercised all proper care and caution, he was injured"; and the negligence averred is the failure to bring the train to a full stop, so that he could alight in safety. It must be apparent, therefore, that under the petition the plaintiff was not seeking to recover damages for his injury on the ground that the company was negligent in not affording him a safe landing place, nor a means of egress from the point on the right of way where he was put off, and the charge excepted to was a proper one under this contention and the evidence as to his place of exit from the train. The elementary rule is that the admission of evidence will be confined to the issue being tried, and it is not necessary to cite authority to establish the principle that instructions of law by the trial judge to the jury should be confined to such issue. In the case of *Hill v. Callahan*, 82 Ga. 109, 8 S. E. 730, our present chief justice, in delivering the opinion of the court, aptly said: "The pleadings in the case are the contentions of the parties. They make the issues

By them the parties must stand or fall. If the court submits only these issues to the jury in his charge, it is not error, and the parties have no right to complain." The supreme court of North Carolina in the case of *Moss v. Railroad Co.*, reported in 29 S. E. 410, which was an action to recover for personal injuries by a passenger against the railroad company, the allegation being that the company was negligent in failing to stop its train at the station where she was to change cars, to allow her to get off, and in suddenly increasing the speed of the train while she was getting off, ruled that the plaintiff could not recover for the failure to show her a safe way to go from one train to another, nor from any train to the station, nor from the station to any train. See, also, *Beach*, Contrib. Neg. (3d Ed.) § 161. So that the failure on the part of the judge to charge the duty of the defendant company to afford the passenger a safe landing and a means of egress from his place of landing was not error.

2. Another ground of the motion is that the court erred in charging the provisions of law contained in section 2321 of the Civil Code, declaring that a railroad company is liable for damage done to persons by the running of its locomotives or cars, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, and that the presumption in all cases is against the company. This was objected to as inapplicable, and because it laid down the rule that ordinary care and diligence was the duty of the defendant to the plaintiff. We do not think it was error for the court to have given in charge this section of the Code. It laid down the rule as to where the burden of proof is to show negligence when the fact of injury had been established by the operation of the locomotives or cars of the railroad company. This court, in the case of *Railroad Co. v. Abbott*, 74 Ga. 851, ruled that the giving of this section in charge was proper on the trial of a case brought to recover damages for personal injuries occasioned by the negligence of the railroad company in the operation of one of its engines, and while the person injured, having alighted from the train on which he was a passenger, was making his way to the baggage car after his trunk. When reference is made to the full charge, which is a part of the record, it cannot justly be contended that charging this section had the effect of instructing the jury as to the care and diligence the carrier must exercise towards a passenger, for, by reference to the charge, it is found that immediately after this section of the Code was read to the jury the court further instructed the jury as follows: "A carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agents to protect all lives and persons of its passengers, but he is not liable for injuries to persons after having used such diligence." And further on in his

you, the rule of diligence relatively to a passenger is that of extraordinary diligence. The extraordinary diligence due by a railroad company to passengers is that extreme care and caution which very prudent and thoughtful persons exercise under the circumstances." And again, in another part of his charge, he instructs the jury as follows: "The law puts upon them a duty. * * * The duty is that they shall carry their passengers safely, and deliver them safely at their destination; and the burden is that when a passenger shows that he was injured, either in being carried or in alighting from the train, the burden is upon the defendant company, and it is incumbent upon them, in order to relieve themselves from liability, to show that they exercised extraordinary diligence relatively to that passenger in his carrying and seeing that he safely alighted from the train."

3. A further ground of the motion for new trial alleges that the court erred in charging the jury that if the plaintiff alighted from a moving train obviously dangerous for him to alight from on account of the rapid speed at which the train was running, and he alighted with or without the direction of the conductor, if the circumstances of the rapid motion of the train made it likely, or seemed likely to him, as an ordinarily prudent man, that it would be dangerous to do so, he could not recover. The correctness of the principle embodied in this charge is found in section 3830 of our Civil Code, which declares that if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. This court has repeatedly ruled that the principle charged is a correct one. See *Blodgett v. Bartlett*, 50 Ga. 353; *Covington v. Railroad Co.*, 81 Ga. 273, 6 S. E. 593; *Barnett v. Railway Co.*, 87 Ga. 766, 13 S. E. 904; and *Railroad Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534. The charge is sustained, where it was alleged that directions were expressly given by the conductor for the passenger to jump from the train, by the case of *Railway Co. v. Hughes*, 92 Ga. 388, 17 S. E. 949; and it must be held that the charge was legal and correct. But it was complained that it was inapplicable, because there was no evidence on which to base such charge. We think differently; at least, under one of the theories of the defendant, based on the evidence introduced by it, such inferences might and could be properly drawn by the jury, if they chose to disbelieve the evidence of the plaintiff. Nor do we think such charge was calculated to cause the jury to believe that a direction given by the conductor to get off was immaterial. The charge strictly confined the act of the plaintiff to have been done under circumstances, from the rapid motion of the train, that would make an ordinarily prudent man believe it to be dangerous.

4. The charges complained of in the other grounds of the motion for new trial to which we have not before referred are based on the

as to what constituted negligence, the jury must regard all the facts and circumstances of the case, and, among them, the question as to whether or not the plaintiff was familiar with the point upon the road at which he sought to alight, and his familiarity with the right of way at that point; and whether the injury was the result of defendant's negligence, or it resulted from the want of care and diligence on the part of the plaintiff. Because one is a passenger, and fully entitled to protection as such, affords no reason why he should, in alighting from a train, not only bring to bear his judgment as a reasonable man as to whether it would be safe for him to alight or not at a particular place, but, if he had a knowledge of the locality, and personally knew as to the conformation of the ground at that locality, or of any impediments or obstacles to his safely alighting there, it was his duty, with a due regard to his own safety, of which he is not relieved under any circumstances, to have acted upon such knowledge as he had; and if he had knowledge that any such defects or impediments existed, so as to make his alighting dangerous, it was negligence in him to attempt to alight at such place; and whether he had such knowledge or not, and, if he did, the extent of it, were questions for the jury; and the substance of the direction of the court was that they should consider what knowledge he had of the particular place at which he alighted. It was shown by the evidence that he lived near the place, and was to a greater or less extent familiar with it. This familiarity, if it existed, would enter largely in determining the question whether he was himself negligent in doing the act by which he was injured, and his knowledge or want of knowledge of the place was a material circumstance, to be considered by the jury. There was no error in overruling the motion for new trial. Judgment affirmed. All the justices concurring.

PHILLIPS v. WAIT.

(Supreme Court of Georgia. March 4, 1899.)

JUDGMENT — REVIVAL — RETURN OF SERVICE — DIRECTING VERDICT.

1. Where a copy of a petition to revive a dormant judgment, but no copy of the entire scire facias issued thereon, is served upon the defendant, and he subsequently ascertains that an order has been passed by the court reviving the judgment, his knowledge of the existence of the order of revival is not inconsistent with ignorance on his part of an entry by the proper officer of service of the scire facias.

2. The evidence introduced by the movant being sufficient to have sustained a verdict in favor of the traverse, the court erred in directing the jury to find against it, and in favor of the officer's return of service.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by W. F. Wait against W. R. Phillips, Jr. Judgment for plaintiff. From an

vivor of the judgment, defendant brings error. Reversed.

Simmons & Corrigan, for plaintiff in error.
Shepard Bryan, for defendant in error.

FISH, J. This was a motion, in the city court of Atlanta, to set aside an order reviving a judgment rendered in that court, which had become dormant. One ground of the motion was the want of service of scire facias. The sheriff's entry of service was traversed, and he was made a party to the proceeding. It appeared from the evidence introduced by the movant, who was the defendant in the judgment, that he had been served with a copy of a petition to revive the judgment, but had not been served with a copy of the scire facias. The only evidence to the contrary was the entry of service by the officer. The movant testified that he did not know of the entry of service made by the sheriff upon the petition to revive the judgment until during the November term, 1897, of the city court of Atlanta, and that he, at the next term of that court thereafter, entered a traverse of the sheriff's return, and moved to have the order reviving the judgment set aside. This evidence was uncontradicted. It appeared that, after the order reviving the judgment was granted, the movant appeared in a justice's court, and moved to have a bond strengthened which had been given by the plaintiff in a garnishment proceeding based upon the judgment. It is contended by counsel for the defendant in error that the movant also filed a bond to dissolve the garnishment, but this does not appear from the record in the case. There was nothing upon the face of either the garnishment affidavit or the original garnishment bond to show that the judgment had been revived; the judgment mentioned in each being simply designated as "a judgment obtained at the September term, 1887, of the city court of Atlanta." The additional bond given to strengthen the original garnishment bond states that the process of garnishment was sued out "upon judgment obtained at the Sept. term, 1887, and revived at Jan'y term, 1897." The movant testified that he did not see this new bond "until during the November term, 1897, of the city court of Atlanta." Counsel for defendant in error contends that: "The traverse was not filed at the first term after notice of the sheriff's entry, because (1) Phillips in August, 1897, made a motion to have bond for garnishment strengthened; and (2) he appeared in court before the September term, and filed a bond to dissolve the garnishment. These facts show that he knew an effort was being made to collect the judgment rendered on the revival of the old judgment." In the view which we take of the case, it does not matter when Phillips (the movant in the present motion) first obtained knowledge that the court had passed an order to revive the judgment. A judgment rendered in a case where there has been no service

nullity; and as a judgment that is void may be attacked in any court, and by anybody (Civ. Code, § 5373), the time when the movant first ascertained the existence of the order reviving the judgment is immaterial. The material question is, when did the return of service entered upon the petition by the sheriff first come to his knowledge? For this return, unless traversed in due time, and proved to be false, would become conclusive, and, when conclusive, would defeat any attack upon the order reviving the judgment, upon the ground that it was void for the want of service. Knowledge of the existence of the order to revive the judgment is not inconsistent with ignorance of the sheriff's return of service of the scire facias. *Parker v. Rosenheim*, 97 Ga. 769, 25 S. E. 763. In *Odum v. Causey*, 59 Ga. 607, it was held that "notice of the execution is not notice of the return of service, and the defendant may traverse the truth of that return at the first term after he ascertains it has been made, though he may have known of the execution before." In the opinion in that case, Jackson, J., said: "It does not follow that, when the defendant sees the execution, he sees the entry on the declaration. On the contrary, he cannot then see it on that paper, and nobody shows that he was told that such an entry as this was on the writ; nor was he then so far bound to go to the record and look at the writ as to estop him from his traverse by presuming that he had notice of the entry. He was in time to traverse it."

2. The evidence introduced by the movant being sufficient to have sustained a verdict in favor of the traverse, the court erred in directing the jury to find against it, and in favor of the officer's return. Judgment reversed. All the justices concurring.

COMPTON v. STATE.

(Supreme Court of Georgia. March 14, 1899.)

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES.

It was error to deny a motion to continue a criminal case, the ground of the motion being the absence of a witness, when it appeared that the showing was in all respects complete, that the facts expected to be proved by this witness bore directly upon the controlling issue in the case, and tended strongly to disprove the charge against the accused, and also that there was no disinterested witness, other than the one absent, by whom the same facts could have been established.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Cap Compton was convicted of crime, and brings error. Reversed.

John V. Edge and A. L. Bartlett, for plaintiff in error. W. T. Roberts, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

CRIMINAL LAW—WEIGHT OF EVIDENCE.

1. The rule relating to the distinction between positive and negative evidence does not apply, and should not be given in charge to a jury, when there are two witnesses, having equal facilities for seeing or hearing the thing about which they testify, and directly contradicting each other; one of them testifying that it occurred, and the other that it did not. Civ. Code, § 5165, and cases there cited. See, also, *Killian v. Railroad Co.*, 25 S. E. 384, 97 Ga. 728; *Humphries v. State*, 28 S. E. 25, 100 Ga. 280.

2. The charge upon this rule, to which exception is taken in the present case, was unwarranted.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

H. T. Skinner was convicted of crime, and brings error. Reversed.

John V. Edge, J. S. James, and W. A. James, for plaintiff in error. W. T. Roberts, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

CARR v. STATE.

(Supreme Court of Georgia. March 15, 1899.)

CRIMINAL LAW—NEW TRIAL.

When material evidence, not merely cumulative or impeaching in its character, but relating to new and important facts, is discovered after a trial, and it appears that the failure to discover it before trial was not due to a want of diligence, and when the nature of the newly-discovered evidence is such that it might, on another hearing, produce a different verdict, a motion for a new trial, based on the ground of such newly-discovered evidence, should be granted.

(Syllabus by the Court.)

Error from superior court, Laurens county; J. S. Candler, Judge.

William Carr was convicted of murder, and brings error. Reversed.

Howard & Armistead and Jas. K. Hines, for plaintiff in error. H. G. Lewis, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LITTLE, J. We find it unnecessary to consider at length any of the grounds of the motion for new trial, except those based on newly-discovered evidence. No one was present at the time of the homicide except the deceased and the accused. The state insisted that the circumstances of the killing, with the previous conduct of the accused to the deceased, and his threats, coupled with the nature of the wound, the explanation given by the accused when the homicide was ascertained, and other circumstances, authorized the jury to find the defendant guilty. The accused, on his part, contended that the homicide was the result of accident, and detailed at length the manner in which the wound was inflicted.

to support it, nor that it was contrary to law. Nor do we think that the court erred in the admission of the evidence complained of, because of the fact that there were no witnesses to the homicide, and the manner in which it was done depended entirely upon circumstances. All facts which went to the nature of the wound, where the ball entered the body, where it made its exit, the nature and condition of the weapon used, were all circumstances which so intimately related to the killing that they should be carefully considered in determining the truth or falsity of the account given by the accused about the real manner in which the wound was received by the deceased. The wound was inflicted with a Winchester rifle, and it was claimed by the accused that at the time the gun fired he was sitting about a foot or a foot and a half from a tree; that the woman killed was lying on the ground on her right side, with her elbow resting on the ground, and her head on her hand; that he had the rifle across his lap, and did not know that it was even pointing towards her; that his left side was to her face; that the catch of the guard did not hold it very tight, and he was working the guard with his finger when the gun fired. On the trial one witness testified, in rebuttal of this theory, that in reversing the lever of a Winchester rifle the guard would have to be moved six or eight inches, and that before the lever is moved, and it is put in that position, it is necessary that the gun should be cocked. Another witness testified on this subject that he was acquainted with the Winchester rifle, and knew how that weapon is shot, loaded, and reloaded; that it was not possible to fire a Winchester rifle by moving the guard; that there is a safety plug that drops behind the trigger, and when you push the guard back in position it moves the plug; when you throw the guard forward,—as soon as you start it forward,—the plug drops down behind the trigger, and prevents the trigger from moving; that, when you press the guard down, a little mechanism that moves the cartridge would keep it from falling out of place; that all Winchester rifles are made with that plug; that a Winchester rifle was a patent gun, and that the cartridge would not get in position and fire until you got the guard back. It will be noted that the defendant claimed that the gun, for some unaccountable reason, fired at a time when he was not expecting it, and when he was only working the guard. The object of the evidence introduced evidently was to contradict the account which the defendant gave of the manner in which the gun fired, and to show that a Winchester rifle could not be fired in the manner in which the defendant claimed that this gun was discharged. This evidence must have had a very important bearing on the case. The newly-discovered evidence, as set out in the affidavit of Robert Shoemaker, is to the effect that he

was the owner of the gun with which the deceased was killed; that he had loaned this gun to the accused prior to the homicide; that it was defective in some way in the lock, and, before the occasion of the homicide, the gun, while being handled, had been discharged without any apparent cause; at other times the gun was used for a considerable time without such an accident. It was also, at the trial, an important fact to be ascertained as to where the ball from the rifle entered the head of the deceased. Under the account given by the accused when he reported the homicide, necessarily the ball must have entered the front part of her head. At the trial, a witness, who was a physician, testified as follows on that subject: "I examined the wound. There was no powder burn about the face. The ball passed between two of her fingers a little to the right of the left eye, and came out about an inch and a half lower than where it went in. I examined the wound on the other side. From what I know of gunshot wounds, I would say the ball went in from behind. It generally makes a larger hole at the exit than where it goes in. I am a practicing physician. If I had been called there to make a decision as to which side of that head that ball entered, I would have said it went in at the back, and came out in front." This, and other similar evidence tending to prove the same thing, must also have been very material in the case, because, if the ball entered the back of the head, and came out in front, necessarily the account which the accused gave of the position the woman was in, and the manner in which the wound was inflicted, was untrue, and tended to show that it was otherwise inflicted, and that the shot was fired from her rear. The newly-discovered evidence set out in the affidavits of W. W. Bailey, W. J. Ferdham, T. D. Bailey, I. B. Hiltson, A. J. Weaver, and Enoch M. Howard disputes this theory of the state. The last-named five affiants say that they served as jurors on the inquest held over the body of the deceased the day after the homicide; that they did not call a physician to make an examination of the wound on the body of the deceased, but they themselves carefully examined such wound, both in the front and back of the head; that they found what appeared plainly a large hole in the front of the skull, and, after shaving the hair from the back of her head, found that the back of the head was shattered almost to pieces, with pieces of bones and brain in the hair, which convinced these jurors that the ball entered the front of the head. Here, then, was testimony directly negativing the theory of the state as to where the ball entered the head, and tending to show, to some extent at least, that the wound might have been inflicted while the deceased was in the position which the defendant described when he called for assistance. These affiants further say that they never communicated these facts to the defendant, nor to his attorneys, before or at

the time of the trial. Accompanying the affidavits of the witnesses by whom this newly-discovered evidence is expected to be proven are the affidavits of accused that he did not know of the evidence of either of these witnesses, nor could the same have been procured by the exercise of due diligence. Also affidavits of the same tenor from his counsel.

It was, of course, possible, with the active diligence which the defendant and his counsel should use in preparing a case of this nature for trial, to have obtained a description of the weapon with which the wound was inflicted from the owner; but, without anything to excite their inquiries in this direction, we are not prepared to say that this information was not obtained because of the want of due diligence. As to the personal examination of the wound made by the five witnesses who served on the coroner's jury, we cannot see how the failure to procure their testimony resulted from any want of diligence. They were not witnesses whose testimony would appear in the report of the evidence made by the coroner, but jurors charged with the duty of ascertaining the cause of death, and who, in the discharge of their duties, made a careful personal examination, the result of which was not communicated to the accused or his counsel before nor at the trial. We therefore think that this alleged newly-discovered evidence should not be disregarded on the ground that due diligence was not shown in procuring it, nor do we think that it is merely cumulative in its character. So far as appears in the record, there was no evidence that the rifle was out of condition, nor any relating to this condition. It is true that during the examination of one or more of the witnesses who testified as to the construction of a Winchester rifle, and the only manner in which it could be fired, questions were asked in relation to whether their testimony would apply to this character of arm if the lock or working parts should be rusty, etc.; but nothing which we have observed, as to the condition of the working parts of this rifle, which would or would not cause it, by other means than those testified to, to be discharged. Certainly, therefore, some of this evidence was not cumulative at all, but new and original, as well as very material. The rule in relation to the grant of new trials for newly-discovered evidence is that it must be material, not merely cumulative, in its character, but relating to new and material facts, shall be discovered by the applicant after the rendition of the verdict, and brought to the notice of the court within a proper time. When all this appears, it is not absolutely required that a new trial shall be granted. The provision of law is that, when these requisites appear, a new trial may be granted. Pen. Code, § 1061. In the case of *Thompson v. State*, 60 Ga. 619, this court ruled that the newly-discovered evidence, in view of the evidence had on a former trial, which might produce a different

S. E. 287, this court ordered a new trial on the ground that the ends of justice would be promoted by allowing the defendant an opportunity to avail himself of the newly-discovered evidence. And so we think here. The truth of the matter must necessarily be ascertained by the jury, either through the statement of the accused, or from the circumstances which convincingly show that statement to be untrue. It is an important case to the defendant, and one in which he is entitled to have the benefit of all accessible legal evidence, and it may be that, if this evidence had been before the jury, a different result would have been reached; at least, the jury having this evidence before them, might have drawn more or less corroboration of the account given by the defendant immediately after the homicide, as well as his statement made at the trial. We do not go to the extent of saying that this evidence should or would have controlled the verdict. The value of it was for the jury. With it before them, they must still decide the truth of the issue. What we do say is that, the evidence appearing to be material, and not merely cumulative, having been shown to be newly discovered, and without want of diligence in its discovery, a new trial should have been granted, in order to allow the jury to pass on it in connection with the other evidence in the case, and to say, after due consideration of all the facts attendant, whether the defendant is or is not guilty. In our opinion, the court erred in overruling the motion for new trial on the ground of newly-discovered evidence, and the judgment is reversed. All the justices concurring.

GREEN v. GRANT.

(Supreme Court of Georgia. March 16, 1899.)

DESCENT AND DISTRIBUTION—ADMINISTRATOR—ACTION TO RECOVER LAND—RES JUDICATA—SERVICE OF PROCESS.

1. A woman, who married one of two brothers, and survived them both, she being of no blood kin to either, and her husband dying first, is in no event an heir at law of the other.

2. As against one not an heir, an administrator may maintain an action for the recovery of land belonging to the estate of his intestate, without showing a necessity to administer the land for the purpose of paying debts. Civ. Code, § 3357.

3. A judgment of a court of competent jurisdiction is binding and conclusive upon all parties properly before the court when it was rendered; and a defendant who, by a plea or answer in a pending case, seeks to avoid an existing judgment on the ground that he was not duly served, must, when there is, as to him, an entry of service purporting to have been made by a sheriff, traverse the return, and make the officer a party to the proceeding.

4. This case, though somewhat complicated, is, upon the facts disclosed by the record, controlled by the familiar rules above laid down. The court did not err in any of the rulings ex-

Error from superior court, Dekalb county; A. W. Fite, Judge.

Action by Anna L. Ector against E. L. Grant. From the judgment, Green brings error. Pending hearing, plaintiff died, and J. H. Green, administrator, was substituted. Affirmed.

John A. Wimpy, for plaintiff in error. T. J. Ripley and Rosser & Carter, for defendant in error.

PER CURIAM. Judgment affirmed.

GAY et al. v. GAY.

(Supreme Court of Georgia. March 17, 1899.)

APPEAL—REVIEW—DECISION—DEED—WILL.

1. It appearing that the question made in the cross bill of exceptions is controlling upon the case as a whole, it has been first considered; and, inasmuch as the judgment therein is reversed, there is no occasion for determining the errors alleged in the main bill of exceptions. *Cheshire v. Williams*, 29 S. E. 191. 101 Ga. 814.

2. Upon the line of construction indicated by this court in *White v. Hopkins*, 4 S. E. 863, 80 Ga. 154, which has since been followed in *Goff v. Davenport*, 23 S. E. 395, 96 Ga. 423, and *Guthrie v. Guthrie*, 31 S. E. 40, the instrument under consideration in the present case was a deed, and not a will.

(Syllabus by the Court.)

Error from superior court, Emanuel county; R. L. Gamble, Judge.

Action by J. W. Gay, administrator, and others, against C. M. Gay. From the judgment both parties bring error. Reversed on cross bill, and main bill of exceptions dismissed.

P. W. Williams and Williams & Williams, for plaintiffs in error. Saffold & Mitchell, for defendant in error.

PER CURIAM. Judgment reversed on cross bill of exceptions; main bill of exceptions dismissed.

HOLLIS et al. v. LAWTON et al.

LAWTON et al. v. HOLLIS et al.

(Supreme Court of Georgia. March 18, 1899.)

TRUST DEED—CONSTRUCTION—BENEFICIARIES—RIGHT OF ACTION.

1. A conveyance by deed of land to one as trustee for "his wife and the children, issue of their marriage," included as beneficiaries of the trust only the wife and such of her children of the marriage with the trustee as were in life at the time of the execution and delivery of the deed. When the youngest of such beneficiaries reached the age of majority, the trust became executed, and the legal title to the property vested in them.

2. It follows from the above that a suit could not be maintained by the wife and all the children of the marriage, including several children who were born after the execution of the trust

lish the trust in the property; to remove the trustee on account of mismanagement, and to appoint another trustee in his place to take charge of the property in the interest of the plaintiffs as the cestui que trustent.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by Mariah A. Hollis and others against Carrie W. Lawton and Jerry Hollis, Sr. From the judgment both parties bring error. Judgment on cross bill reversed, and main bill dismissed.

Preston & Ayer, R. C. Jordan, and Hall & Hardeman, for plaintiffs in error. Guerry & Hall, and Hardeman, Davis & Turner, for defendants in error.

LEWIS, J. At the April term, 1898, of Bibb superior court, there was tried the case of Mariah A. Hollis and her children, five of whom were minors, suing by their next friend, against Carrie W. Lawton and Jerry Hollis, Sr., alleged to be the trustee of the plaintiffs. It appeared from the petition that on the 29th day of December, 1875, Leonard Y. Gibbs conveyed by deed to "Jerry Hollis, trustee of his wife, Mariah A. Hollis, and the children issue of their marriage," a certain tract of land. This land, including some smaller tracts, which it seems had been exchanged for certain small portions of the original tract, was conveyed in a deed from Jerry Hollis, as trustee for his wife and children, to R. F. Lawton, on April 11, 1887, in consideration of the sum of \$9,500. R. F. Lawton died, and on March 12, 1892, his will was admitted to probate, in which he bequeathed and devised to his wife, Carrie W. Lawton, all of his property. Under that will she passed into possession of the premises in dispute as sole devisee of her husband.

It was alleged in the petition that the sale by Hollis, trustee, to Lawton, was made for the purpose of paying the individual debt due by the trustee to Lawton, for which the estate was in no wise liable, and also for the purpose of paying other individual indebtedness of Jerry Hollis; that Lawton knew of such purpose, applied a large portion of the money to his individual debt, and colluded with Hollis in the misappropriation of a portion of the other proceeds of the sale in the payment of Hollis' individual debts. It appears, however, that a part of the proceeds of the sale, to wit, about \$2,500, was invested in other lands for the benefit of the wife and children, and the plaintiffs offered to do equity as to that amount by allowing it as a charge on the premises in dispute. The purposes of the petition, as amended, were to have the sale of Hollis, trustee, to Lawton set aside as fraudulent; to recover of Carrie W. Lawton the trust property conveyed by said sale; to re-establish the trust thereon; to remove Jerry Hollis, trustee, from his office for mismanagement and waste of the

of and manage the estate for the benefit of the children. It further appeared that all the children who were in life at the time of the conveyance from Gibbs to Jerry Hollis, trustee, were of age, or had passed the age of majority, when Hollis, trustee, conveyed the property to Lawton, on April 11, 1887. The petition was brought against the trustee, Jerry Hollis, and Carrie W. Lawton, sole devisee under the will of her husband. To the petition and the amendments thereto the defendants filed a demurrer upon several grounds; among others, on the ground that the five minors who were made parties plaintiff were not proper parties in the case, because the deed set out as an exhibit to the petition, by virtue of which they claim an interest in the land in dispute, conveyed to them no title to or interest in the property. There was also a special ground of demurrer to so much of the prayer in the petition as prays for some other person to be appointed in the place and stead of Jerry Hollis, on the ground that said trust is an executed trust, and no trustee is needed in the place of the said Jerry Hollis. The demurrer was overruled on all the grounds, to which judgment defendants filed exceptions *pendente lite*. After the plaintiffs had closed their testimony, the court, upon motion of defendants' counsel, awarded a nonsuit, to which judgment, and various rulings of the court in the progress of the trial, plaintiffs assigned error in their bill of exceptions. Defendants likewise assigned error in their cross bill of exceptions on the judgment overruling their demurrer, to which judgment exceptions *pendente lite* were filed.

The vital question that meets us at the threshold of this case arises in the cross bill, and is whether or not the words of the deed from Gibbs to Hollis, trustee, executed in 1873, included only such issue of the marriage between himself and his wife as were in life at the time the conveyance was made, or whether it also included children that might be born to them thereafter. We therefore deal first with this question. See *Cheshire v. Williams*, 101 Ga. 814, 29 S. E. 191; *Gay v. Gay* (this term) 32 S. E. 846. If it included only the children then in life, it is conceded that the trust was executed prior to the conveyance made by Hollis, trustee, to Lawton, that the title had before then vested in the beneficiaries, and that, therefore, this action could not be maintained. On the other hand, if the original trust deed, by its terms, included not only the living, but after-born, children, the trust is still of an executory nature, five of these children still being minors, and the legal title to whatever trust estate remains is in the trustee. After a consideration of several cases decided by this court bearing upon this subject, we have reached the conclusion that the words of the trust deed of 1873 do not include any children then not in esse. In the case of *Loyless v. Blackshear*, 43 Ga. 327, it was decided that, under a deed conveying land to one in trust for

common. In *Ginspie v. Schuman*, 62 Ga. 252, 253, it was held that a devise to a woman and her children, if any living, means to her and such children as may be living at the death of the testator. If none be living, she takes a fee-simple estate, and the birth of children subsequently to the death of the testator cannot affect the estate conveyed. In the case of *Estill v. Beers*, 82 Ga. 608, 9 S. E. 596, it appears there was a conveyance in trust for the benefit of a certain person and her three daughters (naming them), and it was provided that the portions devised to the sisters were to be settled severally and separately upon each of them, but for the sole use, benefit, and advantage of each of these sisters and their child or children. One of the sisters had a child at the time of the conveyance, and the others none. It was decided by this court that the deed passed an estate in common to this daughter and her child, and the sole estate in fee to each of the other daughters. In the case of *Baird v. Brookin*, 86 Ga. 709, 12 S. E. 981, it was held that under a deed to A. as trustee for B. and her children, B. having at the time of its execution no children, the children of B. born subsequently to the execution of the deed took no interest thereunder. See, also, *Tharp v. Yarbrough*, 79 Ga. 382, 4 S. E. 915, where it is decided that a deed from A. to the heirs of B. passed the title to the children then in life, and no title to children after-born. The principle upon which these decisions are based is that, when property is conveyed to one and his child or children, without naming the children, and without giving any other designation as to what particular children are contemplated, it necessarily refers only to such as are in life at the time the instrument of conveyance goes into effect. So rigidly has this rule been adhered to that in the case last cited, the words of the conveyance being "to B. and her children," after-born children took no interest in the property, although B. had no children at the time of the execution of the deed. The argument might have been, and doubtless was, urged with force in that case that the grantor must necessarily have contemplated and intended to include in the conveyance children subsequently born, for the simple reason that any other construction would have made the word "children" meaningless at the time it was used; but so rigidly was the rule enforced that this court adhered to the letter of the deed, and decided that B. took an absolute fee-simple estate in the property. The rule, then, governing the construction of such words in a deed will is that the intention of the maker of the instrument will be construed to refer only to such persons as are in life, unless there are some words or expressions in the instrument indicating a contrary intention, and showing that the maker also had in mind a certain person, or class of persons, that might thereafter be born.

Upon a careful examination of the decisions

peculiar facts in each case that none are in point. In the case of *Vinson v. Vinson*, 33 Ga. 454, it appeared that the testator devised certain property "to the heirs in law" of one of his sons, and made that son trustee of the property so bequeathed. It was held that the son held the property in trust for all who might answer the description of his heirs in law at the time of his death, then to be distributed; and the reason for that decision, as expressed by Lumpkin, C. J., on page 457, was that the testator looked to the death of his son as fixing the period when the legatees should be ascertained. In the case of *Gaboury v. McGovern*, 74 Ga. 133, a bequest was made to a daughter for the use of herself and her lawful issue during her life. It was held that this created an estate subject to be opened upon the birth of a child, and to let in such child as a beneficiary with the mother during her life. It will be seen, however, by reference to the contents of the will that was under consideration in that case, that the language of the bequest was modified by superadded words in the will, giving other direction with reference to a disposition of the property in the event of the death of the testator's daughter without child or children, or the issue thereof, surviving her; and, accordingly, in the opinion in that case, on page 143, it was argued that by these superadded words "lawful issue" the testator meant such child or children of his daughter as she might have living at her death, and not an indefinite line of descendants. Again, in the case of *Toole v. Perry*, 80 Ga. 681, 7 S. E. 118, the will directed that all the property devised to the testator's daughters and children should be free from the debts and liabilities of their present or any future husbands, and for their sole and separate use. It was held in that case that the devise was not only for the benefit of such children as were in life at the death of the testator, but also included those afterwards born to the daughters. The reasoning of that decision rested upon the superadded words "free from the control," etc., "of their present or any future husbands"; and Justice Blandford, in his opinion, on page 682, argues that from these words it was to be inferred the testator had in view the probability naturally flowing from the relation of husband and wife; the testator speaking, not only of the present, but of any future, husbands. The distinction between that case and the case of *Baird v. Brookin*, cited above, is clearly shown in the opinion of Justice Lumpkin on page 716, 86 Ga., and page 981, 12 S. E. The deed now under consideration is simply to Jerry Hollis, trustee of his wife, Mariah A. Hollis, and the children issue of their marriage. Under the uniform rulings of this court, the words, standing alone, refer to the children then in life. The expression "issue of their marriage" can mean nothing more or less than to designate the particular children of the trustee and his wife, so as not to in-

have been tantamount to the same thing had the conveyance been to the trustee for the benefit of his wife and the children of their marriage, there being no superadded words in the conveyance indicating any intention whatever of the grantor to include any persons not in life at the time his conveyance went into effect. Under the uniform rule of construction adopted by this court, as we view its decisions, we conclude that none of the children of this marriage born after the execution of this deed have any interest whatever in the property conveyed. It follows, therefore, that the trust was executed before the alleged illegal sale of the property by the trustee, and that on this account the present action cannot be maintained. Hence we think the court erred in overruling the defendants' demurrer to the plaintiffs' petition, but that, after this was done, the court was right in sustaining the defendants' motion for nonsuit.

The above view of the case renders it entirely unnecessary to consider the questions presented by the main bill of exceptions, or the other questions arising upon assignment of error in the cross bill of exceptions. Judgment on cross bill of exception reversed; main bill dismissed. All the justices concurring, except SIMMONS, C. J., disqualified.

GILBERT v. STEPHENS.

(Supreme Court of Georgia. March 15, 1899.)

GUARDIAN—APPOINTMENT.

A new guardian cannot be lawfully appointed as the successor of a guardian in office until after a revocation of the latter's letters. An alleged appointment of a new guardian, purporting to have been made without such revocation, does not confer upon the appointee the right to cite the old guardian to a settlement of his accounts.

(Syllabus by the Court.)

Error from superior court, Clayton county; J. S. Candler, Judge.

Suit by T. O. Stephens against R. M. Gilbert for an accounting. Judgment for plaintiff was affirmed by the superior court, and defendant brings error. Reversed.

J. B. Hutcheson and J. L. Doyal, for plaintiff in error. W. M. Wright and Chas. T. Roan, for defendant in error.

LUMPKIN, P. J. A citation, issued by the ordinary of Clayton county at the instance of T. O. Stephens, reciting that he was the guardian of his wife, and calling upon R. M. Gilbert, as her former guardian, to appear and submit to a settlement of his accounts, was duly served upon the latter. In the court of ordinary, the plaintiff obtained a judgment, and Gilbert entered an appeal to the superior court. On the trial there, Stephens introduced a transcript from the records of the court of ordinary, purporting to show his appoint-

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transcript, however, that, at the time of the granting of the order appointing Stephens as such guardian, Gilbert was still the lawful guardian of Mrs. Stephens, his letters of guardianship never having been revoked. During the progress of the trial additional evidence to the same effect was introduced. When the plaintiff closed his case, the defendant moved to dismiss the proceeding, upon the ground, among others, that Stephens had no right to maintain his action; he not being the lawful guardian of Mrs. Stephens, for the reason that letters of guardianship could not lawfully be issued to him without a revocation of the defendant's letters of guardianship. This motion was overruled, and the court thereupon directed a verdict in favor of the plaintiff for a specified amount. Gilbert filed a bill of exceptions, complaining that the court erred in overruling his motion to dismiss, and also in directing the verdict.

Without dealing with the motion to dismiss, we are clear that the court erred in directing the jury to return a verdict in favor of the plaintiff. It is plain that he had no right to recover without showing that he was the duly and lawfully appointed guardian of his wife. The proceeding was instituted in his name as guardian, and could not be maintained by him in any other capacity. The proof showed he was not in fact her guardian, for it distinctly appeared that his letters were granted before those of Gilbert had been revoked. In the case of *Justices of Inferior Court of Morgan Co. v. Selman*, 6 Ga. 432, this court decided that, when the court of ordinary had formally granted letters of guardianship to a person capable of discharging the duties of the trust, no new appointment could be lawfully made until the former authority was vacated, by death, removal, or in some other way, and that a new appointment, made while the guardian originally appointed still remained in office, was totally void. This decision rests upon sound principle, and has not, so far as we have been able to ascertain, ever been in any manner departed from or modified by this court. The conclusion we have reached in the case now before us, therefore, is that Stephens was not entitled to a verdict in any amount, and that the court erred in directing a finding in his favor. Judgment reversed. All the justices concurring.

SPENCER v. STATE.

(Supreme Court of Georgia. March 14, 1899.)

ROBBERY—WHEAT CONSTITUTES.

Suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner, or injury to his person, does not constitute robbery.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Owens Johnson and A. D. Gale, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

FISH, J. Frank Spencer, alias Joe Brown, was indicted and tried for the offense of robbery. From the evidence submitted by the state (there was no evidence introduced by the defendant) it appears that Mrs. O'Connor and another lady were standing on a street in the city of Brunswick, when the accused approached them, and asked, "Will you please tell me where Capt. Dart lives?" and just as he said this he snatched a pocketbook containing \$7.50 from the hand of Mrs. O'Connor, and ran away with it. She testified that she did not have time to hold onto the book, it was all done so quickly; that she just had it in her hand, as ladies usually carry pocketbooks, and was not expecting it to be taken away from her, and was therefore not grasping it unusually tightly; that she did nothing at all to prevent him from taking it; that she did not consent or object to his taking it, as she did not have time to do either; that the accused had it, and was gone, before she knew it. The court charged the jury: "If you shall find it to be true that this defendant, in the county of Glynn, and on the date named, coming into contact with Mrs. Mary O'Connor upon the sidewalk, and entering into some conversation with her, or propounding some question to her, or to others who were with her, if you shall find that she held her purse openly in her hand, and this defendant, in full view of her, and with her knowledge, she seeing him, suddenly snatched her purse and its contents from her, without her consent, and ran off with it, the court charges you that if you shall find that to be true, and that this was done by this defendant with intent to steal the same, that would make, under the law of this state, a case of robbery, and in such event it would be your duty to convict the defendant." There was a verdict finding the accused guilty of robbery. He moved for a new trial upon the grounds that the verdict was contrary to law and the evidence, that the charge above quoted was error, and upon other grounds not necessary, in the view which we take of the case, to be passed upon. The motion was overruled, and he accepted.

The question which controls this case is whether the facts as proved constitute the offense of robbery, which is "the wrongful, fraudulent, and violent taking of money, goods or chattels from the person of another by force or intimidation, without the consent of the owner." We have no difficulty, in deciding that this, under the facts, is not a case of robbery. Section 177 of the Penal Code, referring to larceny from the person, the general definition of which is given in the preceding

intent to steal, without using intimidation, or open force and violence, shall be within this class of larceny, though some small force be used by the thief to possess himself of the property: provided, there be no resistance by the owner, or injury to his person, and all the circumstances of the case show that the thing was taken, not so much against as without the consent of the owner." The facts of this case bring it clearly within the provisions of this section. The accused, without using any intimidation, suddenly snatched the purse from the hand of Mrs. O'Connor, and ran off with it. There was no injury to her person, nor any resistance or struggle to prevent him from taking the purse. All the circumstances of the case show that the purse was taken, not so much against as without her consent. The charge of the court was erroneous, because, under the hypothetical case stated by the court, without more, the offense would not be robbery, but would be larceny from the person, under the provision of the last-quoted section of the Penal Code. In Fanning's Case, 66 Ga. 167, the accused slipped his hand into a lady's outside pocket, and furtively took therefrom a purse of money. Before he got the purse entirely out, she felt the hand, and tried to seize it, but the thief had succeeded, and the purse was gone. In the effort of the thief to extract his hand and the purse, the pocket was torn. She rushed upon him, and caught him by the coat, which, in his struggle to escape, was left, torn, in her possession. It was held that the offense was larceny from the person, and not robbery, because there was no force or intimidation in the act.

Counsel for the state strongly relies upon Burke's Case, 74 Ga. 372, contending that the facts there and those in the case at bar are substantially the same. But there is evidently not a full statement of the facts in that case as it is reported in 74 Ga., for it does not appear in such report that the owner of the money taken by Burke made any resistance, but simply that the accused grabbed four dollars from his hand, and ran; that the owner called after him, etc. Yet the headnote, which is sound law, is as follows: "Where, before the felonious taking of money by one person from another, the latter makes resistance, and the taking is not only without his consent, but against it, the crime is robbery, not larceny from the person." The record of the case is not at hand, but the recorded opinion of Mr. Justice Hall is as follows: "The question made in his case is that the defendant, who was convicted of robbery, was, under the evidence adduced on the trial, guilty of nothing more than larceny from the person. Both the judge and the jury who tried the case were of a different opinion, and, if the testimony is to be credited, their conclusion seems to be supported. It is insisted that this was a secret, sudden, and wrongful taking by the defendant of the prosecutor's

companied either by force or intimidation, one or the other of which is essential to constitute the offense of robbery. Code 1882, §§ 4389, 4410, 4412. According to the last-cited section of the Code, however, where there is 'resistance' by the prosecutor, and 'all the circumstances of the case show that the thing was taken against his consent,' this constitutes the force contemplated by the law defining robbery as one of its ruling elements. 'If there is a struggle to retain the possession of the property before it is taken, it is the "force" of our Penal Code.' Long's Case, 12 Ga. 294; Fanning's Case, 66 Ga. 167. If there be 'resistance' before the felonious taking is complete, and that taking be against, not simply without, the owner's consent, this, too, under our Code, is robbery, and is one of the decisive tests distinguishing it from larceny from the person. There was in this case evidence both of 'resistance' by the owner and of a struggle between him and the defendant before the money was snatched from his person, and carried away by defendant." This last sentence in the opinion in Burke's Case, alone, shows the difference between the facts in that case and those in the case which we are now considering. In Doyle's Case, 77 Ga. 513, the prosecutor agreed to treat the accused to a drink, and took out his pocketbook to pay for it. He had the book in one hand, and in the other a rubber strap which he had taken from around it. In the pocketbook was a five-dollar bill with one end sticking out. The accused extracted it from the book with a quick jerk, and passed it to a confederate, who made off with it. There was no struggle and no threats, the accused merely snatched or jerked the money from the pocketbook, which the prosecutor held in his hand. It was held that these facts did not constitute the offense of robbery, and the ruling was put on Burke's Case, *supra*. Mr. Justice Hall, who also delivered the opinion in that case, said that, in view of the fact that almost every community is infested with thieves, who throw unsuspecting persons off their guard, and snatch money or other valuables from their persons, the court unanimously recommended to the general assembly that such offense be made robbery.

Counsel for the state also cites Usom's Case, 97 Ga. 194, 22 S. E. 399, but in that case there was evidence both of resistance by the owner of the satchel and of a struggle between her and the accused before it was pulled from her hand, and the case is directly in line with those which we have cited above.

The distinction between robbery and larceny from the person pointed out in our Penal Code and the decisions of this court above referred to is one that is generally recognized. "Snatching, which is a sufficient asportation in simple larceny, carries with it or not the added violence of robbery, according as it is met or not by resistance." 2 Bish. New Cr.

thing from the hands or person of another, without any struggle or resistance by the owner, or any force or violence on the part of the thief, does not amount to robbery." 21 Am. & Eng. Enc. Law, 420, and cases cited in note 5. "With respect to the degree of actual 'violence,' where the taking is effected by that means, it appears to be well settled that a sudden snatching from a person unawares is not sufficient." 2 Russ. Cr. (6th Ed.) p. 88. Judgment reversed. All the justices concurring.

SMITH v. STATE.

(Supreme Court of Georgia. March 14, 1899.)

HOMICIDE—EVIDENCE—FLIGHT—MUTUAL COMBAT—JUSTIFIABLE HOMICIDE.

1. The evidence did not warrant a charge of voluntary manslaughter.

2. The fact that one who has done an act which may amount to a crime immediately flees may always be given in evidence as tending to show guilt, but should always be considered by the jury in connection with the motive that prompted it, and, at most, is only one of a series of circumstances from which guilt may be inferred.

3. The provisions of law relating to justifiable homicide, where the parties had been engaged in mutual combat, contained in section 78 of the Penal Code, were not applicable to the facts of this case.

4. When two or more persons manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another, for the purpose of assaulting or offering personal violence to any one being therein, and one of them, to prevent such entry, is killed by the occupant of the house, if the circumstances were sufficient to excite the fears of a reasonable man that such entry was intended, and the killing was done under the influence of such fears, such a homicide is justifiable, even though the assault or personal violence intended be less than a felony; and a charge that the assault intended must amount to a felony was error.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

Sam Smith was convicted of murder, and brings error. Reversed.

John R. Cooper, Oscar Brown, and J. A. Perry, for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

LITTLE, J. The first two grounds of the motion for new trial are based on the allegations that the verdict is contrary to law, and without evidence to support it. Inasmuch as the case goes back for another trial, we do not pass upon the weight of the evidence in the case.

1. The next ground of error assigned is that the court erred in charging the jury the law in relation to voluntary manslaughter. We are of the opinion that, under the facts in this case, there was no evidence which authorized a charge on the law of voluntary

were different (that is to say, if there was any proof, or a legitimate inference from the facts in evidence, that the plaintiff in error slew the deceased as the result of passion founded on sufficient provocation, found in the trespass of the deceased on the property of the accused), the offense of which he would be guilty would not be that of voluntary manslaughter. Every homicide committed as the result of passion is by no means to be classed as voluntary manslaughter. A homicide, when done in the absence of malice, and as the result of a sudden heat of passion engendered by a provocation sufficient in law to justify the passion, is graded below the crime of murder, because the killing is then partially excused on account of the justly-aroused passion. Nor is it always necessary, in order to grade the offense as voluntary manslaughter, that there should be an assault upon the person killing, to justify the excitement of passion which induced the homicide. *Golden v. State*, 25 Ga. 532; *Stokes v. State*, 18 Ga. 17. Our Penal Code (section 65) declares that in all cases of voluntary manslaughter there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion. Assuming, as we must, under the evidence, that the deceased was a trespasser on the property of the accused at the time of the homicide, under the theory of the state he was a mere trespasser, without intending to injure the person or property. Under general criminal law, neither insulting nor abusive words or gestures, nor trespass, nor breach of contract, of themselves, amount to sufficient provocation for an act of resentment likely to endanger life. A mere trespass on property, less than that, to protect which, our Code makes it justifiable homicide to kill the trespasser, may be resisted by any reasonable or necessary force, short of taking or endangering life. *Clarke*, Cr. Law, p. 145. If, in the course of a struggle to prevent such a trespass, by the use of reasonable and necessary force, which the owner is entitled to use, a struggle and combat ensue, then, whether the slayer is justified, or guilty of murder or voluntary manslaughter, is to be determined by other rules, not necessary here to be discussed. According to the evidence, there was no attempt to remove the trespasser; but the theory of the state is that the plaintiff in error, with malice, or actuated by the spirit of revenge, deliberately shot the accused while standing in the yard of the latter, when there was no necessity for him to do so to protect his habitation or family, and no circumstances at the time to justify a passion which caused him to shoot the deceased. The theory of the defendant was that he shot and killed the deceased to prevent him from entering his house, which he

The issue is a clearly-defined one. If the theory of the defendant be supported by the facts, he was not guilty of any offense, but was entirely justified. If the theory of the state be correct, then the crime was murder. Under the evidence, there seemed to have been a deliberate shooting on the part of the deceased, not as the result of passion, nor in a struggle; nor was there any mutual combat, nor any evidence of an attempt by the slayer to remove the trespasser from his premises otherwise than by deliberately shooting him down. The evidence in this case is remarkable, not for what the witnesses who went to the house of the accused with the deceased say as to the facts of the homicide, but as to what they do not say; and, although three of them were present at the time on the premises of the accused, no clear account is rendered by any of them as to the facts of the homicide. But from the evidence of these witnesses, and circumstances shown by other witnesses, we fail to find any circumstances establishing the proposition that the shooting was the result of passion. This being true, a charge relating to voluntary manslaughter was error. Nor can a conviction for this offense stand, under the evidence disclosed in the record. *Dyal v. State*, 97 Ga. 428. 25 S. E. 319.

2. Another ground of the motion for new trial alleges that the court erred in charging on the subject of flight. The language of the court on this subject is as follows: "Something has been said upon the subject of flight. The rule on that subject is that where one commits an act that amounts presumptively to a crime, and the party who commits the act immediately flees from the processes and officers of the law, to avoid arrest or trial, the presumption would be authorized that he fled from the consciousness of guilt. That presumption can be rebutted by showing that flight was not from a sense of conscious guilt, but for other reasons." It may be that the principle stated by the judge in his charge is a correct one, and if the propositions that the accused immediately flees from the processes and officers of the law, and that such flight was for the purpose of avoiding arrest or trial, be assumed, the conclusions which follow are legal and natural. But, whether so or not, the charge as to the law of presumptions which applies to the flight of one who is charged with the commission of an offense, or has done an act which may amount to a crime, was too strongly put, and, without qualification, does not correctly lay down the principle applicable under the facts of this case. Mr. Wharton, in his work on Criminal Evidence (section 750), in treating this subject, says: "When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from a consciousness of guilt; and, though this inference is by no means strong enough

which guilt may be inferred." And, further treating the subject, he also says: "The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say that escape, disguise, and similar acts, in connection with other proof, the basis from which guilt may be inferred; but this cannot be qualified by a general statement of the countervailing considerations incidental to a comprehensive view of the question. Underhill, in his treatise on Criminal Evidence (section 119, citing *State v. Jackson*, 95 Mo. 623, 8 S. W. 749; *People v. Petnecky*, 2 N. Y. Cr. R. 450), says: "It cannot with correctness be said that the flight or attempted flight of the accused before his arrest, taken alone, raises any legal presumption of guilt, or that his flight, without regard to the motive which prompted it, is, in law, evidence of guilt. At the most, it is only a circumstance, to be considered by the jury with the reasons that prompted it, tending to show guilt, or by which an inference of guilt may be raised, and it has no probative force unless it appears that the accused fled to avoid arrest or imprisonment." In the case of *Hickory v. U. S.*, 160 U. S. 408, 16 Sup. Ct. 327, it was ruled that the flight of the accused is a presumption of fact, not of law, and is merely a circumstance tending to increase the probability of the defendant's being the guilty person, which is to be weighed by the jury like any other evidentiary circumstance. See *People v. Wong Ah Ngow*, 54 Cal. 151. And such, also, is the ruling of our own court. *Jesse v. State*, 20 Ga. 156-166; *Smith v. State*, 63 Ga. 170; *Sewell v. State*, 76 Ga. 36. The judge in this case charged that the rule was, where one immediately flees to avoid arrest or trial, that the presumption would be authorized that he fled, from the consciousness of guilt. This we think was not a fair presentation of the law of this case, for there was evidence tending to show the flight was not from the officers of the law, but to escape violence from the companions of the deceased; and the court made no qualification of its charge, appropriate to the evidence just mentioned. Flight is, at most, only a circumstance which may be weighed by the jury, in connection with other circumstances, to determine guilt, and is, of itself, no such circumstance as authorizes the jury to presume guilt.

3. Another ground of the motion for new trial is that the court erred in charging the jury the provisions of section 73 of the Penal Code, in relation to the homicide of a person where the killing must be done in order to save the life of the slayer. It must be apparent that the law of this section of the Code is wholly inapplicable to a case of this character. The provisions of this section apply only to cases of mutual combat, where

it is only justifiable to slay his adversary after a bona fide effort to avoid all further difficulty. *Powell v. State*, 101 Ga. 9, 29 S. E. 309. The slayer is protected only in cases in which the provisions of this section apply, when the killing was done as an absolute necessity to save his own life, and only in cases when it appears that the person killed was the assailant, or that the slayer had, in good faith, endeavored to decline any further struggle before he inflicted the mortal wound. There was no evidence of any mutual combat between the deceased and the accused preceding this homicide. On the contrary, the accused was in his house, and the deceased on his premises, without the house. There was no evidence of quarreling between them, nor of any attempt at flight; and the rules which determine the guilt or innocence of the defendant are not to be found in these provisions of law.

4. An exception is taken to the charge of the court which instructed the jury as follows: "If persons assemble before another's house, and actually advance on him, and render it necessary for his protection, or make such demonstrations as to excite the fears of a reasonable man that it was their intention to commit a felony on him or some member of his family, he would be justified in shooting them; but, if they merely threaten to commit violence, he is not justifiable in shooting until he has warned them off." We do not think this is a fair presentation of the provisions of our law which afford protection to one who resists an invasion of the house in which he dwells. Section 70 of the Penal Code declares that it is justifiable homicide for one to kill a person who, in connection with another or others, manifestly intends and endeavors, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. It was held in the case of *Hudgins v. State*, 2 Ga. 173, that this provision of the Penal Code does not apply to a single individual, but contemplates the joint action of two or more persons, and that under this section the killing is justifiable when the assailant designed entering the habitation for the purpose of assaulting, or of offering any personal violence to, one of the inmates. So that this case establishes two propositions,—that under this provision of the Code it is justifiable homicide for one to kill another who, in company with some person or with other persons, intends and endeavors, in a riotous and tumultuous manner, to enter his habitation for the purpose of assaulting or offering personal violence to any person therein, and that it is not necessary, in order to justify, that such personal violence shall amount to a felony. In the case of *Caldwell v. State*, 34 Ga. 10, where a number of persons went to the house of another, and en-

window, and was shot by the prosecutor in the act, this court held that a fair test whether the prosecutor was guilty of murder, or even of manslaughter, was whether the person killed was violently and unlawfully entering his dwelling. Again, under the provisions of section 72 of the Penal Code, if, after persuasion, remonstrance, or other gentle measure used, a forcible attack and invasion on the habitation of another cannot be prevented, it is justifiable homicide to kill the person so forcibly attacking and invading the habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue, to the person, property, or family of the person killing. Under the provisions of these two sections of our Code, it must be apparent that the court erred in charging the jury as complained of. If, as a matter of fact, the evidence shows that more than one person, acting in concert and in the prosecution of a joint enterprise, went to the house of the plaintiff in error, then, whether the provisions of section 70 of the Penal Code, above referred to, would apply, depends entirely upon whether they, or one of them, in the prosecution of such common intent, manifestly intended and endeavored, in a riotous and tumultuous manner, to enter his house for the purpose of assaulting, or offering personal violence to, any person therein. Then, if the defendant shot and killed one of such persons so intending and endeavoring to enter, it would be justifiable homicide. If, however, only one of such persons made a forcible attack and attempt to invade the habitation, after persuasion, remonstrance, or other gentle measures, and such attack and invasion could not otherwise be prevented, it was justifiable homicide to kill the person so making the attack and invasion. And this is manifestly right. The law protects not only the person and the property of the citizen, but it protects his home, whether it be a hut or a palace; and he who seeks in a violent manner to enter that habitation, and will not heed the remonstrance or persuasion of the owner, but continues the attack and invasion, intending to do a serious injury, either to the person who resides there, to his house, or to some member of the family, forfeits his life; and he who, in good faith, under such circumstances, takes the life of the person so invading his home, is guiltless of crime, and is acting in the due protection of himself and his family. We do not say that the facts show that the plaintiff in error is thus protected, but these are the principles of law which, on his theory of the case, should have been given in charge to the jury; and the charge, as complained of, did not present, as we consider, the provisions of law which

committed no error in its charge to the jury which calls for a reversal of its judgment. Judgment reversed. All the justices concurring.

MORGAN v. STATE.

(Supreme Court of Georgia. March 14, 1899.)

MANSLAUGHTER—EVIDENCE.

Under the evidence for the state, the jury would have been authorized to find the accused guilty of murder. The evidence for the accused would have authorized his acquittal. Under no view of the case would a conviction for voluntary manslaughter be justified. It was therefore error to charge the jury the law of voluntary manslaughter, and a verdict finding the accused guilty of that offense should have been set aside. The case should be tried again, and, if the evidence is substantially the same as at the previous trial, the accused should be either convicted of murder or acquitted. *Dyal v. State*, 25 S. E. 319, 97 Ga. 423; *Smith v. State* (this day decided) 32 S. E. 851.

(Syllabus by the Court.)

Error from superior court, Wayne county: J. L. Sweat, Judge.

Berry Morgan was convicted of voluntary manslaughter, and brings error. Reversed.

J. W. Poppell, Brantley & Bennet, A. D. Gale, Owens Johnson, and W. G. Brantley, for plaintiff in error. John W. Bennett, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

WATERS v. LEWIS.

(Supreme Court of Georgia. March 15, 1899.)

CLOUD ON TITLE—INJUNCTION—RESTRAINING TRESPASS.

1. A mere verbal claim to, or assertion of ownership in, property, is not such a cloud upon the title of the owner as can be removed by equitable proceedings.

2. Except in a case specially provided for by statute, equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render the interposition of this writ necessary and proper.

(Syllabus by the Court.)

Error from superior court, Chatham county: R. Falligant, Judge.

Action by Sarah Lewis against David Waters. Judgment for plaintiff. Defendant brings error. Reversed.

Alexander & Hitch, for plaintiff in error. Gignilliat & Stubbs, for defendant in error.

FISH, J. Sarah Lewis brought her equitable petition against David Waters, in which she alleged: in substance, that she was the owner and in possession of a certain parcel of land in the city of Savannah; that she purchased the land from one Eva Johnson, who

under an agreement that, upon the completion of the payments, Eva Johnson would make her a sufficient deed of conveyance to the property; that such conveyance was never made; that, subsequent to such purchase, Eva Johnson had intermarried with David Waters, and died, and after her death, the lot being vacant, David Waters, knowing that petitioner had paid for the same and was entitled to a deed thereto, and in fraud of her rights, set up a claim to the land, as the sole heir at law of his deceased wife, Eva, and had a house erected thereon, and actually took possession of the premises under his pretended and fraudulent claim; that petitioner, from time to time, made demand upon him to surrender the property, but he refused to do so, and continued to claim the same until April, 1895, when, the premises being vacant, petitioner took possession thereof, and had since retained possession. Plaintiff further averred that "said claim of David Waters to the land is fraudulent, and without foundation in fact; that the said claim is such that it operates to cast a cloud upon her title, and has been and is being vexatiously and injuriously used against her by the said David Waters, who has instituted proceedings, both civil and criminal, against her for forcible entry and detainment; that the witnesses within whose knowledge the facts within set forth rest are of great age, and their evidence is likely to be lost by the death of said witnesses; and that your petitioner cannot immediately and effectively protect herself and maintain her rights by any course of proceeding open to her except by an application to this court to administer equitable relief in the premises." The prayers for relief were "(1) that the said David Waters, and all parties who claim, or may hereafter claim, by, through, or under him, may be enjoined from entering upon the said land, and from seeking to assert said claim; (2) that a decree or judgment of this court be granted declaring said claim of the said David Waters fraudulent and void." To this petition the defendant filed a general demurrer, which was overruled, and the defendant excepted.

1. A cloud upon the title of the true owner of land, such as may be removed in equitable proceedings, is some deed, instrument, or other writing which by itself, or in connection with proof of possession by a former occupant, or other extrinsic facts, gives the claimant thereunder an apparent right in or to the property. Civ. Code, §§ 4892, 4893; *Thompson v. Iron Co.*, 91 Ga. 538, 17 S. E. 663; 2 Am. & Eng. Enc. Law (1st Ed.) p. 298; 3 Pom. Eq. Jur. § 1898. A mere verbal claim to, or oral assertion of ownership in, property is not such a cloud upon the title of the owner. *Parker v. Shannon*, 121 Ill. 452, 13 N. E. 155. The petition shows that the only claim that the defendant is setting up to the property is an

void. She does not pray to have any instrument canceled or any proceeding set aside. It is clear, therefore, that her petition shows no such cloud upon her title as she can have removed.

2. The plaintiff prayed that "David Waters, and all parties who claim, or may hereafter claim, by, through, or under him, may be enjoined from entering upon said land." The rule is that, except in a case specially provided for by the statute, equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render the interposition of this writ necessary and proper. Civ. Code, § 4916. There are no allegations in the plaintiff's petition which bring her case within this rule. It follows that the court erred in overruling the demurrer. Judgment reversed. All the justices concurring.

PUTZEL v. RICE.

(Supreme Court of Georgia. March 15, 1899.)

APPEAL—REVIEW—DENIAL OF NEW TRIAL.

No exception was made to the charge of the court. There was some evidence to support the verdict, and, as the trial judge was satisfied therewith, this court will not interfere with his discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action between Charlie Rice and M. G. Putzel. From the judgment, Putzel brings error. Affirmed.

Estes & Jones, for plaintiff in error. Monroe G. Ogden, for defendant in error.

PER CURIAM. Judgment affirmed.

OVERSTREET v. RAWLINGS et al.

(Supreme Court of Georgia. March 16, 1899.)

FINES—APPROPRIATION.

All fines imposed by a judge of the county court upon persons convicted of a violation of the laws of this state are required to be paid over to the county treasurer; and this is true whether the conviction is had upon an accusation in the county court, or upon an indictment or presentment found in the superior court, and transferred to the county court for trial. The county judge has no authority to pay any part of such fines, either to the officers of his own court or the officers of the superior court, in payment of their insolvent costs accruing in his court.

(Syllabus by the Court.)

Error from superior court, Screven county; R. L. Gamble, Judge.

Application of B. T. Rawlings and others for a writ of mandamus against E. K. Over-

Rawlings and Hardwick and H. S. White, for defendants in error.

COBB, J. This case arose upon a petition by certain officers of the superior court of Screven county for a writ of mandamus against the judge of the county court of that county. The facts appearing in the record are, in substance, as follows: At the November term, 1897, of the superior court of Screven county, a large number of indictments in misdemeanor cases were transferred to the county court for trial. In some of these cases the persons accused were acquitted, while in others nolle prosequis were entered on the indictments, so that the costs due petitioners for services therein became insolvent and uncollectible. The county judge has on hand the sum of \$500 which has been collected by him in payment of the fines imposed in two of the transferred cases in which convictions were had. The petitioners have been paid all the costs due them by reason of their services in these two cases. The county judge refused to pay petitioners out of the fund in his hands the insolvent costs due them for services in the transferred cases, other than the two in which fines were collected, and his refusal so to do is made the basis of the application for the writ of mandamus. On these facts, the judge of the superior court granted a mandamus absolute against the county judge, and he excepted.

The precise question which is presented in the present record does not seem to have ever been passed upon by this court. No case which was referred to in the argument is controlling upon the matter, and we have been unable to find any which is directly in point. The question now before us was not involved either in *Re Speer*, 54 Ga. 40, or in *Greer v. Hudson*, 74 Ga. 817. The original county court act provided that, "when a party is adjudged liable, in a criminal proceeding, to pay costs, or fines, or both, the same shall be collected as costs and fines are collected in the superior courts. Whatever fines and forfeitures are collected by virtue of the sentence or judgment of the county judge, shall be collected and paid over to the county treasurer of each county." Code 1882, § 300. In 1872 an amendment to the county court act was adopted, which provided that whenever an indictment for a misdemeanor shall be transferred to the county court for trial, and the party on trial shall be adjudged liable to pay costs or fines, or both, it shall be the duty of the county judge "to collect the same, as costs and fines are collected in the superior courts; and, when collected, before paying over the same to the county treasurer, to deduct therefrom the costs due to the solicitor general and clerk of the superior court, and to pay the same over to said officers, or retain

that, as to all cases originating in the county court where fines are imposed, it is the duty of the county judge to pay the fines to the county treasurer, and it would seem that the same is true of cases transferred from the superior court; there being no authority in the act of 1872 for the county judge to retain any amount other than the costs due to the solicitor general and the clerk of the superior court in each case in which he may collect such costs. A strict construction of the section would require, not only that he should pay the fines into the county treasury, but that he should also pay to the treasurer the costs due the sheriff, or other officers not named in the section, as well as the jail fees and the fees due witnesses. That the law required all fines collected by the county judge to be paid to the county treasurer seems to have been the opinion entertained by the codifiers of the Code of 1895. Section 771 of the Penal Code, which declares that "fines and costs shall be collected as they are in the superior court, and all fines shall be paid over to the county treasurer," is a part of the county court act of 1872, which was originally embodied in section 300 of the Code of 1882, which we have quoted above; while section 315 of that Code, which contained the amendment of 1872 in reference to the collection of costs in transferred cases, is entirely omitted from the Code of 1895, and no reference is made thereto in any way. If, however, section 771, above quoted, is carefully read, it will be seen that it was intended to make provision for all of the cases which were covered, both by sections 300 and 315 of the Code of 1882. This is undoubtedly true, if we have properly construed section 315. It is not contemplated by the county court law that the county judge should be a disbursing officer as to anything except the costs collected by him for the officers of his court and officers of the superior court. All fines collected by him must be paid over to the county treasurer. Section 775 of the Penal Code provides that insolvent costs due bailiffs "shall be paid from the fines and forfeitures paid to the county treasurer from cases in the county court." Section 776 declares that insolvent costs due justices and constables "shall be paid out of the fines and forfeitures in this court in the same manner as costs of the bailiff are paid." We know of no law which authorizes the county judge to pay either to the officers of his own court or to the officers of the superior court any part of the fines collected by him. If the officers of the county court or the officers of the superior court have any claim upon the fund now in the hands of the county judge of Screven county, they must assert the same after the fund has been paid over to the county treasurer. See, in this connection, Pen. Code, §§ 774, 1092-1094, 1096; Gamble

WHITTON v. SOUTH CAROLINA & G. R. CO.

(Supreme Court of Georgia. March 16, 1899.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

When, in the trial of an action brought by the widow of a conductor against a railroad company for his homicide, it affirmatively appeared from the evidence that he was in charge of, and directing, the movements of the train by which his death was caused, and that, instead of confining himself to the line of his duties on that occasion, which did not include coupling and uncoupling cars, he voluntarily, and in the absence of any emergency so requiring, went between two cars, one of which he knew to be in a defective condition, for the purpose of unchaining or uncoupling the same, the conclusion follows that he was "outside of duty, and at fault," and consequently there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by A. L. Whitton against the South Carolina & Georgia Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. T. Ladson, J. T. Pendleton, and M. P. Carroll, for plaintiff in error. Jos. B. Oumming, for defendant in error.

SIMMONS, C. J. Mrs. Whitton sued the South Carolina & Georgia Railroad Company for damages for the homicide of her husband. Upon the close of the evidence for the plaintiff, the trial judge granted a nonsuit, to which the plaintiff excepted. Whitton, the husband, was the conductor of a construction train. This train was made up for the purpose of removing wreckage from the line of the railroad. In making it up, there was one car which had no bumper or drawhead at one end, and which was attached to another car by means of a chain. The train went upon a trip, and returned to the city of Augusta, Ga., where it was determined to detach the defective car from the others. The crew of the train consisted of several persons whose main duty seems to have been to gather up the wreckage on the line of the road, Whitton, the conductor, and a flagman. The defective car being without bumper or drawhead, there was nothing to prevent its contact with the other car in case of a movement of the train or in taking up or letting off slack. The conductor sent the flagman to a crossing for the purpose of flagging this train when it became necessary, and he himself undertook to unchain the defective car from the other. Before going under and between the cars, he placed a piece of wood in front of the wheels of the car which was attached to, and immediately behind, the defective one,

ductor was under the car, unfastening the chain, the flagman, without any command from the conductor, gave the engineer the signal to move forward. The engineer obeyed the signal, and moved the train forward, dragging the car over the stick of wood. The conductor was crushed between the cars and killed. Under this state of facts, the court granted a nonsuit, holding that while the evidence showed the flagman, a servant of the company, was negligent, the conductor was also in fault.

In this state the law is that an employé who has been injured by the negligence of a co-employé is prima facie entitled to recover from the company upon showing either that he was free from fault or that the company was in fault. Evidence of either of these things puts the burden upon the company to prove the contrary of one of them. If, however, the employé, in making out his case by showing that the company was negligent, shows that he also was negligent or in fault, the company is relieved of the necessity of introducing evidence to show negligence on the part of the employé. If the evidence shows that the employé, by his negligence, contributed to the injury, the court should grant a nonsuit. Applying this rule, we think that the facts of this case show that, although the servants of the company were negligent in moving the train forward without warning to the conductor, he also was negligent in undertaking to unchain this defective car. There is no evidence in the record tending to show that it was any part of the duties of the conductor to uncouple this car. As far as the record discloses, it was a voluntary act upon his part. The evidence does show that it was the duty of the flagman to couple and uncouple cars. It is true that the evidence also shows that the conductor had sent the flagman forward to the crossing for the purpose of signaling the engineer, but no reason appears for the conduct of the conductor in voluntarily assuming the duties of the flagman. As to the management of this particular train, the conductor was the vice principal of the company. It was his duty to be where he could superintend the whole train, and not without a pressing emergency ought he to have abdicated his position of authority, and assumed the duties of a subordinate. He must have known that it was dangerous to go under and between the cars, because of the defective condition of one of them. He showed a knowledge of this by placing the wood in front of the wheels of the car next to the defective one. In the case of *Sears v. Railroad Co.*, 53 Ga. 630, this court held: "It is not the duty of the conductor of a freight train to couple and uncouple cars, except in the case of a pressing emergency, of which the jury must judge. If he is killed performing such service, in the absence of such emer-

company." This ruling was reaffirmed in the same case when it came twice afterwards to this court. 59 Ga. 496; 61 Ga. 279. In the present case, there is nothing in the evidence to show that it was the duty or any part of the duty of Whitton, the conductor, to uncouple cars, or that there was any pressing emergency upon him to do so in order to save life or limb, or to prevent a collision with another train. According to the ruling in the case of *Railway Co. v. Ray*, 70 Ga. 674, the plaintiff in the court below should have shown affirmatively that, at the time her husband was killed, his duty required him to be at the place the injury occurred. For the reasons given above and others which might be mentioned, we think the court was right in granting a nonsuit. Judgment affirmed. All the justices concurring.

SWEENEY v. MALLOY.

(Supreme Court of Georgia. March 18, 1899.)

COSTS—STAY OF SECOND ACTION PENDING PAYMENT.

1. Where, upon the dismissal by the plaintiff of an equitable action under which a receiver had been appointed to take charge of real estate claimed by the plaintiff and held by the defendant, the court adjudged that the defendant recover of the plaintiff "all the costs and expenses which have been taxed against the funds in the hands of the receiver," and at the same time passed an order directing the receiver to turn over to the defendant the corpus of the property in dispute, and also a specified sum which he had received as rents of the same while in his hands, less the costs and expenses of the case, including his compensation, and where the entire fund in his hands was not enough to more than pay these costs and expenses, so that the defendant received nothing from him, it was, under section 5043 of the Civil Code, incumbent upon the plaintiff, before undertaking to recommence the action, to pay to the defendant a sum equal to that in the receiver's hands which was disposed of as above stated, and also to settle the balance, if any, of the costs in the case which remained unpaid.

2. The foregoing is true, although the defendant was insolvent at the time the plaintiff filed a second petition for the purpose of renewing his original action.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Suit by Myles Sweeney against Mary Malloy. Judgment for defendant, and plaintiff brings error. Affirmed.

John I. Hall, J. L. Hardeman, and Estes & Jones, for plaintiff in error. Anderson, Anderson & Grace, for defendant in error.

LUMPKIN, P. J. An equitable action was brought by Myles Sweeney against Mary Malloy for the recovery of certain real estate in her possession to which he claimed title. Under his petition, a receiver was appointed to take possession of the property in dispute; and, while the same was in his hands, he

voluntarily dismissed his action, and thereupon the court entered a judgment by which it was, among other things, adjudged "that the defendant, Mary Malloy, do have and recover of the plaintiff, Myles Sweeney, all the costs and expenses which have been taxed against the funds in the hands of the receiver, all of which are particularly shown by the order of the court granted contemporaneously herewith, distributing assets in the hands of the receiver." The order referred to directed that the receiver turn over to the defendant, Mary Malloy, from whose possession he had received the same, the property in controversy, and also that he pay over to her the net sum in his hands realized from rents, to wit, "three hundred dollars, less the costs and expenses of said case, namely, (\$132.05) one hundred and thirty-two dollars and five cents, clerk's and sheriff's costs, and ——— dollars for the receiver's compensation, for which amounts a judgment over has been this day rendered by the court in favor of the said Mary Malloy against the said Myles Sweeney." Subsequently this last order was amended by another reciting that the blank for inserting the amount of the receiver's fees had by an oversight been left unfilled, and directing that the order previously passed be amended by inserting in this blank the words "two hundred." It will thus be seen that, under the orders passed by the court, there was no net sum left in the receiver's hands to be turned over to Mary Malloy. On the contrary, the \$300 held by him lacked \$32.05 of being enough to pay his fees and the costs due the clerk and sheriff. Apparently, however, these officers accepted the \$300 in full settlement of their respective claims; for the record discloses that both of the parties to the present case admitted that the receiver, when the former suit was dismissed, "had in his hands certain moneys which had arisen from rents of the property in dispute, from which rents he paid the officers of court the costs, including the receiver's fees." The plaintiff, after the dismissal of his suit, filed against the defendant another petition, setting forth identically the same cause of action. At the appearance term of this second action, the defendant filed a plea in abatement, in which she alleged that the plaintiff had never paid to her the costs and expenses of his first suit, and prayed that the present proceeding be abated accordingly. This plea was demurred to, the demurrer was overruled, and a trial had on the defendant's plea, which resulted in a verdict in her favor. Thereupon the plaintiff's action was dismissed. The bill of exceptions brought to this court alleges error in refusing to sustain the plaintiff's demurrer to the plea in abatement and in overruling his motion for a new trial. One ground of this motion complains that the court refused to allow him to introduce evidence showing that Mary Malloy was insolvent.

This section makes the payment of the costs due upon a dismissed action a condition precedent to the recommencement of the same. It is obvious that Sweeney has never paid the costs of his former suit, unless, as his counsel contend, the money in the receiver's hands belonged to Sweeney. Whether it did or not was one of the issues which would have been determined if the original action had been tried upon its merits. As the case was dismissed without a trial of this issue, it certainly would not do to arbitrarily assume that this fund did in fact belong to Sweeney. When he dismissed his first suit, it followed as an inevitable legal consequence that the court should order the receiver to restore to the possession of the defendant the real estate in controversy. It would also have been eminently proper for the court to direct the receiver to turn over to Mary Malloy the money in his hands arising from the rents of the property, and to further adjudge that the costs of the proceeding be paid by the plaintiff. In that event, the latter would have occupied no better nor worse status than that in which he was prior to the commencement of the litigation. While he would not, had this been done, have been cut off from renewing his action, he certainly could not properly have claimed that his ownership of the fund in the receiver's hands was established; his alleged right thereto not having been adjudicated. That is to say, if the receiver had turned this fund over to Mary Malloy, she would have been liable to account therefor as a portion of the mesne profits enjoyed by her while holding adversely to the plaintiff, in the event he prevailed on the trial of an action subsequently brought against her; but, until his right to the fund in question had been thus established, it could not in any legal sense be regarded as belonging to him. As has been seen, however, the court did not direct the receiver absolutely to pay this fund over to the defendant, but, on the contrary, charged it with the payment of the costs and expenses of the litigation, amounting to \$32.05 more than the fund itself. Accordingly she received no part of the same from the receiver. As, in legal contemplation, she was entitled to receive this fund but for the direction last mentioned, it was, in effect, compelling her to pay the costs out of a fund which, in a sense, at least, was, under the action taken out by the court, her own. Construing all together the judgment and the orders entered in the original case, it was practically adjudicated that Mary Malloy was entitled to this money, but that the same should be used in payment of costs and expenses, she to be reimbursed therefor by an enforcement of the judgment in her favor against Sweeney. If this be true, he has never paid the costs of his former proceeding to anybody, and the above-cited section of the Code imposes upon him the obligation of paying these

the costs and expenses which had accrued therein. To whom should he pay them? Obviously to the person to whom the court adjudicated he should pay them, viz. Mary Malloy. While it is true that this court, in *Stirk v. Banking Co.*, 79 Ga. 495, 5 S. E. 105, expressed the view that the provision of law as to the payment of costs before renewing an action was intended for the benefit of the officers of court, and not that of the defendant, it is to be remarked that the court recognized the right of a defendant, if he desires to set up failure to pay costs, to do so by plea in abatement at the first term. It appeared in that case that no such plea had been filed, and the complaint urged was "that the court below permitted the plaintiff to pay the costs in the former case while the latter case was pending." All the court really decided was that, as the defendant in the particular instance was not liable in any event to pay the costs, no substantial right of his was affected by the ruling complained of. In the case now before us, it is to be noted that the defendant pursued the proper course by filing a timely plea in abatement and insisting that the plaintiff had no right to maintain his action without paying to her the costs which, under the judgment rendered in his former suit, she was entitled to receive. As she was required, in effect, to advance money with which to pay these costs, it would be a hardship upon her, and a denial of a substantial right, to hold that she had no personal interest in the matter. Indeed, she is not standing upon a mere technicality, or asserting that it may not be overcome by a substantial compliance on the part of the plaintiff with the terms of our statute as to the payment of costs. He has made no offer whatever to comply with the mandate of the statute, and contends that he is under no duty to do so; whereas she insists to the contrary, and calls upon him for payment of the costs which it has been formally adjudged she has a right to demand. Under our system, judgments for costs are rendered against the losing, and in favor of the prevailing, party, primarily, for the use of the officers of court; they not being parties to the litigation. In other words, the courts adjudge that the party in whose favor the case is decided shall be the channel, as it were, through whom the officers shall receive their compensation. Certainly, then, when, as in the present case, the defendant is compelled to advance the costs, there is no reason in principle or in justice why she should not be reimbursed, as the court in passing its order contemplated, before the plaintiff is permitted to renew his suit. That the officers of court have thus received the money due to them will not have the effect of satisfying the judgment for costs rendered in the defendant's favor, with the terms of which judgment the plaintiff is bound to comply as a condition precedent to maintaining a second action. We therefore

the sum of \$300. If the \$32.05, the balance of the amount taxed as costs and receiver's fees, has never been paid, he must also pay this amount; but if, by an arrangement among the officers, the \$300 in the receiver's hands was accepted in full settlement of the whole amount of \$332.05 due them, payment of the balance of \$32.05 will not be requisite.

The only remaining question to be disposed of is whether or not the insolvency of Mary Malloy, had the plaintiff been allowed to prove the same, would alter the rule herein laid down. We think not. The statute makes no exception on the ground of insolvency, but imperatively declares that, before renewing a dismissed action, the plaintiff must pay the costs which accrued therein.

Judgment affirmed. All the justices concurring.

LOUISVILLE & W. R. CO. v. HALL.
(Supreme Court of Georgia. March 16, 1899.)

**RAILROADS—KILLING STOCK—EVIDENCE—
NEGLECTANCE.**

1. In the trial of a suit against a railroad company for the negligent killing of stock by the running of a train, evidence tending to establish that the stock were at large through no fault of the plaintiff was admissible.

2. When, in such a trial, the evidence was that the stock killed had been a part of a car load of stock which had been transported by the defendant company, and tended to establish that the stock being at large was due to the fact that the defendant had failed to provide a stock pen and other proper facilities for unloading stock, it was the duty of the court, without any request to that effect, to have instructed the jury that the escape of the mules under these circumstances would not, of itself, make the defendant liable in damages for the subsequent killing of the mules, and that the defendant would not be liable if, at the time of the killing, its agents and employes exercised all ordinary care and diligence to prevent the same. The rule here stated was essentially a part of the law of the case, an understanding of which by the jury was necessary to a fair and lawful trial.

(Syllabus by the Court.)

Error from superior court, Jefferson county; B. D. Evans, Judge pro hac.

Action by Will Hall against the Louisville & Wadley Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Phillips & Phillips, for plaintiff in error. Jas. K. Hines, for defendant in error.

COBB, J. Hall sued the Louisville & Wadley Railroad Company for damages, alleging, in substance, that he was the owner of four mules, which, without the fault of petitioner, strayed upon the track and grounds occupied by the defendant's line of railway, near its terminus at Louisville; that the defendant, by its agents and servants, so carelessly and negligently operated its train of cars that the same ran over and killed petitioner's mules, to

Louisville, reaching there about sunset on the day the mules were killed, but that, in consequence of the fact that the defendant had its turntable at Louisville torn up for repairs, and that it had none of the means and appliances by which stock could be quickly and safely unloaded at this place, it was after night and very dark before the mules could be unloaded. The four mules above mentioned escaped, and ran down the track of the defendant, which fact was known to the agents and servants of the defendant. As soon as the last of the mules were unloaded, the servants and agents in charge of the train started to run the train back to Wadley, and the train was negligently and without due care and caution run at a rapid rate of speed towards Wadley, when it was known to the employes in charge of the train that the mules were on the track. The servants and agents of the defendant failed to keep a watchout for the mules, and were negligent in not running slowly until the mules could be taken from the track, by reason of which negligence three of petitioner's mules were killed outright, and the fourth so wounded and damaged that it was rendered worthless. The defendant answered, denying the allegations of negligence charged against it.

At the trial the evidence for the plaintiff tended to establish the allegations in the petition in reference to the time at which the stock were unloaded and the cause of the delay. There was also testimony in his behalf as to the value of the mules. There was further testimony that, when the mules escaped from the car from which they were being unloaded, the plaintiff called to one of his assistants, who was in the car at the time, unloading the stock, that the mules had run down the railroad, and to go and get them, and that the conductor, engineer, and other train hands were standing there at the time, sufficiently near to have heard what was said easier than the person to whom the order was addressed, who heard what was said. The plaintiff testified that the agent of the railroad at Louisville told him next morning that he heard him give the order in question. There is an embankment which reaches from near the depot to about 300 yards below, and then the track runs in a cut from that point to near the stock gap where the mules were killed. There is a road which crosses the track near the end of the embankment, and near this point is where the mules first came upon the track. A few minutes after the plaintiff ordered his assistant to go after the mules, and after he had gone, the train left for Wadley, running at a rapid rate of speed. The defendant had no stock pen at Louisville. There was evidence for the defendant that the delay in allowing the stock to be unloaded was but a few minutes after the train reached Louisville, and that it was dark when the train reached that place. The employes of the

rainy, and there is a steep grade on the track leading down to the point where the mules were killed,—so steep, in fact, that the train was allowed to run down it of its own weight, as was always done at this grade. The speed at which the train was run on this occasion was about 15 miles per hour. The engine was in good condition, the headlight was in order, and the mules could not have been earlier discovered. The engineer was on the lookout for anything which might be upon the track. After the mules were discovered, the engineer blew for brakes, reversed his engine, sanded the tracks, and did everything in his power to stop the train. The jury returned a verdict for the plaintiff for \$400 and costs of suit. The defendant's motion for a new trial having been overruled, it excepted.

The original motion contained the general grounds. The first ground of the amended motion was as follows: "The court erred in allowing Will Hall to testify as follows: 'The car reached Louisville before sundown, but the turntable was out of repair, and they were working on it, and this caused delay in unloading the stock, and it was after night when we got them unloaded.'—said testimony being objected to by defendant's counsel on the ground that such delay, if any, and the fact that the turntable was out of repair, if true, was not the proximate cause of the damage claimed, and could not be used as any evidence of negligence, or want of ordinary care and diligence, when the damage alleged was the killing of certain mules on the line of the road at a different place from where the stock was unloaded." We do not think there was any error in admitting this testimony, nor do we think that the testimony was very material to the issues raised in the case. The way in which the mules escaped from the car having been described with great particularity in the petition, it was permissible to prove these allegations, simply to show how the mules escaped, and thus account for their being at large. This evidence, however, throws very little light on the controlling question to be decided in the case; that is, whether the mules, after they escaped and wandered upon the track, were killed by the negligence of the defendant. But it was admissible for the purpose of showing that the mules were at large through no fault of the plaintiff. *Railroad Co. v. Neely*, 56 Ga. 543.

2. The second ground of the amended motion was as follows: "The court erred in not giving the jury instruction to the effect that the negligence complained of on the part of the plaintiff would have to operate as the cause of the damage sustained by him, and only such negligence as was the natural and proximate cause of the damage could be invoked against the defendant." We think it was error in the court to fail to charge the principle referred to in this ground. This was

proper facilities for unloading stock, this had little bearing upon the real question at issue. It was proper to allege and prove the circumstances which brought about the escape of the mules, and thus account for their being at large, simply to explain how they came to be upon the track; but these circumstances, no matter how pregnant with negligence on the part of the defendant, would not authorize a recovery for the subsequent killing of the stock, if in that transaction the agents and employes of the defendant were free from fault. It was, therefore, all-important to the defendant that the jury should be made clearly to understand that the failure to supply proper facilities for unloading these mules at the depot would not render the defendant liable for killing them at the stock gap; and that if the engineer and other employes in charge of the train had exercised that degree of diligence that the law required, both in keeping a lookout for objects upon the track, and in endeavoring to save the stock from injury after their presence upon the track became known, there should be no recovery. The case of the plaintiff, at best, is weak and unsatisfactory. The testimony of the engineer and other persons on the train seems to establish that the killing of the mules was evitable; and the only circumstance in the case that could be relied upon at all to make the company liable was that the employee on the train knew, before they left the depot, that the mules had escaped, at some point on the track. The evidence on this point is directly conflicting, and the preponderance of the evidence was in favor of the view that the employes did not know the fact. In view of the character of the testimony on this important point, it is material to the defendant to show that they have been distinctly instructed in the petition of the defendant's motion to be terminated by what occurred. If the mules were killed, the plaintiff should recover, and it is not necessary to try the case again, when the question of the negligence of the plaintiff in not providing proper facilities for unloading the stock upon the track is the only question at issue. All the just

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in his character as administrator of a deceased person, a defendant to the action, and defends in the right of his intestate's estate, the estate is concluded by the judgment rendered in that action.

(Syllabus by the Court.)

Error from superior court, Jefferson county: R. L. Gamble, Judge.

Suit by T. B. Hicks, administrator, against James Braswell. Judgment for plaintiff. Defendant brings error. Reversed.

V. B. Robinson, Cain & Polhill, and Jas. K. Hines, for plaintiff in error. Evans & Evans, J. B. Hicks, and Hudson & Wright, for defendant in error.

SIMMONS, C. J. It appears from the record that T. A. Parsons, Sr., died. A woman named Jane Ennis, now Braswell, opened his trunk, and took therefrom money to the amount of \$1,200, claiming it as her own. She afterwards deposited it with Hicks, the present defendant in error. Shortly thereafter Hicks was made administrator of Parsons. Mrs. Braswell demanded of him the money deposited, and he refused to surrender it, whereupon she brought her action of trover against Hicks individually to recover the money. Hicks pleaded, in substance, that, after he had received the money from her, he had ascertained that it was not her money, but that it belonged to the estate of Parsons, his intestate; that he had been appointed administrator of that estate; and that, as such administrator, he claimed the money. He attached copy of his letters of administration. Upon the trial of that case, the jury returned a verdict in favor of the plaintiff against Hicks. Judgment was rendered, and an execution, issued thereon, was levied upon certain lands of Hicks. He then filed an equitable petition, wherein he alleged the foregoing facts, and further alleged the insolvency of Mrs. Braswell. He prayed an injunction restraining the sale of the land, and that the money might be decreed to be the property of the estate of Parsons. To this petition Mrs. Braswell filed a plea of res adjudicata, attaching thereto the declaration in the trover suit, the plea of Hicks, and the judgment. Hicks demurred to this plea, upon the ground that the suits were not between the same parties; that the first suit was between defendant and Hicks individually, and the second between her and Hicks as administrator. The court sustained this demurrer, and struck the plea. The defendant excepted to this ruling, and assigns error thereon.

It is a general rule, well recognized by all the courts, that a judgment against a person as an individual will not bind him as administrator. See discussion of this subject in *Hukm Chand*, Res. Adj. p. 158 et seq., particularly 81; *Bigelow*, Estop. p. 130; 1 *Herm.*

a person sued as an individual voluntarily pleads in that suit his rights in a representative capacity, as administrator, executor, guardian, or trustee, and the issue thus raised by his plea is passed upon by the court, a judgment in that suit binds him in both capacities, as an individual and as a representative. It is not necessary, in order that the judgment should be so binding, that an order should be taken making him a party in his representative capacity. The fact that he pleads in that capacity, and that the issue so raised by him is passed upon by the court, binds him, without a formal order making him a party in his representative capacity. As was said by Searles, C. J., in the case of *Association v. Chalmers*, 75 Cal. 332, 17 Pac. 220, quoted with approval by *Hukm Chand*, Res. Adj. p. 182: "It may well be that a party who voluntarily files an answer in a cause, without an order of court making him a party defendant, and who goes to trial upon the issues made by his answer to the complaint, will be concluded by the judgment rendered on the trial of such issues, and estopped from denying that he was a party to the action." *Hukm Chand* adds: "On the same principle, a decree in a suit brought by an executor in his own right, but to which he was a necessary party as executor, and in which the rights of his testator are adjudicated, is conclusive between the administrator de bonis non and the other parties to it, and cannot be re-examined in a subsequent suit between them."

Hicks filed his plea, both as an individual and as administrator, and, as administrator, claimed the property. The issue was tried by the court, and adjudicated against him: and he is, in both capacities, bound by the judgment. If he had not filed such a plea, and the case had been tried between him individually and the plaintiff, the judgment would not have been binding upon him as administrator. But by his plea he practically became a litigant in his representative capacity, and was in that capacity concluded by the judgment rendered in the case. In the case of *Jenkins v. Nolan*, 79 Ga. 295, 5 S. E. 34, it was held: "To a bill by an executor for direction and for relief, in which he is personally interested as creditor and as surety of his testator, he is a party in his individual capacity also, and as such is bound by the decree." See, also, *Fouché v. Harrison*, 78 Ga. 359, 410, 3 S. E. 330. We think, therefore, that, under the facts set up in the defendant's plea, Hicks was estopped to deny the binding force and effect of the judgment rendered against him in the trover suit upon his plea in that case, and the court erred in sustaining his demurrer to the plea of Mrs. Braswell. The court having ruled erroneously upon the plea, the trial had thereafter was nugatory, and it is unnecessary now to

SOUTH CAROLINA & G. R. CO. v. THURMAN.

(Supreme Court of Georgia. March 16, 1899.)

INJURY TO EMPLOYE—LEX LOCI—DEFECTIVE APPLIANCES—KNOWLEDGE OF EMPLOYE—EVIDENCE.

1. When an action by an employé against a railroad company to recover damages for a personal injury inflicted by the company, through its agents, while he was in its employ, is tried in a different state from that in which the contract of employment was made and in which the injury was received, the right of the plaintiff to recover, and the rule as to what conduct on his part shall or shall not constitute a defense to the action are governed by the *lex loci*, and not by the *lex fori*. (a) Under the constitution of the state of South Carolina, "knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." Therefore, on the trial of a suit in the courts of this state, instituted by a coupler or brakeman against a railroad company, to recover damages for an injury sustained by him while in its service in the state of South Carolina, alleged to have been occasioned because of its negligence in furnishing him with unsafe and defective machinery, it was not error for the court to give in charge to the jury the above-quoted portion of the fundamental law of South Carolina on the subject.

2. The charge of the court fully and fairly covered the issues in the case, and, if there was any error at all in omitting to charge any of the requests presented by counsel for the defendant, such error was immaterial, and harmless. The verdict was not without evidence to support it, and accordingly this court will not interfere with the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Suit by John J. Thurman against the South Carolina & Georgia Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Jos. B. & Bryan Cumming, for plaintiff in error. Boykin Wright, for defendant in error.

LEWIS, J. Suit was brought by John J. Thurman against the South Carolina & Georgia Railroad Company, a corporation chartered both under the laws of South Carolina and of this state, for a personal injury he received while in its service in the capacity of brakeman and car coupler in the company's yard at Hamburg, S. C. The action was instituted in the superior court of Richmond county, where the company had its principal office in this state. It appears that the petitioner received personal injuries while undertaking to couple an engine to a caboose, the particular work to which he had been

ground or negligence relied on for a recovery was the failure of the company to furnish a proper engine for the purposes of this work; it being alleged that the particular engine in question was unfit and not properly equipped for switching and drilling cars in the yard, in that it had no drawbar attached to the bumper of the tender, no step on the rear, or rod for holding by, and too short a bumper, thus causing the tender or rear of the engine, when it came in contact with the caboose, to leave no sufficient space to accommodate the human frame, or to prevent the body from being mashed and crushed between the tender and the caboose. There was testimony tending to show that, while this engine might have been properly used upon the main line of the railroad, it was not, on account of its short bumper, adapted to the service of switching and drilling cars and making up trains in the yard; that the plaintiff was engaged in this work for the first time with this particular engine, at night; had succeeded in coupling one car with it before he was injured, but, on account of its being night, and the celerity with which he was required to discharge his duties, he did not observe its condition until after he was hurt, and did not know it was unsafe or defective. On the other hand, there was testimony going to sustain the company's contention that such an engine was often used for this particular purpose, and could have been used, in the exercise of due caution, with perfect safety; and that the plaintiff did know the character of the engine with which he was operating before he received his injury.

Error is assigned in the motion for a new trial upon the following charge of the court: "Under the law of South Carolina, knowledge on the part of the plaintiff that the machinery was defective, or not suited for the purposes intended, will not be a bar to recovery by plaintiff, if the injuries received were the result of the negligence of the defendant." There was no dispute as to what was the law of South Carolina bearing upon this subject. Attached as an exhibit to the plaintiff's petition was a copy of section 15 of article 9 of the constitution of that state, which contains the provision quoted in the first headnote. There can be no question as to the soundness of the principle announced in that headnote, regarded as a general rule of law. It is true that the courts of one state enforce the laws of another as a matter of comity merely, and that the exercise of this comity may be limited by the policy of any particular state where the laws of a foreign jurisdiction are sought to be enforced; and in this connection it is suggested by counsel for the company that it is contrary to the declared policy of Georgia that a railroad employé should recover for injuries received in the use by him of defective machinery, when he knew of its dan-

the South Carolina rule which is so repugnant to any declared policy of this state as would justify its courts in ignoring the constitutional provision of our sister state bearing upon the subject under discussion. This particular point was considered by the supreme court of the United States in the case of Railroad Co. v. Babcock, 154 U. S. 190, 198, 14 Sup. Ct. 978. It appeared in that case that suit was instituted in the state of Minnesota against a railroad company for a personal injury which occurred in the state of Montana, and the law of the latter state was applied to the case for the reason that, while the action was brought in a Minnesota court, the contract of employment between the company and its servant was made in Montana, and he was injured in that state. In the opinion delivered by Mr. Justice White he cites approvingly the decision in the case of Herrick v. Railway Co., 31 Minn. 11, 16 N. W. 413, wherein it was held that: "To justify a court in refusing to enforce a right of action which accrued under the laws of another state because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interest of our own citizens." It is insisted, however, that, while the law of South Carolina was correctly stated in the charge complained of, the provision in question merely furnishes a rule of evidence; that the rules of evidence applicable to the trial of a case are those of the forum in which the case is tried; and, accordingly, the Georgia law of evidence on this point should have controlled, the South Carolina rule being contrary thereto. It is true that under the laws of this state, when a servant uses a dangerous machine knowing it to be dangerous, he cannot recover for an injury caused by its defective condition. It is contended that this principle in our law raises a presumption, more or less conclusive, of negligence. We do not think, however, this principle has any reference to rules of evidence at all. It is simply declaratory of the doctrine, which has, in this state, been accepted as sound, that the use by an employé of dangerous machinery, with full knowledge of its condition, constitutes such negligence as will defeat a recovery against his master. The law of South Carolina does not undertake to declare that such conduct on the part of a servant will not amount to presumptive evidence of negligence, but provides, in effect, that, notwithstanding such negligence on the part of an employé, he shall nevertheless be entitled to recover, provided his injury was directly traceable to neglect on the master's part to properly guard his safety. In other words, the constitutional provision of South Carolina relates, not to a remedy, nor to any particular rule of evidence governing parties

common law, or under the laws of other states, constitute a complete defense to an action by an employé, shall not relieve a master from liability in the state of South Carolina. It gives to the employé a cause of action which he could not otherwise assert. A declaration filed in the courts of that state, though it might admit that the plaintiff used dangerous machinery with full knowledge of its condition, would not be demurrable on this account; whereas such a petition filed in the courts of this state would be clearly demurrable if alleging a cause of action arising in Georgia, for the simple reason that, tested by our laws, it would show upon its face that the plaintiff had no legal cause of complaint against the defendant. In the case of Railroad Co. v. Mitchell, 95 Ga. 79, 22 S. E. 124, it appeared that the plaintiff, while an employé of a railroad company, was injured by a locomotive of the defendant in the state of Alabama, and that under the laws of that state the company was liable to answer in damages for personal injuries received by an employé in the service or business of the employer, when such injuries were caused "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business" of the employer. The testimony in that case tended to show that the defendant, at the place where the plaintiff was injured, had allowed its track to become so full of coal and coke as to render it obviously "dangerous for men to switch around at night," and that the injuries complained of were attributable to these obstructions on the track. The law of Alabama was applied as the rule governing the rights of the parties in that case, and it was accordingly held that the verdict in the plaintiff's favor was not unwarranted. Our conclusion therefore is that in the present case the South Carolina rule was properly applied. It was, of course, notwithstanding the constitutional provision of that state that knowledge by an employé of the dangerous condition of machinery will not defeat a recovery by him for injuries received by reason of its use, proper for the jury to consider the fact (if proven) that the plaintiff was aware of the defective condition of the engine causing his injuries, with a view to determining whether or not he exercised due care under the peculiar circumstances that surrounded him. This principle was, however, fully covered by the charge of the court, as will appear from the following extract therefrom: "It was the plaintiff's duty to know whether there was anything in the construction of the tender and cab requiring more care than was required in an ordinary case of coupling. If he had a reasonable opportunity to discover the fact, provided these things were open and obvious, and not hidden. If he had such knowledge, or ought to have had it, as just stated, then you will consider

existence of such knowledge in ascertaining whether he exercised the care which an ordinary prudent man would exercise under the circumstances. If he did not, he cannot over."

2. In several of the grounds of the motion a new trial complaint is made of the refusal of the court to charge certain written questions, and exception is also taken to various portions of the charge as given relating to matters not specifically dealt with above. We do not think there is sufficient merit in any of these exceptions, however, to demand special attention or discussion in this opinion. After fully considering the same in connection with the entire charge, we have concluded that all of them are well founded, as the instructions given to the jury fully, fairly, and comprehensively covered all the issues involved in the trial. It follows that, the verdict not being without evidence to support it, there was no abuse of discretion by the judge in refusing to grant a new trial. Judgment affirmed.

MULHERIN et al. v. RICE et al.

Supreme Court of Georgia. March 16, 1899.)
**RIGHTS OF SURVIVING PARTNERS—FIRM ASSETS—
 MORTGAGE FORECLOSURE.**

When, after the dissolution of a partnership by the death of one of its members, all its assets in action, including a promissory note secured by a mortgage on land, were, by agreement, left for collection with the surviving partners, and "the estate of" the deceased partner, and subsequently the interest of his estate in these choses in action was set apart to certain of his heirs as a portion of their distributive shares in that estate, it was not incumbent on the surviving partners, in order that these heirs might receive in full their proportion of the proceeds of such note, to make the mortgaged property, though actually worth more than the amount due upon the note, bring that amount at a judicial sale under an execution levied upon the foreclosure of a junior mortgage held by another creditor of the mortgagor. It is more especially so when, upon being requested by these heirs so to do, the surviving partners distinctly declared, before the sale took place, that if they bid thereat they would act for and represent themselves alone. (Syllabus by the Court.)

Error from city court of Richmond; W. F. Rice, Judge.

Appeal by William Mulherin Sons & Co. against Rice and O'Connor. From an order sustaining demurrer to plaintiffs' declaration, bringing error. Affirmed.

W. W. Capers, for plaintiffs in error. J. R. Capers, for defendants in error.

MR. JUSTICE UMPKIN, P. J. The error alleged in the present bill of exceptions is the sustaining of demurrer to the plaintiffs' petition. They are John P. Mulherin, Charles P. Mulherin, Mrs. M. A. Mulherin, but, for some reason not apparent, they sued as a partnership, under the name and style of "Wm. Mulherin & Co." The allegations set forth in their

petition were, in substance, as follows: The partnership of Mulherin, Rice & Co., composed of William Mulherin, Patrick H. Rice, and Jeremiah J. O'Connor, was dissolved by the death of its senior partner. All the notes and accounts belonging to this partnership were, by agreement, left "with the surviving partners and the estate of William Mulherin to collect * * * as rapidly as possible." Subsequently, "the estate of the late William Mulherin was divided among his heirs, and the interest of the said estate in the notes and accounts of the late firm of Mulherin, Rice & Co. was set aside to your petitioners as a part of their distributive share of said estate." Among the choses in action held by this firm was a note of James Cothran, Jr., for \$1,000, besides interest, secured by a first mortgage on two described tracts of land in South Carolina. The mortgaged premises were worth the amount due upon this note. These tracts of land were brought to sale under the foreclosure of a second mortgage held by one McCormick, which sale was conducted by the sheriff of Abbeville county, S. C. Before the same took place, the plaintiffs notified the defendants to protect the interests of the former by bidding at the contemplated sale, and making the property bring "the full face value of their mortgage." The defendants, upon receiving this notice, informed the plaintiffs that they would not comply with the request thus made, but that if they bid at the sale they would do so "as individuals and in their own interest." They also informed the plaintiffs that, if the latter desired to make the property bring its full value, they had better attend the sale and represent themselves. The sale took place, and the defendants purchased the property "for the sum of \$700, in fraud of the rights of these plaintiffs, and in violation of their trust as trustees of the interest of their late partners in the firm assets." James Cothran, Jr., the mortgagor, was insolvent, "and the balance due on said note secured as aforesaid is a dead loss to your petitioners." Accordingly, "through the breach of duty of these defendants, in the fraudulent purchase for their own use of this valuable asset held by them in trust in the manner aforesaid, these plaintiffs have been damaged in the sum of \$700."

In our opinion, the court was right in sustaining the demurrer. In the first place, it would be a great strain to hold that, under the facts alleged, any trust relation whatever existed between the defendants and the plaintiffs. They sued as a partnership, but treating the members composing the plaintiffs' firm as the heirs at law of William Mulherin, deceased, and, dealing with their action as if brought in their character as such heirs, it would seem that the duty of making the South Carolina property bring its full value devolved as much upon them as upon the surviving partners of the firm of Mulherin, Rice & Co. The petition alleges that the choses in action belonging to that firm were left with

reason is alleged why it was not incumbent upon them to look after that interest themselves. Certainly, Rice and O'Connor were under no more obligation to advance money for the purpose of buying in the property at the sheriff's sale than were the plaintiffs. If, therefore, the property had been purchased by Rice and O'Connor for the benefit of all concerned, and had brought the full amount due upon the note,—say, for example, \$1,400,—they, according to the plaintiffs' theory, would have been under a duty of paying the purchase price, keeping the land, and settling with the plaintiffs with money; that is to say, they would have had to advance the cash necessary to satisfy the interest of the plaintiffs in the note, and then look for reimbursement to a resale of the property. Why this burden should fall entirely upon Rice and O'Connor, and the plaintiffs be wholly relieved therefrom, we are unable to perceive.

But even if the facts alleged can be regarded as establishing a trust relation of any kind between the plaintiffs and the defendants, we are still of the opinion that the latter were not liable as alleged. It will be observed that the sale was made by the sheriff of Abbeville county, S. C. It was not a sale by Rice and O'Connor, nor did they have anything to do with bringing it about. In *Allen v. Gillette*, 127 U. S. 596, 8 Sup. Ct. 1384, Mr. Justice Lamar said: "The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control, is upheld by numerous decisions of this court and of other courts of this country,"—citing *Prevost v. Gratz*, 1 Pet. C. C. 864, 378, Fed. Cas. No. 11,406; *Oil Co. v. Marbury*, 91 U. S. 587; *Chorpenning's Appeal*, 32 Pa. St. 315; and *Fisk v. Sarber*, 6 Watts & S. 18. In the case last cited, it was held by the supreme court of Pennsylvania that the assignee of an insolvent debtor was "not incapable, by reason of his fiduciary character, of becoming the purchaser of the debtor's real estate when sold by the sheriff upon a mortgage which incumbered it before the time of the assignment." In delivering the opinion of the court, Kennedy, J. (pages 22, 23), quotes the following from the opinion of Mr. Justice Washington in *Prevost v. Gratz*, supra: "I know of no principle of equity which will invalidate the title of a trustee to land which the law has taken out of his hands and which he purchased from one appointed by the same authority to sell it. This is precisely like the case of an executor who purchases at a sheriff's sale the personal property of his testator, seized and sold under execution. The reasons which forbid a trustee from purchasing the trust property, where he himself is the seller, do not apply to such a case." It would not be

lection" of the note,—and, certainly, their undertaking went no further,—it could hardly be expected of them that they should buy in the property given as security therefor, in the event the same should be levied on and sold to satisfy other claims against the owner held by third persons. But even if the plaintiffs had at any time the right to assume that Rice and O'Connor would represent them in doing all that might be necessary to realize upon the note and security in question, and accordingly to expect that in bidding at a sale of the mortgaged property the defendants would be acting in a fiduciary character, surely the plaintiffs were not justified in relying upon any such assumption, after direct and positive notice to them by Rice and O'Connor that, if they bid at the particular sale under consideration, they would do so in their own behalf alone. This principle was recognized in *Fisk v. Sarber*, cited above, wherein it was said: "There are cases in which the party acting in a fiduciary character may, by his own act, divest or discharge himself of the power or trust under which he has acted, at pleasure; but then he will not be permitted to act for his own benefit, in opposition to the interests of those for whom he had previously undertaken to act in the matter, without making known to them the fact of his having relinquished his trust or authority to act for them." See, also, *Bartholemew v. Leech*, 7 Watts, 472. One occupying a fiduciary relation, when he is not bound, either by law or by contract, to represent the interest of another as to a particular matter, may, upon notice that he intends to act for himself alone in regard thereto, completely absolve himself from the obligation of representing such other person. Thus, in *Baker v. Whiting*, 3 Sumn. 476, Fed. Cas. No. 787, it was held: "A purchase by an agent will be deemed, by a court of equity, a purchase for his principals, unless the agent has openly and notoriously, and with full notice to his principals, discharged himself from his agency."

It will be observed that, while the plaintiffs' petition avers that the purchase by Rice and O'Connor was fraudulent, it clearly appears therefrom that the only fraud relied on or intended to be alleged as having been perpetrated by them was in buying the mortgaged premises exclusively for their own benefit, and not for the joint protection of themselves and the plaintiffs. If what we have above laid down is sound, it necessarily follows that the conduct of the defendants in this respect was not in any sense fraudulent. The petition does not allege that the sale was not fairly conducted, or that Rice and O'Connor did anything whatever to make the property bring less than its value. Presumptively, then, their bid was the highest price the land could be sold for; and, in order to carry out the plain-

Is' idea of what the duty of Rice and O'Connor was in the premises, they would have been impelled, after securing the land by a bid of \$100, to raise their own bid, and make the land bring about twice as much. Certainly, the law does not require any party to be guilty of conduct so absurd. Judgment affirmed. All the justices concurring.

DAVIDSON v. STORY et al.

STORY et al. v. DAVIDSON.

Supreme Court of Georgia. March 16, 1899.)

EXECUTORS—ACCOUNTING—PROFESSIONAL SERVICES—FORFEITURE OF COMMISSIONS—COSTS IN EQUITY—APPEAL—REVIEW—VERDICT OF JURY—COSTS ON APPEAL.

1. The evidence warranted the auditor in finding that the estate of the defendant's testator was not entitled to any credit upon the claim for professional services set up in defense of the plaintiffs' action; and there was no error in charging against such estate the amount alleged to have been retained for attorneys' fees, with interest from the time such amount was appropriated by the deceased. (a) Can an executor, who is an attorney at law, charge the estate which he represents with the value of professional services rendered by him to the estate, unless the same be allowed by the ordinance as "extra compensation" for "extraordinary services?"

2. Even if, in any case where legatees under will resort to a court of equity for the settlement of an estate, such court can relieve an executor from a forfeiture of commissions owing out of a failure to make returns, there was no error in the present case in refusing to exercise this power.

3. It being within "the province of the judge to determine upon whom the costs shall fall" in an equity case, the exercise of this power will not be controlled unless it is manifest that has been abused. There was no error in the present case in requiring each of the parties to pay one-half of the auditor's fee, nor in requiring the defendant to pay all other costs.

4. There was sufficient evidence before the auditor to authorize a finding in favor of the plaintiffs on all of the items which he allowed them. While in some instances the evidence is conflicting, and in others not very strong, the court will not control the discretion of the trial judge in refusing to allow any of the exceptions of fact. There was no ruling by the judge on any of the exceptions of law which would require a reversal of the judgment.

5. When all of the exceptions of law and fact are dismissed, a decree should have been rendered without a verdict of a jury; but the rendition of the verdict, though improper, will not require a reversal of the judgment. The judge ended that the verdict and decree should be entered in accordance with the auditor's report; and, while it appears from the record that the decree does not exactly conform thereto, the judgment is affirmed, with direction that the verdict and decree be amended so as to conform to the auditor's report. As this could have been done in the superior court by a simple motion, and it was not necessary to bring the case to this court for this purpose, the costs bringing the main bill of exceptions here will be taxed against the defendants in error.

Syllabus by the Court.)

Error from superior court, Richmond, county. E. H. Callaway, Judge.

Action by Elizabeth Story and M. E. DeLeon against A. H. Davidson, executor.

From the judgment both parties bring error. Judgment on main bill of exceptions affirmed, with directions, and cross bill dismissed.

J. S. & W. T. Davidson and W. K. Miller, for plaintiff in error. H. O. Roney and Leonard Phinizy, for defendants in error.

CORB, J. Elizabeth Story and M. E. DeLeon brought suit against the executor of Davidson, alleging that Davidson was the executor of the will of Albert H. Story, and that they were among the legatees under the will, and, having purchased the interests of all of the other legatees, were entitled to the entire estate of the testator. The petition prayed for an accounting as to certain specific items with which it was claimed the estate of Davidson was chargeable, and also "an accounting by the defendant for all sums collected and paid out for the estate of Albert H. Story" by Davidson as his executor. Upon the application of the plaintiffs, an auditor was appointed, who, having heard the case, filed his report, finding in favor of the plaintiffs as to certain items, and against them as to others. The report concluded with the following summary, showing what the total amount of the recovery of the plaintiffs should be:

Executor's commissions improperly retained	\$ 172 31
Lost to estate in interest on Cary note	294 00
Rents collected and unaccounted for	86 25
	<hr/>
	\$ 502 56
Deduct amount due executor as shown above	203 16
	<hr/>
Balance in plaintiffs' favor	\$ 299 40
7% interest thereon from Dec. 2, '95, to date	47 42
	<hr/>
	\$ 346 82
Attorney's fees improperly retained ..	\$ 750 00
7% interest thereon from June 16, '91, to date	853 01
	<hr/>
	\$1,103 01

Total amount due this date. \$1,449 83
Interest will run from this date (March 7, 1893) on (\$299.40 and \$750) \$1,049.40 at the rate of seven per cent., to be added to the \$1,449.83.

Exceptions, both of law and fact, were filed by the plaintiffs and by the defendant. The judge dismissed all of the exceptions, and passed an order confirming the auditor's report, and directing a verdict and decree to be taken in conformity therewith, and also directing that the fee allowed the auditor for his services be divided equally between the plaintiffs and defendant. The defendant filed a bill of exceptions complaining of the rulings of the judge which were adverse to him, and a cross bill of exceptions complaining of the refusal of the judge to sustain their exceptions was filed by the plaintiffs.

1. Complaint is made that the estate of Davidson was improperly charged with the item of \$750, with interest from June 16, 1891; it being contended that Davidson, as executor of

estate after his death. Davidson had never made any returns to the ordinary, and therefore this amount had never been allowed by the ordinary as a proper charge against the estate. It would seem that the only way that an executor who is an attorney at law can be allowed compensation for professional services rendered the estate of which he is the executor is by an application to the ordinary for extra compensation. Section 3488 of the Civil Code provides for compensation for expenses and loss of time when the executor is required to go out of the county to attend to business of the estate, and section 3489 declares that, in other cases of extraordinary services, extra compensation may be allowed by the ordinary. But in no case is the allowance of extra compensation by the ordinary conclusive upon the parties in interest. Section 3484 prescribes the general rule in regard to compensation of an administrator or an executor, which is $2\frac{1}{2}$ per cent. on all sums received, and a like commission on all sums paid out. It would seem that any compensation other than this must be allowed by the ordinary. See, in this connection, *Bird v. Mitchell* (Ga.) 28 S. E. 674. It is not necessary, however, in the present case, to decide whether or not an executor could take compensation for services of this character without having made a return to the ordinary and having the claim allowed by him, as the evidence before the auditor warranted him in finding that the estate of Davidson was not entitled to any credit for professional services to Story while in life, or to his estate. The proof as to the character and the value of these alleged services was too vague and indefinite to justify the auditor in allowing any part of the \$750 item. He refused, for this reason, to do so. The judge has not seen proper to interfere in the matter, and neither do we.

Further complaint is made, in regard to this item, that no interest should have been charged until a demand was made upon the executor of Davidson. It was contended that this case fell within the rule laid down in section 2881 of the Civil Code, which declares that "where money can be recovered because of a mistake, or other like reasons, no interest runs until after demand and refusal to refund." There is nothing in this case which would make the retention by Davidson of the attorney's fees such a mistake as to make the section applicable; nor does any other reason appear which would relieve, from the penalty of paying interest, one who, without authority of law, diverts from the proper channel funds in his hands. That this diversion was made in good faith, and with honest intentions, is not sufficient to bring the case within the rule laid down in the section quoted. If Davidson's estate is liable for the retention of this amount, it is certainly liable for interest from

2. The auditor refused to allow the estate of Davidson credit for commissions, and this is the foundation of one of the assignments of error. The failure of the executor to make returns forfeited his commissions. Civ. Code, § 3491. It is contended, however, that under the circumstances of this case the court should have relieved against this forfeiture. Even if, in any case where legatees resort to a court of equity for a settlement of an estate, the court can relieve against a forfeiture of commissions for failure to make returns, we cannot say that there was any error in refusing to do so in the present case. There was evidence before the auditor tending to show that Davidson had been requested to make returns by the parties at interest in the estate, and that he had been requested by the ordinary to do so; and, being himself a lawyer, the consequences of such failure were, of course, well known to him. It was contended, however, that there was an agreement between the legatees of Story and Davidson that the estate should be managed without regard to the strict rules of law, but according to the plan which is set up in the answer of the defendant. The evidence before the auditor was hardly sufficient to establish this contention, and his finding was that the same was not established.

3. It is alleged that the court erred in compelling the defendant to pay all the court costs, and one-half of the fee allowed to the auditor, and in not taxing the whole of that fee against the plaintiffs. This being a proceeding in equity, the costs could be taxed by the judge in such way as seemed to him proper under the circumstances of the case. We cannot say there was any abuse of discretion in requiring the defendant to pay one-half of auditor's fee and all other costs. Civ. Code, § 4850.

4. There was sufficient evidence before the auditor to authorize a finding in favor of the plaintiffs on all of the items which he has allowed. It is true, in some cases the evidence was conflicting, and in others not very strong. We are not, however, prepared to say that the finding on any item was entirely unsupported by evidence, and therefore the discretion of the judge in refusing to allow any of the exceptions of fact will not be controlled. The exceptions of law which are not specifically dealt with above were either of such a character as not to require more elaborate treatment, or were not, in the language of Judge Callaway, "set out with sufficient clearness and distinctness to be considered."

5. This being an equity case, and all exceptions of law and fact having been dismissed, it was not the proper practice to have directed a verdict on the auditor's report, but a decree without a verdict should have been entered thereon. *Hearn v. Laird* (Ga.) 29 S. E. 973. So doing, however, will not be reason for revers-

tween the verdict and decree and the auditor's report, but it is not necessary to reverse the judgment in order to remedy this. It being clear from the record that the judge intended that the verdict and decree should follow the auditor's report, and the bill of exceptions showing that his attention was not called to this variance when the decree was signed, and was raised for the first time when the bill of exceptions was tendered to him, direction is given that the verdict and decree be amended so as to conform to the report of the auditor. As this could have been done by simple motion in the superior court, and the correction of the discrepancy did not necessitate a resort to this court, the costs of bringing the main bill of exceptions here will not be taxed against the defendant in error. Judgment on main bill of exceptions affirmed, with directions. Cross bill dismissed. All the justices concurring.

ULLMER v. FITZGERALD.

(Supreme Court of Georgia. March 16, 1899.)

GUARDIAN AND WARD—CONTRACTS BETWEEN.

1. A minor who, by permission of his guardian, engages in any business as an adult, is bound for all contracts connected with such business; and, if the guardian is subsequently discharged from his trust, and then, during the minority of his former ward, a contract is entered into between them touching such business of the minor, the relation previously existing between the parties will not invalidate the contract.

2. The testimony in this case was amply sufficient to sustain the verdict; and, no error of law being committed, the judgment overruling the motion for a new trial is affirmed.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by T. D. Fitzgerald against Benj. F. Ullmer. Judgment for plaintiff. Defendant brings error. Affirmed.

W. H. Boyd and W. F. Slater, for plaintiff in error. Geo. W. Owens, for defendant in error.

LEWIS, J. An action was brought by Fitzgerald against Ullmer for the foreclosure of a mortgage given to secure a note dated the 18th of June, 1896, which note was renewed by a subsequent one executed on September 21st of the same year. To this action the defendant pleaded that at the time the note was given by him to Fitzgerald, he was under the age of 21 years, and therefore, under the laws of this state, the contract as represented by the note and mortgage given to secure it, was not binding upon him, the same not having been given for necessities. It appears from the record that the plaintiff had been the guardian of Ullmer, and that about Feb-

evidence as to whether or not the ward was of age at the time of this discharge, but the weight of the evidence shows that he did not really arrive at majority until the month of January, 1897. The plaintiff contended that when he applied for his discharge he relied upon the statement of the ward that he had reached the age of 21. It was undisputed, however, that the guardian had previously given the ward permission to enter into business on his own account, and that he was conducting a business of his own at the time his guardian was discharged. It further appears from the testimony that the latter, out of his individual money, advanced to his ward the necessary funds to buy the property to be used in the ward's business; and while the guardian, under the agreement with his ward, was to have an interest in this business, yet the ward had exclusive control and management of it, and realized and used all the profits therefrom. A settlement was finally had between the guardian and his ward, and the contract sued on in this case was duly executed after the guardian's discharge, the consideration of the contract being the money advanced by him, and his interest in the business, amounting to \$100. The ward testified that he had received and kept the property bought with the guardian's money, and it is fairly inferable from his testimony that he continued to enjoy the use of such property, or its proceeds, after his arrival at majority. There was no pretense, either in the pleadings or in the testimony, that the guardian had taken any undue advantage of the ward in any of the business transactions above referred to, nor that the ward did not receive, and was fully enjoying, the benefit of the money advanced him by the plaintiff.

Section 3650 of the Civil Code declares: "If an infant, by permission of his parent or guardian, or by permission of law, practices any profession or trade, or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade or business." In the motion for a new trial, error is assigned because the court gave this section in charge to the jury. In the same connection the court further charged that the fact that the defendant "may for a part of the time have been connected in business with an individual who was also his guardian, does not necessarily void the contract, but the fact of the existence of such a relationship should make [the jury] scrutinize very carefully any contract made between the guardian and his ward to see whether or not any fraud was practiced on the ward, and that no advantage was taken"; that any such advantage or undue influence would justify the jury in setting the contract aside, but, if they should believe "there was no advantage taken, no undue influence used, and it was a perfectly fair and honest contract in the

that, on account of the relationship existing between the plaintiff and the defendant, as a matter of public policy the law would not enforce a contract made during the existence of such relationship, it matters not under what circumstances or for what purpose made. Even if this proposition is sound as a matter of abstract law, it has no application to the facts of this case, for, when the contract sued on by the plaintiff was entered into, the relation of guardian and ward did not exist between the parties. Under the section of the Code above cited, a minor is bound by contracts connected with the business which he is permitted to follow by his parent or guardian. Therefore, while the relationship of guardian and ward existed between these parties, Ullmer was properly permitted by his guardian to enter upon a legitimate business enterprise, and his contracts in connection with this particular business became as binding upon him as though he was of full age. Even if the plaintiff could have made no binding contract while Ullmer continued to be his ward, he certainly had as much right as any other person to contract with his former ward after the relation between them had been dissolved. The mere fact that the discharge of the plaintiff from the guardianship was had during the minority of his ward can make no difference. This discharge, whether properly or improperly granted, effectually severed the relation which had previously existed between the parties, and the only way in which it could have been restored would have been by a regular proceeding to set aside the judgment and reinstate the guardian in his trust. Accordingly, if there was any error in the charge complained of, it certainly did not operate to the injury of the defendant, but rather tended to prejudice the rights of the plaintiff in giving to Ullmer the benefit of a theory not supported by the facts in the case. Furthermore, we think there is sufficient evidence to authorize the conclusion that there was a ratification of the contract by Ullmer after he arrived at majority. While section 3648 of our Civil Code declares that "the contracts of an infant under twenty-one years of age are void, except for necessities," that section further provides that, if "the infant receives property, or other valuable consideration, and after arrival at age retains possession of such property, or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him." See, also, *Howard v. Tucker*, 65 Ga. 323, and *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. 312. The verdict of the jury, if not demanded by the evidence, was certainly authorized thereby, and, no error of law being committed of which the plaintiff in error can justly complain, the judgment of the court below overruling his motion for a new trial is affirmed. All the justices concurring:

APPEAL—REVIEW—GRANT OF CERTIORARI.

1. In determining whether or not a superior court erred in dealing with a certiorari, this court must ascertain the facts by looking to the statements made in the answer to the writ of certiorari, and, consequently, allegations in a petition for certiorari cannot, except as verified by the answer, be considered.

2. Applying this obviously correct rule to the present case, it manifestly appears that the verdict rendered in the justice's court, in the plaintiff's favor, was right, and the only result which could have been legally arrived at under the pleadings and the evidence. This being so, the court erred in sustaining the certiorari sued out by the defendants.

(Syllabus by the Court.)

Error from superior court, Chatham county, R. Falligant, Judge.

Action by J. W. Heldt against Canuet & Co. Judgment for plaintiff. From an order granting certiorari, defendants bring error. Reversed.

J. G. & D. H. Clark, for plaintiffs in error.
Alexander & Hitch, for defendant in error.

PER CURIAM. Judgment reversed.

MANN v. ANDERSON, et al.

(Supreme Court of Georgia. March 18, 1899.)
DEATH OF LIFE TENANT—INCOME FROM TRUST PROPERTY.

Where, by the terms of a testator's will, certain shares of stock in a corporation are bequeathed to one for life, with remainder over to others; and the life tenant dies between dividend days, the dividend declared by the corporation next after his death, unless the intention of the will be clearly otherwise, is not apportionable between his estate and the remaindermen, but, under such circumstances, the entire dividend belongs to those who own the stock at the time it is declared.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action between M. M. Mann, executrix, and Kate B. Anderson and others. From the judgment, Mann brings error. Affirmed.

Charlton, Mackall & Anderson, for plaintiff in error. Lawton & Cunningham, Denmark, Adams & Freeman, and Mercer & Mercer, for defendants in error.

FISH; J. William Grayson Mann was the life tenant and the defendants are the remaindermen of a certain trust estate created by the will of George B. Cumming. A part of the property of this trust estate consisted of shares of stock in the Southwestern Railroad Company and shares of stock in the Savannah Gaslight Company. Mann, the life tenant, died on November 20, 1896, and each of these corporations declared a semiannual dividend on January 1, 1897; from its earnings for the previous six months. A contest

these dividends should be apportioned between her and the remainder-men, two-thirds to her and one-third to them; the remainder-men claiming that the whole of the dividends should be distributed among them, according to their respective interests. The court below awarded the entire fund arising from these dividends to the remainder-men, and the executrix excepted.

Where the owner of a life estate in shares of stock in a corporation dies between dividend days, the general rule is that the dividend declared next after his death is not apportionable, but belongs entirely to the corpus of the trust fund, and so goes to the remainder-man or the reversioner. 1 Cook, Stock, Stockh. & Corp. Law, § 558; Perry, Trusts, § 556. Counsel for the executrix of the life tenant admit that this principle "seems to be sound in regard to dividends declared by going concerns which are subject to the vicissitudes and risks of business, and may not know, until the time of declaring a dividend, whether their financial condition will warrant such action," but contend that "it does not seem sound under the peculiar circumstances of this case." Without undertaking to restate "the peculiar circumstances of this case," which will be seen in the reporter's statement, let us, for the sake of the argument, take it for granted that the fund available to each of these corporations from which to declare and pay a dividend to its stockholders never varies from one dividend day to another. Would the fact that the amount of such fund is not "subject to the vicissitudes and risks of business" render a dividend declared by the corporation next after the death of one who held a life estate in shares of its stock apportionable between his executor and the remainder-men? We think not. The general rule at common law was that fixed, periodical payments were not apportionable, and it therefore required positive parliamentary enactments to make them so in England. See 11 Geo. II. c. 19; 4 & 5 Wm. IV. c. 22; and 38 & 39 Vict. c. 35. Nothing in the way of income could be more fixed as to amount, or more certain of realization, than the income to be derived from money invested in the public funds of Great Britain, and yet, at common law, it was not apportionable. *Wilson v. Harman*, Amb. 279; *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, Id. 505. Nor were rents, annuities, pensions, etc. 2 Williams, Ex'rs, *728, *729. It was not until the passage of the act of 11 Geo. II. that rent of any kind was apportionable in England. This act created apportionments in a very limited class of cases, and the later statutes above cited were each passed for the purpose of giving the apportionment principle a wider range, so that it might include income which was not embraced in it at common law, or under any

did not render it apportionable. The common-law principle is that an entire interest, which accrues only at stated periods, cannot be apportioned, because not susceptible of any intermediate division. Interest was apportionable at common law because it was held to accrue *de die in diem*, and therefore to be susceptible of intermediate division. This is the rule of the common law, and there is no statutory law of force in this state which changes this rule in reference to dividends declared upon stock in corporations.

It is not necessary to determine whether rent is apportionable in Georgia, as the contest here is not over rent, but over dividends. In a case of this character, it matters not that the source from which a corporation derives the fund upon which it bases, and from which it pays, a dividend to its shareholders may be rent, for the dividend which it pays to a shareholder is not rent. The question is: whether what the stockholder receives from the corporation is apportionable or not. What he receives comes not to him as rent, but as dividends. He leases nothing, and he receives nothing as rent. Before the money reaches his hands, it has been paid by the lessee to the corporation in which he held stock, has become a part of its corporate assets, has ceased to be rent, and he has no claim upon it until it has been segregated from such assets by the declaration of a dividend. When a dividend has been declared, a debt in his favor is created against the corporation, and when he collects his dividend he is simply collecting this debt, and not collecting rent which the corporation has received from his tenant, and pays over to him.

It is contended by the learned counsel for the executrix that the money received by each of these corporations, and paid out in dividends to its stockholders, was "interest, pure and simple, on the investment of the property, earned day by day, but payable, in the one case quarterly, in the other semiannually." It seems very clear to us that the money which each of these corporations receives upon a lease of its corporate property is not interest. It certainly is not compensation received for the loan or use of money. The mere fact, in the case of the Southwestern Railroad Company, that the lease contract stipulates that the lessee shall pay to the lessor, "during each and every year of the continuance of the term of the lease, a sum equal to five per centum upon the amount of the capital stock of the Southwestern Railroad" outstanding at the date of the lease, does not change what would otherwise be rent into interest. But it is immaterial whether what the corporation receives is interest or not, because the stockholder, when he receives his money from the corporation, is not receiving interest, but a dividend upon his stock. Aside from the general common-law

think would control the decision in this case. The profits and surplus funds of a corporation, whensoever they may accrue, are, until separated from the capital by the declaration of a dividend, a part of the stock itself, and will pass with the stock, under that name, in a transfer or a bequest. *Thomp. Corp.* § 2173. So, when one person transfers stock in a corporation to another, the transfer of the stock carries with it, as an incident to its ownership, all dividends thereafter declared, irrespective of when such dividends may have been earned (9 Am. & Eng. Enc. Law [2d Ed.] 720, and cases cited), and without regard to the source from which the funds divided were acquired by the corporation (*Jermain v. Railway Co.*, 91 N. Y. 483; *Richardson v. Richardson*, 75 Me. 570). This results from the principle that a stockholder has no claim to a dividend until it is declared, and each share of stock represents a present interest in it, and that passes upon the transfer of the share. *Thomp. Corp.* § 2172. This general rule regulating the transfer of stock, giving the dividend to the holder of the stock at the time the dividend is declared, is ordinarily followed when a life tenancy in shares of stock in a corporation expires between dividend days. 9 Am. & Eng. Enc. Law (2d Ed.) 719. A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made, or a dividend declared. Until then the fund upon which the declaration of a dividend may be based, and from which it may be paid, is a part of the assets of the corporation, and belongs, in solido, to the corporation, no shareholder having any title to any part of it. *Jones v. Railroad Co.*, 57 N. Y. 196; *Boardman v. Railway Co.*, 84 N. Y. 157. When a cash dividend is declared out of net earnings, the money set apart for the payment of such dividend is segregated from the assets of the corporation, and belongs to those holding stock in the corporation at the time that the dividend is declared. The instant it is thus severed from the corporate property, it is necessarily severed from the stock, and goes to those who were the owners of stock when the severance took place; but, until the segregation is accomplished, it is a part of the stock. Herein this case differs from one where a life tenant is entitled to the income arising from a trust fund loaned out at interest. In the latter case the income is accruing from day to day, and, as it belongs to the life tenant, so much of it as is earned during his lifetime rightly belongs to him. In the present case, even if we admit, for the sake of argument, that the income received by each of the corporations in which the stock belonging to the trust estate was held, accrued from day to day, it would by no means follow that the income which the life tenant received from this stock accrued from day to

shares owes him nothing until it declares a dividend, and when that event happens the whole dividend is due at once. The instant before a dividend is declared a corporation owes nothing to its stockholders; the instant after it is declared the whole dividend belongs to them. Therefore a person who owns stock in a corporation just prior to the declaration of a dividend, but from whose ownership it passes to that of another before the dividend is declared, unless there is something in the nature of a saving reservation as to such dividend, has no interest whatever in the dividend. We cannot see that it makes any difference whether the transfer of ownership is occasioned by death or by contract. In either event, the moment the title to the stock is vested in the new owner, the latter acquires all the rights which appertain to the ownership of the stock, one of which is the right to receive all subsequently declared dividends. It seems to us that these principles must control this case. Upon the death of the life tenant the stock which he held passed as effectually from his ownership to that of the remainder-men as it would have done if, prior to his death, he had owned the whole title, and had sold the stock to these same persons; and, as the stock represented its proportionate interest in all the assets of the corporation, and so carried with it the right to receive any dividends which might be declared in the future, the right to the whole of such dividends passed to and vested in the remainder-men.

The ruling in the case of *Meldrim v. Trustees*, 100 Ga. 479, 28 S. E. 431, is in entire harmony with the one which we now make. There "a lessee railroad corporation, as a consideration for the lease, stipulated with the lessor corporation to declare and pay to the stockholders of the latter semiannual dividends of not less than 7 per cent. per annum on the amount of their stock, but for several years failed to do so." It was held that "these minimum dividends, upon being afterwards realized in part through a compromise between the lessor corporation and a successor of the lessee corporation, [belonged], in so far as realized, to the persons to whom they ought to and would have been paid as they accrued if the contract had been complied with," upon the ground that "these dividends, as to the minimum amount were not undeclared, but were predeclared by express contract between the two corporations." On page 484, 100 Ga., and page 433, 28 S. E. Chief Justice Simmons, who delivered the opinion of the court, says: "The rule being that dividends belong to the owner of the stock at the time they are declared and made payable, and these dividends having been declared in advance by contract, they certainly belong to McIntire in so far as they were made payable up to the time of his death.

; part of his personal estate, his executors entitled to recover them." Judgment affirmed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO. v. DORSEY.

same Court of Georgia. March 17, 1899.)

OF EVIDENCE—WAIVER OF OBJECTIONS—ERRORS—TRANSPORTING BEYOND STATION.

It is too late, after a motion for a new trial, without objection to the brief of evidence, which has been heard and determined upon its merits, to raise the question that the brief was not duly filed.

While it is the duty of a conductor to ascertain, before reaching a flag station, whether there is on board a passenger ticketed for that station, there is a corresponding duty upon the passenger who has purchased a ticket to such station, upon discovering that he has been overlooked by the conductor, to call the latter's attention to the fact, and surrender the ticket, so that the conductor may know the passenger's destination, and have the train stopped in time to alight. The failure of a passenger to perform this duty is a material matter in determining whether or not, in a given instance, the carrying of the passenger beyond his station was attributable to the negligence of the railway company, or whether the passenger, by failing to perform the proper diligence, could have avoided being carried beyond such station.

In the trial of a case to which, under the circumstances introduced by the defendant, the rule stated is applicable, it was erroneous to submit the case to the jury, without explanation or qualification: "You must determine from the evidence whether, by the exercise of extraordinary diligence, the conductor could, on the occasion of the trial, have ascertained the destination" of the passenger. The failure of the court to instruct the jury concerning the duty of the passenger, under such circumstances, is all the more objectionable, when it clearly appears that the court was perfectly familiar with the situation and must have known the train would have stopped beyond the flag station, unless the conductor was notified to have it stopped.

Reversed. (Error by the Court.)

From superior court, Henry county; Beck, Judge.

On appeal by N. E. Dorsey against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

& Boynton and W. C. Beeks, for plaintiff. W. I. Dicken, G. W. Bryan, L. J. Reagan, for defendant in error.

MONS. C. J. 1. There was a motion to dismiss this case upon the ground that the evidence used at the hearing of the motion for a new trial had not been duly filed. The question is sufficiently dealt with in the opinion.

Mr. Dorsey purchased a ticket over the plaintiff company's line of railway from Milledgeville, Ga., to Lovejoy, Ga.; the latter a flag station, at which the train stops only when it had a passenger to put off or on. It was signaled to stop to take on a passenger.

She boarded the train, and claims in evidence that she had no opportunity to de-

liver her ticket to the conductor until after she had passed her point of destination. She testified that the conductor passed through the car in which she was seated once only between these two points, and then came from the seat where she was sitting, and passed on towards the front. She was carried beyond Lovejoy to the next station, where she alighted, and was compelled to walk from one-half to three-quarters of a mile, according to her testimony, to the house of a friend, where she spent the night. On the way she heard some negroes talking, and they followed her nearly to the house of her friend. She was much alarmed, became nervous, and, by reason of the walk and the fright, her health was impaired. The evidence for the company tended to show that the plaintiff knew that Lovejoy was a flag station only, had traveled frequently over this road for four or five years, and was well acquainted with the surroundings; that the conductor did fail to take up plaintiff's ticket because, as he passed her several times during the trip, she had her face turned towards the window, or was talking to some other ladies, and, inasmuch as she did not board the train at the end of the car where he stood to receive passengers, but at the other end, he did not know that she was a passenger whose ticket had not been inspected, and for that reason did not stop at Lovejoy. Other witnesses, who were passengers on the train and in that car, testified that the conductor passed through the car several times before the train reached Lovejoy. Under the charge of the court, the jury returned a verdict for the plaintiff. Defendant made a motion for a new trial, which was overruled by the court, and to this ruling the defendant excepted.

We think it is the duty of the conductor of a passenger train, when the company has sold tickets to passengers, to go through the train, and ascertain the stations at which the passengers wish to alight; but we also think that, in a case like the present, there is a corresponding duty upon the part of a passenger, when he sees that the conductor has failed to call for and take up his ticket, and is ignorant of his presence on the train and of his destination, to notify the conductor of his presence and of his destination, especially where the ride is a short one, and the passenger knows that the train will not stop at his station unless the conductor has notice that there is on board a passenger for that station. A passenger or any other person cannot sit still when he sees he is about to be injured, make no attempt to avoid the injury, and rely upon recovering damages for the injury. Under the law, he must exercise reasonable and ordinary care either to prevent the injury, or, after the injury has been inflicted, to abate the damages. Here the passenger wished to leave the train at a station about 15 miles from her starting point. The conductor failed to take up her ticket or to notice her presence, and she must have known that, in a very short time, her

presence of or her destination. If therefore became material, in the present case, for the jury to determine whether the railway company was entirely to blame, and to be mulcted in heavy damages, or whether the plaintiff, by the exercise of ordinary care, could have avoided being carried beyond her station, and the consequent injury to her.

3. It follows that the court erred in charging the jury, without explanation or qualification: "You must determine from the evidence whether, by the exercise of extraordinary diligence, the conductor could, on the occasion alleged, have ascertained the destination of Mrs. Dorsey." The court should have given in charge the principle above dealt with, especially when the evidence discloses that the passenger knew of the distance between the point where she boarded the train and the point of her destination, that the latter was a flag station for that particular train, and that the train would not stop unless the conductor had notice of her desire to leave it at that station. Judgment reversed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO. v. CANNON.

(Supreme Court of Georgia. March 17, 1899.)

CARRIERS—EXPULSION OF PASSENGER—EXCURSION TICKET—CONDITIONS—PERFORMANCE—IDENTIFICATION—INSTRUCTIONS.

1. The burden of showing that the expulsion of a person from a passenger car was lawful does not devolve upon a railway company until it be shown that this person was rightfully in the car.

2. When the purchaser of a reduced rate excursion railway ticket, by signing a special contract thereon, agrees with the company issuing the ticket that "it shall not be good for returning passage unless the holder identifies himself * * * as the original purchaser to the satisfaction of" a designated agent of the company in the town or city to which the purchaser is to be transported on his "going passage"; that, "when officially signed and stamped by said agent, this ticket shall then be good for return passage"; and that "the holder will identify himself * * * as the original purchaser of this ticket by writing his name, or by other means, if necessary, when required by conductor or agents,"—it is incumbent upon such purchaser, as a condition precedent to having the ticket so signed and stamped, to furnish such proof of his identity, and of the fact that he was the original purchaser, as would be sufficient to satisfy a reasonable man. Under such a contract the validating agent is entitled to call for other proof of identity than that afforded by the holder's writing his name.

3. It was, on the trial of a case involving the determination of the question whether or not there had been due compliance with the terms of such a contract, erroneous to instruct the jury that, if the proof furnished to the validating agent by the ticket holder as to his identity, etc., was satisfactory to them, he was entitled to have the ticket validated.

4. It was, in such a trial, also erroneous to give in charge to the jury language authorizing them to infer that, if the ticket holder produced to the validating agent evidence suffi-

cient to establish the manner in which the purchaser's name was written at the time of obtaining the ticket was peculiar and unusual, and therefore a matter of much consequence upon the question of identification at the time the ticket was presented for validation, it was erroneous to charge that, "if the plaintiff signed said ticket in the presence of the validating officer, it is immaterial as to the nature and character of this signature."

5. The court ought not, in such a trial, to have given a charge to the effect that, if the validating agent refused to sign and stamp the ticket, and the holder boarded a train, tendered the ticket to the conductor, identified himself as the man he represented himself to be, and as the original purchaser of the ticket, at the same time informing the conductor that the ticket had been offered for validation, and the conductor thereupon refused to accept the ticket and ejected the holder, he was entitled to recover.

6. If the purchaser of such a ticket, at the time of buying the same, intentionally adopted, as the method of signing his name, the making of the letters thereof in the form of printed characters, and thus rendered it impossible to identify himself as the original purchaser by reproducing his signature, the burden was on him to find other means of satisfactory identification. Merely proving by witnesses that his name was the same as that "printed" upon the ticket would not in every case, and under all circumstances, be sufficient or satisfactory proof that he was the original purchaser.

(Syllabus by the Court.)

Error from city court of Griffin, E. W. Beck, Judge.

Action by H. A. Cannon against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hall & Boynton and W. C. Beeks, for plaintiff in error. R. T. Daniel, for defendant in error.

LUMPKIN, P. J. It appears from the record that H. A. Cannon purchased at Camilla, Ga., a reduced rate ticket from that point to Atlanta and return. When he applied to the agent at Camilla for such a ticket, he was handed one upon which was printed a contract the portion of which now material was of the nature indicated in the first headnote. The agent asked Cannon to sign his name to that contract. Thereupon the latter took a pen, and, instead of affixing his signature in the usual way, made the letters composing his name in the form of printed characters, or, as stated by a witness, he "printed" his name upon the ticket, instead of writing it. The agent informed Cannon that this method of making his signature was not satisfactory, refused to stamp the ticket, and wrote upon it the word "void." Cannon insisted it was his right to sign his name in any manner he pleased, and the agent, upon reflection, reaching the conclusion that he had no right to refuse to sell a ticket to an applicant for the same, furnished Cannon with another ticket in the same form, at the same time cautioning him that if he "printed" his name to the contract thereon he would have difficulty in iden-

ing himself in Atlanta as the original purchaser. Nevertheless Cannon "printed" his name upon this second ticket. It was duly accepted by the agent, and subsequently was accepted for passage from Camilla to Atlanta. Desiring to return to Camilla, Cannon went to the validating agent in Atlanta, who requested him to write his name on a blank line upon the ticket reserved for this purpose, and thereupon Cannon "printed" his signature upon this ticket. The validating agent refused to accept it as sufficient proof of Cannon's identity as the original purchaser of the ticket. The latter then produced two witnesses who stated to the validating agent that they knew Cannon, and that he was the man he represented himself to be. They were, however, unable to prove that he was the man who purchased the ticket in Camilla. No other proof being offered, the validating agent declined to stamp the ticket, and informed Cannon that it would not be accepted for passage. Nevertheless he boarded a train of the defendant company, and was ejected therefrom by the conductor, who refused to recognize the ticket as valid. Cannon brought his action against the company, recovered a verdict of \$950, and the defendant filed a motion for a new trial, which was overruled, and it excepted. This motion contained many grounds. It is unnecessary to set them forth in full, for the material questions of law thereby presented are stated in the headnotes. In the main, these questions were raised by exceptions to the instructions given by the judge at the trial, and refusals to give in charge to the jury the requests submitted by counsel for the defendant.

1. The most important issue at the trial was whether or not the plaintiff was rightful upon the car of the defendant company as a passenger. The court charged, without qualification or explanation, that the burden of proof was upon the defendant to show that the plaintiff was ejected from the car, he was lawfully expelled. Upon the assumption that the plaintiff was entitled to ride upon the defendant's train, this instruction would have been correct; but, it being a seriously contested issue whether or not he was so entitled, the instruction should have been qualified by a statement to the effect that the burden referred to would rest upon the company only in the event the evidence satisfied the jury that the plaintiff had a legal right to enter and take passage upon this train. Certainly, until it appeared, the company was not bound to show that he was properly ejected.

2. The language of the contract signed by Cannon plainly expresses his undertaking with the railway company. In construing a simple contract, this court, in *Morse v. Railway Co.*, 102 Ga. 302, 29 S. E. 865, held it was incumbent upon the ticket holder to furnish such proof of his identity as would satisfy a reasonable man. It requires no argument to show that, under such a contract, the validating agent, if not satisfied by having the ticket

holder write his name, had the right to call for other proof of his identity as the original purchaser of the ticket, and that so doing cannot properly be regarded as either arbitrary or capricious. *Railway Co. v. Barlow* (Ga.) 30 S. E. 732.

3. The person who, under the terms of such a contract, is to be satisfied of the identity of the holder as the original purchaser of the ticket, is the validating agent; and while, under the ruling in the case first above cited, a wrong would be done to the ticket holder if such agent arbitrarily refused to accept and act upon evidence that ought to satisfy a reasonable man, we know of no rule of law or justice which would authorize a jury to find that the agent acted capriciously and without justification merely because the evidence presented to him would have been satisfactory to them. The question upon which the jury should have been instructed to pass was, not what they would have done, but how a reasonable man ought, under the circumstances, to have acted in discharging the duties imposed upon him.

4. One of the expressions used by the judge in his charge to the jury was capable of the construction that, if the plaintiff produced to the validating agent evidence sufficient to show that the former "was the man he represented himself to be," it should be regarded as satisfactory proof that he was in fact the original purchaser of the ticket. Obviously, such an inference would be unauthorized. The plaintiff might have produced any number of reputable witnesses to show that his name was H. A. Cannon, but this would not have proved he was the H. A. Cannon who purchased the ticket in Camilla, or negative the inference that a person of an entirely different name had really purchased the ticket at that station, had there "printed" the name of H. A. Cannon upon it, and subsequently delivered the ticket to the plaintiff, in accordance with a preconcerted arrangement between them. It is a lamentable fact, too well known to be overlooked, that, as regards the unauthorized and fraudulent transfer of non-negotiable railway tickets, the standard of morality to which those who deal in and use such tickets have attained is not, as yet, sufficiently elevated to justify any inference, much less a presumption of law, that the holder of such a ticket is the person who purchased it from the carrier.

5. The preliminary statement preceding this discussion discloses the manner in which the plaintiff placed his name beneath the contract on the ticket at the time he purchased it in Camilla, and the manner in which he wrote his name at the time of offering the ticket for validation in Atlanta. In view of these facts, it was clearly erroneous to instruct the jury as indicated in the fifth headnote. It is apparent, without argument, that the nature and character of this "signature" were of the utmost materiality and importance.

ter what passed between Cannon and the validating agent, or how reasonably the latter may have acted in declining to stamp and sign the ticket, the holder of it was nevertheless entitled to a return passage thereon if he satisfactorily identified himself to the conductor as the original purchaser, and merely informed the latter that the ticket had been offered for validation.

7. As will have been seen, Cannon intentionally and deliberately adopted a peculiar and unusual method of affixing his name to the contract upon the ticket. Any man of ordinary common sense ought to have known that when he merely "printed" his name in the manner stated, he could not identify himself as the man to whom the ticket was issued by again "printing" his name in a similar way. Moreover, Cannon was distinctly cautioned that signing his name to the contract in such a manner would inevitably give him trouble when he sought to have the ticket validated for his return passage. There is in the record some evidence strongly indicating that he had a definite object in acting as he did. One of the witnesses introduced at the trial testified that Cannon, immediately after signing the second ticket handed to him by the agent at Camilla, said, in speaking of the exposition in Atlanta, which he was expecting to attend, that going there would be "flying high, and having a big time, and cost a heap; and some of these infernal railroads will have to pay for it, and pay my expenses." In view of all the facts and circumstances of this case, there is certainly no hardship done to the plaintiff in holding that, as he had voluntarily placed it out of his power to identify himself "by writing his name" in the presence of the validating agent, it was incumbent upon the former to find other satisfactory means of identifying himself as the original purchaser of the ticket. We do not think that the refusal to accept as sufficient for this purpose the statements of the witnesses produced by the plaintiff, showing merely that he was H. A. Cannon, was at all unreasonable. On the whole, we are of the opinion that a new trial should be ordered. Judgment reversed. All the justices concurring.

GLOVER v. SAVANNAH, F. & W. RY. CO.
SAVANNAH, F. & W. RY. CO. v. GLOVER.
(Supreme Court of Georgia. March 17, 1899.)
PLEADING—AMENDMENT—NEW CAUSE OF ACTION
—LIMITATIONS—WRONGFUL DEATH—OBJECTIONS WAIVED—NONSUIT.

1. The amendments to the petition did not set up a new and distinct cause of action, and the petition, as amended, set forth a cause of action against the defendant.

2. An action brought by a widow to recover for the homicide of her husband, under section 3828 of the Civil Code, is not barred, if the same is filed within two years from the death

which death resulted.

3. A plaintiff who submits to a ruling that his petition is defective without amendment, and amends to meet the objection, which would otherwise result in dismissing his case, will not be thereafter heard to say that the amendment was not necessary.

4. The evidence on the questions of negligence involved was of such a character that the case should have been submitted to a jury. It was therefore error to grant a nonsuit.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by Sarah Glover against the Savannah, Florida & Western Railway Company. From the judgment both parties bring error. Reversed on main bill of exceptions, and affirmed on cross bill.

Twiggs & Oliver, for plaintiff in error. Erwin, Du Bignon, Chisholm & Clay, for defendant in error.

COBB, J. Sarah Glover sued the railway company for damages alleged to have been received by reason of the homicide of her husband by the defendant. Upon the trial the court granted a nonsuit, and the case is here upon a bill of exceptions sued out by the plaintiff complaining of the granting of the nonsuit and other alleged errors, and upon a cross bill sued out by the defendant assigning error upon various rulings of the court.

1. The various amendments offered by the plaintiff did not substantially change the cause of action attempted to be set forth in the original petition, and therefore were not objectionable on the ground that they set forth a new and distinct cause of action. *Ellison v. Railroad Co.*, 87 Ga. 691, 13 S. E. 809; *Railroad Co. v. Kitchens*, 83 Ga. 83, 9 S. E. 827; *Harris v. Railroad Co.*, 78 Ga. 525, 3 S. E. 355. There was enough to amend by in the original petition, and the petition as amended set forth a cause of action.

2. There was no error in refusing to dismiss the petition on the ground that it was barred by the statute of limitations. The petition alleged that the husband of petitioner was injured on April 2, 1895; that his death resulted from these injuries on the 6th day of November, 1895; and the suit was filed on October 11, 1897. No cause of action arose in favor of the widow in this case until the death of the husband. Civ. Code, § 3828; *Railroad Co. v. Bass* (Ga.) 30 S. E. 874. It is not necessary in the present case to determine when an action of this character would be barred, as in no event is there any statute that could be applicable to such a case which would raise a bar within a period of less than two years.

3. The defendant demurred to the original petition on the ground that it did not allege that the plaintiff's husband was free from fault, when plaintiff amended by adding these words: "In discharging his duties as alleged,

was necessary. As the plaintiff submitted to the ruling of the court, and amended her petition to conform thereto, she cannot be heard now to say that the amendment was not necessary. If she had desired to except to the ruling of the court on this subject, she should have submitted to an order dismissing her case, and filed her exceptions to that judgment. See *Railroad Co. v. Thompson*, 101 Ga. 26, 28 S. E. 429.

4. Without expressing any opinion as to what should be the final result of this case, we think the court erred in granting a nonsuit, as the issues raised by the evidence on the questions of negligence involved were of such a character that the same should have been submitted to the jury, under proper instructions. Judgment on main bill of exceptions reversed, and on cross bill of exceptions affirmed. All the justices concurring.

JACOBSON v. JACOBSON.

(Supreme Court of Georgia. March 17, 1899.)

ALLOWANCE TO WIDOW—CAVEAT BY ADMINISTRATOR—AMENDMENT—APPEAL.

Where the return of appraisers duly appointed to set aside a year's support out of the estate of a decedent to a widow and three minor children, the offspring of the decedent by a former wife, and the return made by such appraisers specifically assigns a sum of money and the household and kitchen furniture to the widow, and also specifically assigns sums of money to each of the minor children by name, and a caveat is filed by the administrator of the decedent, which in terms raises an objection only to the sum of money set apart for such widow, the issue to be determined by the ordinary, does not include the allowance to the children, and when, after an appeal from the judgment of the ordinary to the superior court on the issue so formed, it appears that a settlement has been made between the caveator and the widow, such caveat cannot thereafter be so amended as to bring in issue the allowance made to the children, but, on motion, the appeal should be dismissed.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Petition of Catherine Jacobson, widow, for a year's support for herself and children. C. A. Jacobson filed a caveat, and from the judgment the administrator appeals. On refusal of the superior court to dismiss the appeal, the widow brings error. Reversed.

H. W. Johnson, for plaintiff in error. W. P. La Roche, for defendant in error.

LITTLE, J. Catherine Jacobson presented a petition to the ordinary of Chatham county for a year's support, in which she alleged that she was the widow of Charles A. Jacobson, and that he left, surviving him, the petitioner and four children born of a former wife, to wit, Charles, Mary Ann, Maggie, and Alexander, the last-named three children being

subsequently made a return, by which they set aside as a year's support to Catherine Jacobson, the widow, \$1,200, together with the household and kitchen furniture; and to Mary Ann, Maggie, and Alexander, the minor children named in the petition, \$200 each. To this return the administrator of Charles A. Jacobson filed a caveat upon the following ground: "That the sum so set aside to Catherine Jacobson is excessive, and not commensurate with the condition of said estate or the style maintained by the said Charles A. Jacobson during his life." On the hearing, the ordinary reduced the amount set aside to Mrs. Jacobson to \$900, and sustained the award of the appraisers as to the amount set aside to the minor children. From this judgment the administrator entered an appeal to the superior court. In that court counsel for the minor children moved to dismiss the appeal as to such minor children on two grounds: First, because there was no objection or caveat made to the return of the appraisers setting aside the year's support for the minors; second, because the allowance of a year's support to the widow had been satisfied and settled by the caveator since the filing of the appeal. An agreement of counsel, made in writing, was filed, wherein it was admitted that the award or allowance of a year's support to Catherine Jacobson, the widow, has been compromised and fully settled by and between the caveator and Catherine Jacobson since the filing of the appeal. The judge overruled the motion to dismiss.

We think the court erred in refusing to dismiss the appeal. It is provided by section 3470 of the Civil Code that, where there are two sets of minor children by different wives, the appraisers shall specify the portion going to the children of the deceased wife, and such portion shall vest in them. In this case the petitioner alleged the fact that she was the widow of the deceased, and that there were certain minor children by a former wife, and she distinctly prayed that appraisers should be appointed to set apart and assign to petitioner and to minor children a year's support, etc. The appraisers separately set aside to the widow \$1,200 and the household and kitchen furniture, and equally and as distinctly set apart the sum of \$200 each to Mary Ann, Maggie, and Alexander. It is true that there were not two sets of minor children by different wives, but there was the widow and a set of minor children born under a prior marriage of the deceased, and evidently the appraisers set aside the portion going to the children of the deceased wife separately from that of the widow. Whether this was contemplated by the statute or not, it was evidently so treated. The caveator filed an objection to "the sum so set aside to Catherine Jacobson." If treated as a separate assignment to the children, the judgment of the

ordinary, under the caveat filed, only had the legal effect of reducing the amount specifically set aside to the widow, and, there having been a settlement between the only two parties at interest, the motion to dismiss the appeal should have been granted. If, however, we treat the year's support as having been set aside under the provisions of section 3465 of the Civil Code, which declares that on the death of any person leaving an estate and a widow, or a widow and minor child or children, they are entitled to a year's support, etc., then it was only necessary that a gross sum should be set aside for the joint use of the widow and children, and a sum thus set apart is not divisible. So, if the aggregate amount of the sums set apart to the widow and children in this case be considered as the year's support under that section, then the appeal from the judgment of the court of ordinary only involves the gross amount set aside. When, therefore, it appears from the written admission that, after there had been a settlement between the widow and the caveator as to the allowance of the year's support, such settlement necessarily carried with it a settlement of the entire case, because, the amount set aside to a widow and children, under section 3465, being in gross, it was not possible to define the interest of the children therein. The allowance under that section is made for the support of the widow and children jointly, and, there being no legal way of ascertaining the amounts to which the minor children are entitled out of such gross sum, there could, necessarily, be no issue as to whether the sum to which they were entitled was not excessive. So, in any event, the case was ended, and it was proper to refuse to allow the caveat to be amended so as to bring in issue the allowance made to the children. We think for these reasons the motion to dismiss the appeal should have been granted, and for the failure of the presiding judge to do so the judgment is reversed. All the justices concurring.

SANDERS et al. v. SMISSON.

(Supreme Court of Georgia. March 17, 1899.)

TRUSTS—POWER OF TRUSTEES.

The questions presented by the record in this case are controlled by the decision of this court this day rendered in the case of *Sanders v. Warehouse Co.*, 32 S. E. 610.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by B. T. Smisson against John F. Sanders, trustee. Judgment for plaintiff, and Hattie Sanders and others interpose on levy of execution. Judgment for plaintiff, and claimants bring error. Affirmed.

M. G. Bayne, Nottingham & Polhill, and R. N. Holtzclaw, for plaintiffs in error. Louis L. Brown, for defendant in error.

PER CURIAM. Judgment affirmed.

SAVANNAH, F. & W. RY. CO. v. THE (Supreme Court of Georgia. March 18, 1899.)

ACTION AGAINST RAILROAD—VIOLATION.

This case is controlled by the decision in *Gilbert v. Railroad Co.*, 30 S. E. 631, 412, followed in *Jordan v. Railway Co.*, 31 S. E. 748, 105 Ga. —.

(Syllabus by the Court.)

Error from city court of Savannah; J. M. Norwood, Judge.

Action by Reed Tony against the Savannah, Florida & Western Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Erwin, Du Bignon, Chisholm & Co., for plaintiff in error. Twiggs & Oliver, for defendant in error.

PER CURIAM. Judgment reversed.

EVERETT v. SPARKS.

(Supreme Court of Georgia. March 18, 1899.)

CONTEMPT—JUDGMENT AGAINST ADMINISTRATOR—FAILURE TO PAY.

Attachment for contempt is not a writ for enforcing the payment of a judgment rendered against an administrator of a court of ordinary upon a citation not instituted by heirs. This is true, but the judgment may recite that the administrator to be administered is "in the hands of the administrator to be administered," which is apparent from the record of the entire case, showing that the administrator was simply liable as a debtor in the amount stated, there was no adjudication that he was in his hands "the identical money derived from the estate or its assets."

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Proceedings by Fannie Everett and others, heirs at law of J. J. Everett, against O. G. Sparks, administrator, to compel that he be attached by contempt for judgment dismissing the proceedings for bringing error. Affirmed.

A. C. Riley and M. G. Bayne, for plaintiffs in error. Bacon, Miller & Brunson, for defendant in error.

LUMPKIN, P. J. The ordinary of Houston county, at the instance of Fannie Everett and others, heirs at law of J. J. Everett, issued a citation against O. G. Sparks, administrator, requiring him to appear and to a settlement of his accounts. He appeared, and the ordinary, after explanation of the administrator's report, making a calculation thereon, rendered judgment in favor of the plaintiffs therein that each was entitled to receive the defendant an amount stated, and "that said administrator has in his hands now due the heirs of said estate the sum of \$451.93." Subsequently the plaintiffs instituted in the court of ordinary an attachment proceeding, wherein they prayed that

case went by appeal to the superior court, and there, on motion of counsel for the administrator, the proceeding was dismissed on the ground that he was not subject to an attachment for contempt, nor liable to be imprisoned for failing to pay the judgment rendered against him in the court of ordinary. We think the court below was right in dismissing the proceeding. We do not understand from the record that the administrator was adjudged to have in his hands the actual money which he received in his representative capacity. All of the money with which he was chargeable was received by him in 1895, and the citation was not issued until October, 1897. It was therefore to be expected that the money assets of the estate were to be used, loaned out, or invested by the administrator, and not kept idle, or in his actual custody. Properly construed, then, the judgment rendered by the court of ordinary, although it recited that the administrator had "in his hands" a specified sum of money, was no more than an adjudication that he was indebted in this amount to the heirs of his intestate. The case is very similar to that of *Wood v. Wood*, 84 Ga. 102, 10 S. E. 501, and also to the case therein cited of *Clements v. Tillman*, 79 Ga. 451, 5 S. E. 194. In the former Chief Justice Bleckley said: "Since the abolition of imprisonment for debt by the constitutions of 1868 and 1877, we think the sounder and better construction of section 2599 of the Code (section 3494 of the Civil Code), touching the enforcement of judgments rendered by the ordinary against executors and administrators on citations to account, is that mere money liabilities, where no specific fund is involved, are enforceable only by execution against the property, and not by attachment against the person." Judgment affirmed. All the justices concurring.

MCDONALD v. TAYLOR et al.

(Supreme Court of Georgia. March 17, 1899.)

WILLS—CONSTRUCTION—NATURE OF ESTATE—DEED BY LIFE TENANT.

1. A will devising to J. described land, "to belong to her during her natural life, and at her death to her son W., if living," gives to W. a vested remainder, but the same is subject to be divested upon his dying before the termination of the life estate.

2. Where the owner of a life estate and an undivided one-seventh interest in fee conveys to another an interest in the property described as "the life interest and estate" of the grantor, such language will not be sufficient to pass to the grantee the undivided one-seventh interest in fee, when, construing the deed as a whole, it is manifest that the grantor intended to convey the life estate only.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Jr., Judge.

M. G. Payne, for plaintiff in error. R. D. Smith and Guerry & Hall, for defendants in error.

COBB, J. McDonald brought suit in the superior court of Crawford county against James Taylor and another to recover a tract of land. Upon the trial the following facts appeared: Willis Taylor died testate, one of the items of his will being as follows: "I give and bequeath to my daughter, Julia Murray, the land in dispute, to belong to her during her natural life, and at her death to her son William F. Murray, if living." After the death of her husband, Julia Murray intermarried with McDonald, the plaintiff. At the time of this marriage, William F. Murray and Frances Murray, children of Julia Murray, were in life. William F. died in 1882, and Frances died some time before he did. On October 19, 1880, Mrs. McDonald executed a deed to James Taylor, one of the defendants, in which she conveyed "the life interest and estate of said Julia A. McDonald in" the land in dispute, the consideration of the deed, in addition to a nominal consideration, being that James Taylor was "to pay to the said Julia A. McDonald, on the 1st day of October, 1890, and on the 1st day of October of each subsequent year for and during her natural life, 1,100 pounds of middling lint cotton, ginned and packed, and delivered to her in the city of Macon, Ga. And also the said Taylor is to furnish the said Mrs. Julia A. McDonald with a house to live in during her natural life; the said Taylor to furnish for the year 1890 the house known as the 'Dr. V. S. Holton House,' in Taylor, Georgia; and if, at the end of that year, she is dissatisfied, and wishes to leave said house, the said Taylor agrees to build another two-room house on lot No. 132, near where said Julia A. McDonald now resides; and the said Julia A. McDonald is to have free access to the orchard on her old home place, and also to the orchard of the said James Taylor." The deed also contained the following clauses: "The said James Taylor, his heirs and assigns, to hold the said bargained premises in fee simple for and during the natural life of the said Julia A. McDonald; and the said Julia A. McDonald the said interest and estate in said land unto said James Taylor, his heirs, executors, and administrators, will and does hereby warrant and defend." Mrs. McDonald died in October, 1895. Willis Taylor died in 1869, leaving children and descendants of children, there being seven shares in his estate. All of these except Julia McDonald have conveyed their interest in the estate of their ancestor to James Taylor, and he holds also whatever interest of Julia McDonald passed under the deed above referred to. The plaintiff is the sole heir of Mrs. McDonald. The judge directed a verdict for the

and, and in not affecting a verdict for the plaintiff for one-seventh interest in the land.

The estate which William F. Murray took under the will of his grandfather was a vested remainder, subject to be divested by his death before the death of the life tenant. Civ. Code, § 3100; *Bowman v. Long*, 23 Ga. 242; *Hudgens v. Wilkins*, 77 Ga. 555. Upon the death of William F. Murray there was a reversion to the estate of the testator. As this took place in the lifetime of the life tenant, Mrs. McDonald, an undivided one-seventh interest in the land vested in her as an heir at law of her deceased father. Upon her death without children, title to this interest in her father's estate vested in her husband as her sole heir. It is contended, however, that Mrs. McDonald had conveyed all of her interest in the land to the defendant James Taylor by the deed which is above referred to. It is argued that the expression in the deed, "life interest and estate of said Julia A. McDonald," is broad enough, not only to include the life interest of Mrs. McDonald, but also her estate in reversion as an heir at law of her father. As Mrs. McDonald was, at the date of the deed, the owner of both the life estate and one-seventh interest in fee, the language above quoted supports with some degree of plausibility the contention of counsel. But the difficulty about their position is that this is not all that the deed contains. It is distinctly provided therein as a part of the consideration that a certain amount of cotton shall be delivered by Taylor to Mrs. McDonald each year during her natural life, and the habendum and warranty clauses of the deed demonstrate clearly that it was her intention to convey her life estate only. Such being the case, the plaintiff has shown title in himself to a one-seventh interest in the land sued for, and is entitled to recover that interest. It was therefore error to direct a verdict in favor of the defendants for all of the property. Judgment reversed. All the justices concurring.

HICKS v. GEORGIA S. & F. RY. CO.

(Supreme Court of Georgia. March 17, 1899.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. A promise by a conductor to a passenger to stop a train when it arrived at a station at which it was not scheduled to stop, so as to allow the passenger to alight thereat, accompanied by a direction "to be out on the platform, ready to get off," did not warrant the passenger, except at his own risk, in leaving his seat in a car, and going out on the platform thereof, when the train was rushing by the station at a high rate of speed (in the present instance, 45 miles an hour), and there was no slackening of its speed, or anything indicating an intention by the persons in charge of it to bring it to a stop.

2. The evidence introduced for the plaintiff showing affirmatively that the injuries of which

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by William E. Hicks against the Georgia Southern & Florida Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Guerry & Hall, Nottingham & Polhill, and R. H. Culverhouse, for plaintiff in error. R. C. Jordan and John I. Hall, for defendant in error.

SIMMONS, C. J. The Georgia Southern & Florida Railway Company ran an excursion train for passengers from Macon, Ga., to Beach Haven, Ga. The train was scheduled to run between these two points without stopping. Hicks purchased a ticket for the round trip; expecting, he claims, to stop at an intermediate station on the way out. The train did not stop at this station, but carried him on to Beach Haven. According to his statement, when the train was about to return to Macon he approached the conductor, and requested that on the way back the train be stopped at the intermediate station, in order that he might get off. The conductor promised him to stop, and told him to be out on the platform, ready to get off, when the train reached his station. In approaching this station, the train ran rapidly, and Hicks became apprehensive that it would not stop. He left his seat, walked to the platform, took hold of the iron railings, placed one foot on the first step, and had one upon the platform, as the train ran by the station. The train, according to the evidence of Hicks, was going at a rate of not less than 45 miles an hour at that time. When he discovered that the train would not stop, he undertook to return to the car, and in doing so he was thrown to the ground by a movement of the train, and seriously injured. Hicks brought suit against the railway company. Upon the trial of the case the above facts appeared from the evidence offered by the plaintiff, and the court granted a nonsuit.

In our opinion, the evidence of the plaintiff showed affirmatively that he was guilty of gross negligence. Although the conductor may have promised him to stop at the station where he desired to leave the train, and may have told him to be out on the platform, ready to get off, as a prudent man he must have known that when a train is going at the rate of 45 miles an hour, with no indication of a slackening of its speed, it would be exceedingly dangerous for any person to go upon the platform and commence to descend the steps, or even to remain standing upon the platform. Had the conductor been present, and told the passenger to descend the steps and jump from the train, and that it would be safe to do so, and he had jumped and been injured, he could not have recovered, because it was manifestly dangerous, and no

ent man would have considered it other-

Where a man has been guilty of gross negligence, and is injured by the running of a train, he is not entitled to recover, although the company may have been negligent. In this case the passenger relied on a promise to which the conductor had no authority to make, and complied with directions to do so, which was obviously unsafe and dangerous. The trial judge therefore committed no error in granting a nonsuit. See *Barnett v. Railroad Co.*, 87 Ga. 766, 13 S. E. 904. Judgment affirmed. All the justices concurring.

WEATHERS et al. v. BORDERS et ux.

Supreme Court of North Carolina. May 5, 1898.)

REHEARING—PETITION—CONTRACTS OF MARRIED WOMAN—VALIDITY—NECESSARY EXPENSES—PLEADING—JUSTICE COURTS—JURISDICTION

A petition to rehear must contain a statement of the facts or law overlooked or erroneously decided, but should not understate the alleged error by argument. The justices of the peace have no equitable jurisdiction, an action in justice's court to establish a lien must be brought as an accident, in which event the statute creates a lien for the amount recovered, and not as to establish an equitable lien. A married woman's contract for the erection of a house on lands belonging to her separate estate is not a contract for her necessary living expenses, or for expenses incurred for support of her family, within Code, § 1826, which gives the right of married women to make contracts affecting their separate property, without the written consent of their husbands, for such expenses only. The defense of coverture is not waived by failure to plead it.

J., dissenting.

Petition for rehearing. Denied. See report, see 28 S. E. 524.

WEATHERS, J. This case was heard at fall term 1897, and is reported in 121 N. C. 389, 524.

It has been held that a petition to rehear a case which had been decided by this court must contain a plain, concise statement of the facts or law overlooked or erroneously decided, and that it should not undertake to establish the alleged errors by a course of argument. See *White v. Jones*, 92 N. C. 388. This case is an argument containing 10 pages of matter, with citation of authorities to support the argument, and was used as a brief by the petitioner in his argument. This rule has always been observed by attorneys preparing their petitions to rehear. But we understand that this is the rule established in this court, and that it should be observed in preparing such petitions.

The court has repeatedly held that "no case shall be reheard upon a petition to rehear, unless it was decided hastily, and some material fact was overlooked, or some direct authority was not called to the attention of the

court." *Watson v. Dodd*, 72 N. C. 240; *Hicks v. Skinner*, 71 N. C. 539; *Haywood v. Daves*, 81 N. C. 8; *Devereux v. Devereux*, Id. 12; *Smith v. Lyon*, 82 N. C. 2; *Lockhart v. Bell*, 90 N. C. 499; *University v. Harrison*, 93 N. C. 84; *Dupree v. Insurance Co.*, Id. 237. "Where the grounds of error assigned in the petition are substantially the same as those argued and passed upon in the former hearing, the court will not disturb its judgment." *Lewis v. Rountree*, 81 N. C. 20. It is alleged in this petition that *Smaw v. Cohen*, 95 N. C. 85, and *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998, were probably overlooked by the chief justice in writing the opinion of the court. We have examined these cases, and, in our opinion, neither of them sustains the contention of the petitioner, but they are authority against him. *Smaw v. Cohen*, supra, is authority for holding that where the debt sued for is less than \$200 the action should be brought before a justice of the peace, and that where the debt is established by the judgment the statute creates the lien, but where the debt is less than \$200, and it is sought to establish an equitable lien, the action must be brought in the superior court, as a justice of the peace has no equitable jurisdiction; citing *Dougherty v. Sprinkle*, 88 N. C. 300. This action was commenced before a justice of the peace, the amount claimed being less than \$200; and to this extent *Smaw v. Cohen*, supra, sustains the jurisdiction of that court, if it is an action of debt, and where the statute is relied on to fix the lien. But if plaintiffs' action could be sustained as an equitable lien on the house, as it is argued in the petition that it can be, then the action should have been brought in the superior court, as a justice of the peace has no equitable jurisdiction. So we see that, according to *Smaw v. Cohen*, in order to give a justice of the peace jurisdiction it must be an action of debt. If it is an action to establish an equitable lien, a justice of the peace has no jurisdiction, and the plaintiff is out of court. The case of *Farthing v. Shields*, supra, is also authority against the petitioner, as we will show further on. If the petitioner had grounds for an equitable lien, as he claims, he should have commenced his action in a court that had equitable jurisdiction. He could not succeed in this action, as the superior court has no greater jurisdiction than the justice of the peace had, from whom the appeal was taken. So the petitioner must rely on the statute (Code, § 1826). This section provides: "No married woman during her coverture shall be capable of making any contract to affect her real or personal estate, except her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband unless she be a free trader, as hereinafter allowed." The feme defendant was the owner of a lot of land in the town of —, and she and her husband contracted verbally with the plaintiffs to

except \$37. The plaintiff brought his action before a justice of the peace against the husband and wife for the balance due him for building the house, and in this action he claims a mechanic's lien on the house for his debt. He recovered judgment against the husband, but the court refused to give judgment against the feme defendant, and also refused to declare a lien on the house in favor of the plaintiff. This judgment of the superior court was affirmed by this court when it was here before. 121 N. C. 389, 28 S. E. 524. The petitioner says that this was error, which he asks to have corrected. To entitle a party to a statutory lien (as this court must be, if a lien), there must be a valid indebtedness. The debt is the cause of action, and the lien is only incident to the debt. There can be no statutory lien without a debt for the lien to rest upon. *Wilkie v. Bray*, 71 N. C. 206; *Baker v. Robbins*, 119 N. C. 289, 25 S. E. 876; *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794. It therefore follows that plaintiff can have no lien on the house and lot, unless he has a debt against the feme defendant, upon which he could recover a personal judgment against her.

This brings us to a consideration of section 1826 of the Code, quoted above; and we find that this section fails to give the petitioner any right to recover judgment against the feme defendant. The statute declares that no married woman shall be capable of making any contract, affecting either her personal or real estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary to pay her debts, unless with the written consent of her husband existing at the time of her marriage, unless she be a free trader. It is admitted that she is not a free trader, and it is perfectly apparent to us that the building of a house on a lot belonging to the feme defendant does not fall under any one of the exceptions contained in section 1826. It is not her necessary personal expenses, it is not what could be termed expenses incurred for the support of the family, and it is not claimed that it is for a debt due at the time of her marriage. With this interpretation of section 1826, which seems to us to be so manifestly correct that we hardly see how it could be understood otherwise, we fail to see the error in the former opinion and judgment of this court which the petitioner seeks to point out.

But if the plaintiff had been able to establish a debt, and to have obtained a judgment against the feme defendant for any of the excepted matters in section 1826, for which she may contract, such judgment would not have been a lien on the real estate (the house and lot) of the feme defendant, although her personal estate would be liable for the payment of such judgment. This doctrine has been announced by this court in a great number of cases, some of which we cite, as follows: As-

105 N. C. 301, 11 S. E. 460; *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Lambert v. Kinnery*, 74 N. C. 348; *Littlejohn v. Egerton*, 76 N. C. 468. We therefore see no grounds upon which plaintiffs' claim could be declared a lien on the house and lot, the "real estate of the feme defendant," even if he could get a judgment against her.

It is contended in the petition to rehear (used as a brief) that the feme defendant did not plead her coverture. But it appeared all through the case that she was a feme covert, and, this appearing, it was the duty of the court to see that she had the benefit of this defense. *Moore v. Wolfe*, 122 N. C. 711, 30 S. E. 120, and authorities there cited. Petition dismissed.

DOUGLAS, J. (concurring). As the decision in this case apparently depends upon my view of the law, it seems proper that I should briefly state it in its moral as well as strictly legal aspect. In *Sanderlin v. Sanderlin*, 122 N. C. 1, 29 S. E. 55, and in *Slocumb v. Ray*, 123 N. C. 571, 31 S. E. 829, in speaking for the court, I expressed my opinion of the law; but it is now urged that those views are contrary to the spirit of the constitution, and the enlightened progress of the age. I certainly did not intend the slightest reflection upon married women, by continuing to give them the same protection afforded to "infants, idiots, lunatics and convicts"; nor have I heard any complaint from those married women whose opinions would naturally influence my conduct. This protection was accorded to them by the sages of the law for their benefit, and I see no reason to take it from them simply because they share it with others, some of whom may be less worthy than themselves. The mother, holding upon her lap the child to whom she has given life, and for whom she would give her own life, feels that she is in the best of company,—far better than if she were with the so-called reformer. She feels no degradation in being upon an equality with that "infant" in the love of a father and the protection of a husband, and her instincts would prompt her willingly to accord to the humblest convict the equal protection of the law. I am not an iconoclast, and I feel neither the desire nor the obligation to shoulder my judicial battle-ax in a crusade against the wisdom of the ages. Much as I may admire Gibbon's intrepid soldier, who shattered with his battle-ax the pagan idol, I cannot regard the provisions of the common law as the offspring of paganism and superstition. Even if my opinion in this case were otherwise, no matter how strong, the mere fact that it differed from the practical consensus of decisions would lead me to doubt its correctness; and, while the conscience of the man must remain forever

of the rules of the common law, being fitted to then existing conditions, have become inapplicable to our present surroundings, and must be abandoned or reformed. The rules governing the ancient stagecoach and mail driver must be refitted to the exigencies of the railroad and telegraph, while their views of the kingly prerogative find but little place in the government of a republic. But, while we have repudiated the divine right of kings, we still hold the diviner right of wife and mother.

Having thus disposed of the quasi moral aspect of the case, at least to my own satisfaction, I can add but little to the opinion of the court as delivered by Justice FURCHES, with which I fully concur. Article 10, § 6, of the constitution, expressly provides that "the real and personal property of any female * * * may be devised and bequeathed, and with the written assent of her husband conveyed by her as if she were unmarried." As the written assent of the husband is necessary, I think it is clearly within the province of the legislature to provide how that assent shall be legally expressed. I cannot assent to the suggestion that this constitutional provision applies only to a conveyance in its strictly technical sense. I think it is equally applicable to any transaction that may naturally effect an alienation. Of what use would it be for the constitution to prevent the wife from conveying the property, and receiving the money therefor, if it permitted her to spend the money, and let the sheriff sell and convey the property? Such a construction of the constitution would simply defeat its manifest intention. I do not wish to be considered as opposing the legitimate progress of the age, but we should not forget that true progress depends more upon the direction in which we are going than it does upon the speed with which we are traveling. In some directions we may well say, with the ancient philosopher, "*Festina lentè.*"

CLARK, J. (dissenting). The constitution (article 10, § 6) guarantees the property rights of married women. It provides, "The real and personal property of any female in this state acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations and engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." This made her as absolute owner of her property as she was before marriage, or as her husband was of his, with the single exception that in conveyances of her property she must have the written assent of her husband; and there is

to make contracts affecting her property, without the written assent of the husband, except in three cases named, is in direct conflict with this provision of the constitution, and is a curious instance of the survival of preconceived opinions, based on the former constitution, whose provisions had been swept away by the march of public opinion which had been formulated in the new organic instrument. But for such preconceived ideas, it would have occurred to no one that a married woman was less competent to make contracts affecting her property than one who had not been married, or who had become a widow. The requirement of the written assent of the husband to conveyances by the wife was regarded by the constitution as a sufficient guaranty of the rights of the husband. Code, § 1256, in requiring the privy examination of the wife, is another instance of the same kind; for the constitution guarantees the wife the right to convey her property, "with the written assent of the husband" (not with privy examination of the wife), "as if she were unmarried." The legislature cannot restrict the freedom given by the constitution to the wife in dealing with her property, as to which her rights were to "remain" as if she were unmarried, save as to requiring the written assent of the husband to her conveyances. The constitution says a married woman may convey her property, with the written assent of her husband. The Code (section 1256) says she cannot. Which controls? These two sections (1256 and 1826) are the only ones which attempt to restrict the freedom of the wife's property rights,—for section 1246 (5) merely provides, "when a privy examination is necessary," how it shall be taken; and neither of those sections contains any basis for the theory of "a charge in equity," which is a reverter to a condition of things absolutely abolished by the constitution, and to the times when a married woman was placed in the same class with "infants, idiots, lunatics and convicts." The distinction between law and equity has been abolished, and in neither of the only two sections dealing with the subject (1256 and 1826)—antagonistic though they be to the free control of their property guaranteed married women by the constitution—is there any hint of a return to the system of "charging the property" of a married woman any more than "if she had remained unmarried." But, if we were to concede that section 1826 is not in conflict with the constitution, yet, on its face, it does not restrict, in the three cases therein specified, a married woman's right to make contracts affecting her property, "real or personal." If she can do so as to personal property (as the opinion states), she can do so equally as to her realty. This section is the same as to both, and there is no other statute which makes a distinction, and the constitution is

tracts affecting her real as well as her personal estate, without the written assent of her husband?

The legislature of 1899 struck "married women" out of the company and category of "infants, idiots, lunatics and convicts," in which classification they were placed by Code, §§ 148, 163; but the courts have been still slower than the legislature in grasping the fact of the emancipation of married women, and of their property rights guaranteed them by the constitution. It is still held as law in North Carolina, strange as it may seem, not only that a married woman cannot alien her property with merely "the written assent of her husband," as the constitution says, but that her earnings from her own labor belong to her husband. In this connection it is appropriate to quote the following extract from 8 Am. Law Rev. 72 (1871): "Many of the states have passed statutes allowing married women to hold and manage property, and giving them a right, to a greater or less extent, to their separate earnings. Such a law was passed in England in 1870. We read in Gibbon that: 'After the edicts of Theodosius had severely prohibited the sacrifices of the pagans, they were still tolerated in the city and temple of Serapis; and this singular indulgence was imprudently ascribed to the superstitious terrors of Christians themselves, as if they feared to abolish those ancient rites which could alone secure the inundations of the Nile, the harvests, and the subsistence of Constantinople.' But the temple was at last destroyed, and the statue of Serapis was involved in the ruin. 'It was confidently affirmed that, if any impious hand should dare to violate the majesty of the god, the heavens and the earth would instantly return to their original chaos. An intrepid soldier, animated with zeal, and armed with a heavy battle-ax, ascended the ladder; and even the Christian multitude expected with some anxiety the event of the combat. He aimed a vigorous stroke against the cheek of Serapis; the cheek fell to the ground. The thunder was still silent, and both the heavens and the earth continued to preserve their accustomed order and tranquillity. The victorious soldier repeated his blows, the huge idol was overthrown and broken in pieces, and the limbs of Serapis were ignominiously dragged through the streets of Alexandria.' The law of the status of woman is the last vestige of slavery. Upon their subjection it has been thought, rests the basis of society; disturb that, and society crumbles into ruins. By the married woman's property acts the first blow has been struck. The cheek of the idol has fallen to the ground. The thunder is silent, and the earth preserves its accustomed tranquillity. The huge idol will sooner or later be broken in pieces." In North Carolina the constitution of 1868 struck the last shackles from

all respects as if she were unmarried, save that in conveying her property there must be "the written assent of her husband." Notwithstanding this emancipation, married women are still held in medieval leading strings by our courts, and still wait for the salvation of Israel. A married woman is still treated as one possessed of no discretion. We still talk of "charges upon her property," when that is not required "if she remains single," and exact "privity examination," when the constitution requires it only as to her consent to the conveyance by the husband of his homestead. We still hold that her husband is entitled to her earnings, and, though the statute says she can sue and be sued, it is only recently that the legislature has taken her, as to the statute of limitations, out of the classification with "convicts, idiots, lunatics," and those not arrived at years of discretion, and therefore not *sui juris*. The rights of married women, like those of other classes, are to be determined, not by what "sages of the law" in a former age thought good enough for them, but by the plain provisions of a written constitution.

LEAK v. CAROLINA CENT. R. CO.

(Supreme Court of North Carolina. May 5, 1899.)

INJURIES TO BRAKEMAN—CARS OF OTHER COMPANIES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. A railroad company is liable for injuries to a brakeman through defects of a car belonging to another company, which it was transporting over its road.

2. A brakeman is not guilty of contributory negligence in stepping on a defective stirrup while mounting a car in motion, without first inspecting it, where his duties required him to mount the car without opportunity to inspect the stirrup, and where the defect was not palpably apparent.

3. In an action for injuries to a servant through defective appliances furnished by the master, an instruction that the master must exercise greater care in protecting the servant from injuries through defective appliances than is required of the servant in guarding against accident, is too general, the care required of each being that of a prudent man under similar circumstances.

Appeal from superior court, Mecklenburg county; Greene, Judge.

Action by Pickett Leak against the Carolina Central Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Burwell, Walker & Canaler, for appellant. Jones & Tillett, for appellee.

DOUGLAS, J. The plaintiff was a brakeman and switchman, and his contention is that in attempting, in the discharge of his duties, to get on the car while in slow motion, the "stirrup" under the corner of the car,

provided for his use, was defective, and, when he put his foot upon it, gave way, precipitating him on the rail, whereby his foot was crushed by the car wheel. The court properly

instructed the jury that the fact that this was a "foreign" car—i. e. a car belonging on another road—was no defense, for it was the defendant's duty to have such car, as well as its own, inspected before using it for passengers or employes, and its liability for defects is the same in both cases. *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698; *Miller v. Railroad Co.*, 99 N. Y. 657; *Jones v. Railroad Co.*, 92 N. Y. 628. Indeed, the plaintiff could sue both companies (*Railroad Co. v. Ryder* [Ohio Sup.] 45 N. E. 559), and, if it was the fault of the first company, the latter would recover against it (*Moon v. Railroad Co.* [Iinn.] 48 N. W. 679). In *Johnson v. Railroad Co.*, 81 N. C. 453, where a brakeman was injured by the breaking of the rod from a defect discoverable upon an ordinarily careful inspection, but which was unknown both to plaintiff and defendant, and the plaintiff had a reasonable opportunity for inspection, it was held that the defendant was liable, because it had failed to have the rod inspected. Here the plaintiff, hastily mounting the car, the performance of the duties required of him, had no time or opportunity to inspect the strap before putting his foot on it, and was not liable for contributory negligence, unless it had been palpably defective,—as broken and hanging down. But we think that the first prayer for instruction given by the court at the request of the plaintiff was too general in its terms, and therefore liable to mislead the jury. It is as follows: "That the law imposes upon the employer the duty of exercising greater care of protecting the employe from injury due to the defective condition of appliances than is required of the employe in guarding against accident." This may or may not be true, according to circumstances. The true rule is that both are bound to use reasonable care,—such care as a prudent man would ordinarily use under similar circumstances; and the relative degree of care required depends upon a consideration of all the circumstances surrounding the respective parties. This is nearly always a mixed question of law and fact, to be determined by the jury under proper instructions from the court. For this error in the charge of his honor a new trial must be ordered. New trial.

HORNER SCHOOL v. WESCOTT.

Supreme Court of North Carolina. April 25, 1899.)

SCHOOLS — CATALOGUE — TUITION — EXPULSION OF PUPIL — CONSTRUCTION OF CONTRACT — SUPERIOR COURT — JURISDICTION.

1. A school catalogue announced that board and tuition for each semiannual session of 20 weeks was \$125, payable in equal installments September 1st, November 1st, January 18th, and April 1st; no money to be returned in case

of expulsion for bad conduct. One student was received at one-half the catalogue price, on condition of services to be rendered, and another at \$100 per session. Held that, the students having been expelled before the November installment was due, the school could recover only the amount due September 1st under the special agreement, or one-half of \$62.50 in the first case, and one-half of \$100 in the second.

2. A provision in a school catalogue that "no money would be returned" by a school if students were expelled did not prevent recovering of the amount due, in case of expulsion, since defendant's failure to pay in advance was due to plaintiff's indulgence, and not to its fault.

3. An action involving the construction of a contract in which there was a bona fide contention for more than \$200, it was properly brought in the superior court, and hence an appeal from the judgment may be taken to the supreme court.

Appeal from superior court, Granville county; Robinson, Judge.

Action by the Horner School against R. M. Wescott. There was a judgment for defendant, and plaintiff appeals. Reversed.

A. W. Graham and J. W. Graham, for appellant. Edwards & Royster for appellee.

FURCHES, J. The plaintiff is a corporation, conducting a select public school for boys. In September, 1896, R. D. Wescott, a son of the defendant, entered this school as a student; and in October of the same year T. L. Leonard, a nephew and ward of defendant, also entered said school as a student. R. D. Wescott remained about five weeks, and T. L. Leonard about one week, when they were expelled for going into a grog shop on Sunday and getting drunk.

It appears, from the evidence, that the plaintiff had published a catalogue of its school, stating that it was founded in 1851, containing its rules, prices, and terms of payment; that this catalogue had been extensively distributed, and its rules were kept posted up in the schoolroom, the diningroom, and the chambers or bedrooms of students; that in said catalogue, under the head of "Expenses of Session of Twenty Weeks," is the following statement: "Board and tuition, including furnished room, fuel, use of arms, etc., \$125.00; washing and lights, \$6.75; books, stationery, etc., about \$10.00. No extra charges are made. Payments for board and tuition must be made on September 1, 1891, \$62.50; November 1, 1891, \$62.50; January 18, 1892, \$62.50; April 1, 1892, \$62.50. * * * No money will be returned in case of dismissal for bad conduct, or in case of voluntary withdrawal, except at the option of the principals." The catalogue of 1896 was the same as this. Plaintiff contends that this constitutes a contract between it and the defendant for the tuition, board, books, and washing for the students, Wescott and Leonard, for the whole scholastic year, commencing in September, 1896, which, plaintiff says, amounts to \$179.25; that it had the right to expel these "cadets" for the cause assigned; that it was expressly stated that "no money will be paid back in case of dismissal for bad conduct";

ed, would ordinarily be some evidence tending to show that a party who patronized the school had seen and known its terms, and should be submitted to the jury; and if they should find that defendant had seen the catalogue, and then patronized the school, the terms would be binding on him, as an accepted offer and contract. *Horner v. Baker*, 74 N. C. 65; *Bingham v. Richardson*, 60 N. C. 215.

But the plaintiff's evidence shows that these "cadets" were not received under the terms stipulated in the catalogue, but that each one of them was received under a special contract, that differed from the terms stated in the catalogue. Wescott was received at one-half the catalogue price upon condition that he contributed his musical talent to the benefit of the school, one-half being \$62.50; and Leonard was to be taken at \$100, instead of the rates stated in the catalogue. While plaintiff calls 10 months, or 40 weeks, a scholastic year, it calls 5 months or 20 weeks a session. If it should be held that this evidence showed a contract for the full session of 20 weeks, commencing the 1st of September, it must be borne in mind that this was not all the evidence with regard to the contracts under which these cadets entered the plaintiff's school. The plaintiff introduced the catalogue in evidence for the purpose of proving the contract. So the plaintiff's evidence, which shows that Wescott was to be taken at half price and Leonard at \$100 per session, must be taken in connection with the catalogue, which shows that one-half of this amount, to wit, \$31.25 for Wescott and \$50 for Leonard, was due on the 1st of September, or when they entered school; and there was nothing more due from them until the 1st of November, if they had continued in school. Before this November installment was due, they had been expelled, and left school.

There is no stipulation in the contract that, if these cadets are expelled for good cause, they (or those who sent them) should be liable for the whole session, or for the scholastic year. The only stipulations are that \$62.50, or one-half of what will be due for the session of 10 weeks, is due—to be paid—at the commencement of the session, or when the boy enters school. In this case, one-half was \$31.25 for Wescott, and \$50 for Leonard. This was not paid, as it was to be. If it had been paid, it is stipulated that "it would not be returned, except at the option of the plaintiff." That it was not paid when these boys entered school was owing to the indulgence, and not the fault, of the plaintiff; and the defendant has no right to complain of this. If this installment had been paid, the plaintiff would have had the right to retain it, and nothing more. As it was the defendant's duty to have paid this installment when it was due, and not the plaintiff's fault that it was not

tain if both plaintiff and defendant had observed and kept the contract and these installments had been paid. It therefore seems to us that plaintiff, upon its own evidence, cannot recover more than what was due on the September installment.

As this action involves the construction of a contract, in which we can see there was a bona fide contention for more than \$200, it seems to us that it was properly brought to the superior court. We therefore decline to dismiss for want of jurisdiction; but, as there was error in holding that plaintiff could not recover on the contract, there must be a new trial.

LAUDIE et ux. v. WESTERN UNION TEL. CO.

(Supreme Court of North Carolina. April 25, 1899.)

TELEGRAM—NONDELIVERY—MENTAL SUFFERING—UNDISCLOSED PRINCIPAL.

Where a husband, for his wife's benefit, telegraphs in his own name to a relative, announcing the death of their child, and requesting the addressee to prepare a grave, and meet the body at the depot, his failure to notify the company that it was sent for his wife's benefit will not preclude her recovery for mental suffering caused by failure to deliver.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Action by C. L. Laudie and wife against the Western Union Telegraph Company. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Osborne, Maxwell & Keerans, for appellants. Jones & Tillett, for appellee.

DOUGLAS, J. This was a civil action by the feme plaintiff to recover damages for mental anguish suffered by her, caused by the assurance on the part of the defendant that a telegraphic message sent for her benefit had been delivered, when in fact it had not been delivered, and also by the negligent failure of the defendant to promptly deliver said telegram.

The infant child of the plaintiffs had died early on the morning of May 24, 1897; and, about 10 o'clock on the same day, C. L. Laudie, husband of the feme plaintiff, by an agreement with her, and for her benefit, delivered the message hereinafter set forth to the defendant company for transmission to T. L. Huntley, a kinsman of the feme plaintiff. The said Laudie paid the defendant its charges for transmission to Chesterfield, and at the time of the delivery notified the company that it was a very important matter, relating to the burial of the child. The said company assured Laudie that the same would be forwarded immediately, and, in order to be cer-

of its delivery, the said Laudie went to the office of the company about 12 o'clock on the same day, and was assured by the message had been delivered to its nation. He thereupon informed his wife, the feme plaintiff; and she, acting and relying on said representations of the defendant, carried the body of her infant, and started it to Wadesboro on the morning of May 24, reaching that point about 7 o'clock a. m., expecting to be met there in accordance with the telegram. The said message was not delivered on May 24th, as assured by the company, but not until the following day,—too late for any one to meet the feme plaintiff. On account of the nondelivery, she had to remain several hours at the depot in Wadesboro, with the dead body of her infant, and to make arrangements to carry the same across the country to Chesterfield, by which she suffered great mental anguish, as she alleges. The feme plaintiff, in order to maintain her action, proposed to show that the message was sent by an agreement with her, for her benefit, and that she was the undisclosed principal, which the court refused to admit. To this ruling the plaintiff excepted, admitted to a nonsuit, and appealed.

The telegram was as follows: "Charlotte, N. C., May 24, 1897. To T. L. Huntley, Cheseld, S. C.: Frank dead. Meet depot Wadesboro 8 a. m. Bury him in Chesterfield. Grave three feet. C. L. Laudie."

The only point presented to this court by the anguished counsel who frankly admitted that it was covered by the case of *Cashion Telegraph Co. (at this term) 32 S. E. 746*, is that of an undisclosed principal. It is not to them to say that the *Cashion Case* had been decided when the appeal was taken. We see no reason to reverse our ruling in that case, and therefore hold that the plaintiff is debarred from a recovery because her husband was not signed to the telegram, and the defendant was not then notified that it was sent by her direction or for her benefit. The facts as presented to us in this appeal are stronger than those in the *Cashion Case*, and therefore bring this case more clearly within the rule. Even if the male plaintiff had not notified the defendant of the urgency of the message, its importance clearly appeared upon its face; and the negligence of the defendant in failing to deliver it was aggravated by its negligent assurance that it had been delivered.

We have decided this question upon what we have to be true legal principles, but let us pause for a moment by the rule of common sense. The male plaintiff left his wife alone some with the dead body of their child, and sent it to the telegraph office to send a message to a relative to prepare the grave and meet the body. Suppose we had found him doing so, and the defendant says he should have done, boldly and deliberately informing the defendant that he was the agent of one M. E. Laudie, that he sent the telegram by her direction and for her benefit, and that "she had then in

contemplation" heavy damages for great mental anguish which would probably result from a failure to promptly deliver the telegram. Would it not have tended to raise in the minds of the jury a suspicion of speculation? While it might have come within the rule of *Hadley v. Baxendale*, 9 Exch. 341, would it be within the ordinary rule of human conduct? Would we expect such care and deliberation on the part of a father or a mother under such circumstances, and would it be reasonable in us to require it? The telegraph is not intended solely for lawyers, nor for those skilled in business or experienced in litigation. It is intended for the general public, and must meet their reasonable convenience. Moreover, the defendant, as a common carrier, owed to the plaintiff a public duty, which it should have performed with reasonable care and diligence. It cannot be relieved from liability for the proximate results of its own negligence, if it existed, by unreasonable regulations or technical objections. For error in the intimation of his honor, the judgment of nonsuit must be set aside, and a new trial ordered. New trial.

HODGIN v. PEOPLE'S NAT. BANK.

(Supreme Court of North Carolina. April 25, 1899.)

BANKS AND BANKING—APPLICATION OF DEPOSITS.

1. A bank may apply deposits to a matured debt of the depositor.

2. A bank may apply deposits to an unmatured debt of an insolvent depositor.

3. Deposits made by a surviving partner in the name of the firm may be applied to a firm debt to the bank, whether matured or not, where the deposits were not made as a special deposit, and it was not agreed that such application should not be made if the firm becomes insolvent.

4. A bank cannot apply deposits on behalf of a firm, whether made during its existence or by a surviving partner, to an individual debt of a deceased partner, evidenced by a note, indorsed by the survivor, for firm debts.

5. Individual deposits of a partner cannot be applied to firm debts to a bank.

Furches and Douglas, JJ., dissenting.

Appeal from superior court, Forsyth county; McIver, Judge.

Action by George D. Hodgin, as surviving partner of Hodgin Bros. & Lunn, against the People's National Bank, to recover a deposit. From a judgment for defendant, plaintiff appeals. Reversed.

Holton & Alexander, Shepherd & Busbee, E. E. Gray, and Charles Price, for appellant. Glenn & Manly, Watson, Buxton & Watson, Jones & Patterson, and A. H. Eller, for appellee.

CLARK, J. A bank has the right to apply the debt due by it for deposits to any indebtedness by the depositor, in the same right, to the bank, provided such indebtedness to the bank has matured. *Bank v. Hill*, 76 Ind. 223; *Knapp v. Cowell*, 77 Iowa, 528, 42 N.

121. Although each partner (except in limited partnerships) is severally responsible for the entire indebtedness of the firm, yet, notwithstanding that fact, the individual deposits of a partner cannot be applied to the indebtedness of the firm to the bank. *Adams v. Bank*, 113 N. C. 332, 18 S. E. 513, and 23 *Lawy. Rep. Ann.* 111, and notes; *Bank v. Jones*, 119 Ill. 407, 9 N. E. 885; *Raymond v. Palmer*, 41 La. Ann. 425, 6 South. 692; *Dawson v. Bank*, 5 Ark. 283. Upon the issues as found, the judgment might have been corrected to accord with the above opinion but for the finding upon the eighth issue. The plaintiff is entitled to recover the excess of the deposits above the indebtedness of the firm, with interest from date of demand. New trial.

FURCHES, J. (dissenting). The firm of *Hodgin Bros. & Lunn* was composed of the plaintiff, G. D. Hodgin, and L. L. Lunn. This firm was indebted to the defendant bank. Lunn died, and the plaintiff became the sole surviving partner of the firm of *Hodgin Bros. & Lunn*. After the death of Lunn, the plaintiff commenced collecting in the debts due the firm, and, not knowing what to do with the money, went to the president of the defendant bank, stated the fact that he wanted the president to advise him in the matter, when the president advised him to collect the assets as fast as he could, and pay the debts of the firm. The plaintiff then replied, "The firm is owing you, and I want to deposit the assets with you, that you may see that it is properly applied." Thereupon the plaintiff made his deposits in the defendant bank, and they were entered as deposits of *Hodgin Bros. & Lunn*. Besides the debt due the defendant by the firm of *Hodgin Bros. & Lunn*, the deceased partner, Lunn, owed the bank an individual debt of \$650, with plaintiff, Hodgin, as his surety. Plaintiff continued to make deposits in the defendant bank as he collected the assets of the firm until he had about the sum of \$4,000 on deposit with the defendant. But about the 1st of April, 1897, it became known that the firm of *Hodgin Bros. & Lunn* was insolvent, and that Lunn's estate was insolvent, and that the plaintiff, Hodgin, was also insolvent. Upon the defendant's receiving information of the insolvency of the firm, of the estate of Lunn, and of Hodgin, it applied a sufficient amount of the money so deposited with it by defendant to pay the debt against the firm, and also the note of \$650 of Lunn, to which the plaintiff, Hodgin, was surety, amounting in all to more than \$3,000. The question is, could the defendant do this? The partnership was dissolved, by the death of Lunn, on the 16th of March, 1896, and plaintiff became the only surviving partner,—became the legal owner of all the partnership assets. *Bates, Partn.* § 713. Hence his powers to dispose of the part-

App. 144; *Morse, Banks*, § 324; *Bank v. Hughes*, 17 Wend. 94; *Eyrich v. Bank*, 67 Miss. 60, 6 South. 615. Even if the indebtedness to the bank has not matured, if the depositor becomes insolvent, the bank, by virtue of the right of equitable set-off, may apply the deposits with it of such debtor to his indebtedness. *Demmon v. Bank*, 5 Cush. 194; *Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank*, 90 Ky. 225, 13 S. W. 910; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 330, 18 S. W. 822; *Georgia Seed Co. v. Talmadge & Co.*, 96 Ga. 254, 22 S. E. 1001; *Wat. Set-Off*, 432. The money deposited by Hodgin as surviving partner was kept under the same heading in the bank's books, "*Hodgin Bros. & Lunn*," as before the death of Lunn, and was merely a continuation of the old line of deposits; and the principle would have been the same if the deposits, after the death of Lunn, had been made in the name of "*Hodgin, surviving partner*." In either event, the deposits were in behalf of the firm, and were in the same right as the note held by the bank against said firm; and on the insolvency of the firm the bank had the right to apply the deposit made by the surviving partner in behalf of the firm to the indebtedness of the firm, whether matured or not. If the surviving partner had made the deposit a special deposit, or if there had been an agreement with the bank that these deposits should not be applied to the indebtedness of the firm to the bank, then the bank's right of set-off would have been tolled. *Morse, Banks*, § 325. But there was no evidence to that effect. It is true that deposits made by an executor or administrator in a bank cannot be applied to the indebtedness to the bank of the deceased. *Jordan v. Bank*, 74 N. Y. 467; *Appeal of Farmers' & Mechanics' Bank*, 48 Pa. St. 57. But that is because the personal representative holds the funds of the estate for the payment of the debts in the order prescribed by statute, and then pro rata in each class, which would be disturbed if the bank could apply the funds deposited by the executor or administrator to the indebtedness due to it by the deceased, though the deposits at the death of the testator could be applied to any indebtedness of his then due. *Jordan v. Bank*, supra. It is otherwise as to the surviving partner who merely continues the business for the purpose of winding it up, and of whom the law does not require the application of the funds in his hands to the debts in any prescribed order. The bank had no right, however, to apply the deposits on behalf of the firm, whether made during its existence or by the surviving partner, to the indebtedness held by it against one of the partners, and it could make no difference that this was the note of one partner indorsed by the other. It was an individual indebtedness, and part-

121. Although each partner (except in limited partnerships) is severally responsible for the entire indebtedness of the firm, yet, notwithstanding that fact, the individual deposits of a partner cannot be applied to the indebtedness of the firm to the bank. *Adams v. Bank*, 113 N. C. 332, 18 S. E. 513, and 23 *Lawy. Rep. Ann.* 111, and notes; *Bank v. Jones*, 119 Ill. 407, 9 N. E. 885; *Raymond v. Palmer*, 41 La. Ann. 425, 6 South. 692; *Dawson v. Bank*, 5 Ark. 283. Upon the issues as found, the judgment might have been corrected to accord with the above opinion but for the finding upon the eighth issue. The plaintiff is entitled to recover the excess of the deposits above the indebtedness of the firm, with interest from date of demand. New trial.

FURCHES, J. (dissenting). The firm of *Hodgin Bros. & Lunn* was composed of the plaintiff, G. D. Hodgin, and L. L. Lunn. This firm was indebted to the defendant bank. Lunn died, and the plaintiff became the sole surviving partner of the firm of *Hodgin Bros. & Lunn*. After the death of Lunn, the plaintiff commenced collecting in the debts due the firm, and, not knowing what to do with the money, went to the president of the defendant bank, stated the fact that he wanted the president to advise him in the matter, when the president advised him to collect the assets as fast as he could, and pay the debts of the firm. The plaintiff then replied, "The firm is owing you, and I want to deposit the assets with you, that you may see that it is properly applied." Thereupon the plaintiff made his deposits in the defendant bank, and they were entered as deposits of *Hodgin Bros. & Lunn*. Besides the debt due the defendant by the firm of *Hodgin Bros. & Lunn*, the deceased partner, Lunn, owed the bank an individual debt of \$650, with plaintiff, Hodgin, as his surety. Plaintiff continued to make deposits in the defendant bank as he collected the assets of the firm until he had about the sum of \$4,000 on deposit with the defendant. But about the 1st of April, 1897, it became known that the firm of *Hodgin Bros. & Lunn* was insolvent, and that Lunn's estate was insolvent, and that the plaintiff, Hodgin, was also insolvent. Upon the defendant's receiving information of the insolvency of the firm, of the estate of Lunn, and of Hodgin, it applied a sufficient amount of the money so deposited with it by defendant to pay the debt against the firm, and also the note of \$650 of Lunn, to which the plaintiff, Hodgin, was surety, amounting in all to more than \$3,000. The question is, could the defendant do this? The partnership was dissolved, by the death of Lunn, on the 16th of March, 1896, and plaintiff became the only surviving partner,—became the legal owner of all the partnership assets. *Bates, Partn.* § 713. Hence his powers to dispose of the part-

ship assets in payment of debts and setting up the concern is derived from his title to the property, and not from his powers. *Id.* After a dissolution by death, the surviving partner is the legal owner in trust for the purpose of winding up the concern, payment of debts, etc. *Id.* § 720. This being so, the plaintiff was the owner of the money he deposited with the defendant, and the bank became his debtor, and he the bank's creditor, the amount deposited. The fact that the deposits were made in the name of the firm of Hodgins Bros. & Lunn made no difference, as the firm was dissolved by the death of Lunn; and the defendant knew this, and knew that the plaintiff was making the deposits as the surviving partner. *Morse, Banking*, § 326. The effect of "lien, set-off, and application only exists where the individual who is both depositor and debtor stands in both these characters precisely the same relation and on precisely the same footing towards the bank." *Id.* It comes to us that the principles enunciated by these authorities, if applied to this case, defeat it against the defendant's right to apply the deposits to the satisfaction of the debt due the firm of Hodgins Bros. & Lunn. The debts owing the debt and the party making deposits are not the same. The debt due the bank is the debt of Hodgins Bros. & Lunn. The deposits made by the plaintiff are funds that belonged to him. It is true that they belonged to him as trustee, but the defendant cannot be allowed to interfere with his rights as trustee against his will, unless there is a specific lien upon these deposits;

It seems to us that we have shown that there is no such lien. The same principle is involved in this case as that of an executor or administrator who deposits in a bank to which the intestate or testator was indebted. The bank cannot make an application of such deposits to the satisfaction of the debts due by the intestate or testator. *Jordan v. Bank*, 74 Y. 467; *Appeal of Farmers' & Mechanics' Bank*, 48 Pa. St. 57. It is true that it is conceded that the reason of this is that it is the duty of the personal representative to pay the debts of the deceased pro rata. And there is no difference, but we do not think that is a controlling reason. This seems to have been so before the statute requiring the debts to be paid pro rata, and was so when he had no right to prefer creditors of equal degree. The true ground is the one we have stated,—want of mutuality in debtor and creditor. It seems to be clear that the bank had no right to apply these deposits to the satisfaction of the note of Lunn for \$650. A partner is not liable for the debts of its individual members (*Strauss v. Frederick*, 91 N. 21), and, if the deposits had been made by the firm, they could not have been applied by the defendant to the satisfaction of the individual debts of one partner.

DOUGLAS, J. I concur in the dissenting opinion.

PIEDMONT BANK OF MORGANTON et al.
v. WILSON et al.

(Supreme Court of North Carolina. May 2, 1899.)

PAYMENT—SUFFICIENCY OF EVIDENCE—BANKS—
AUTHORITY OF CASHIER—COUNTERCLAIM
—EQUITABLE GROUNDS.

1. A maker of a \$421 note testified that he had transferred a \$1,500 note in his favor to a bank as collateral security, and that the bank agreed to permit him to pay the \$421 note out of the \$1,500 note; that he informed the payee of the \$421 note of such agreement, and paid \$21, leaving \$400, which the payee was to collect out of the \$1,500 note, and the payee agreed to accept this interest in the \$1,500 note in payment of \$400. It was not claimed that the \$400 note had ever been actually paid or surrendered. *Held* to be no evidence of payment of the \$421 note.

2. An agreement of a bank cashier to accept a verbal assignment of an interest in a note, previously assigned to another bank as collateral security, in payment of another note, is void for want of consideration, and as being beyond the scope of the cashier's agency, though the bank holding the collateral agrees to pay the note from the collateral note when collected.

3. One sued on a note by a bank cannot, after the bank is declared insolvent, maintain a counterclaim for a deposit made before the bank became insolvent and after the suit was commenced, under Code, § 244, authorizing a counterclaim only where the cause of action arises out of the transaction alleged in the complaint, or connected with the subject of the action, or arises on a contract existing at the commencement of the action.

4. The fact that an indorser of a note deposited money in a bank after it had brought suit on the note, and that it subsequently became insolvent, affords no ground for equitable interference, though the Code makes no provision whereby the indorser may set up his deposit as a counterclaim.

Appeal from superior court, Burke county; Coble, Judge.

Action by the Piedmont Bank of Morganton against James W. Wilson and the Morganton Manufacturing & Trading Company. After plaintiff became insolvent, L. A. Bristol, its receiver, was made a party plaintiff. Judgment for defendant Wilson, and plaintiff and the manufacturing company appeal. Affirmed in part.

Avery & Ervin, for plaintiffs. S. J. Ervin, for defendants.

DOUGLAS, J. This is an action upon a promissory note executed by the defendant Wilson to his co-defendant, the manufacturing company, and by it indorsed to the plaintiff. A payment on the note reduced the principal to \$400, which is now due, with interest thereon. The defendants, in their answer, contend: "That at the time the said note was executed, and when it was due, the plaintiff held a note on Isaac T. Avery and W. C. Ervin for the sum of \$1,500, to be due January 1, 1895, which he had assigned to the Davis & Wiley Bank; that he had made an arrangement with said bank to allow him \$400 of this note to be used by him in payment of the note sued on in this cause; that accordingly, on the 29th day of December, 1894, he paid to

that in accordance with this agreement the Davis & Wiley Bank, January 1st, sent said note to the plaintiff, and it declined to receive it, and allow defendant credit therefor; that this defendant understood and has been informed by the said Isaac T. Avery that, although the said note for \$1,500 was signed by him and W. C. Ervin, the plaintiff bank was the real party who would have it to pay, and that in making the agreement to accept the said \$400 in payment of his note the plaintiff was only paying an indebtedness due from it; that the said Davis & Wiley Bank is still willing the said arrangement shall be made, and the defendant now pleads said agreement and the said indebtedness as a counterclaim in payment in full of said note." The plaintiff, in reply, denied the material allegations of the answer, set up the pendency of a suit by the Davis & Wiley Bank, and pleaded the statute of frauds. The following issue was submitted: "Did the plaintiff bank agree with the defendant J. W. Wilson to take in payment of the balance of the note sued on an interest of \$400 in a \$1,500 note given said Wilson by I. T. Avery and W. C. Ervin, and assigned by said Wilson to the Davis & Wiley Bank, and did said Davis & Wiley Bank agree that said plaintiff bank should have the said \$400 interest in the \$1,500 note, and was such \$400 interest in the \$1,500 note ever assigned to the plaintiff bank?" This was answered in the affirmative.

The execution of the note sued on by plaintiffs was admitted, as was also its indorsement by the Morganton Manufacturing & Trading Company. The defendant J. W. Wilson, introduced as a witness in his own behalf, subject to the objection of the plaintiffs, testified as follows: "After execution of the note to the Morganton Manufacturing & Trading Company, on August 24, 1894, witness had a conversation with either S. T. Pearson or G. P. Erwin; thinks it was with Mr. Pearson. (Mr. Pearson was cashier and Mr. Erwin was president of the Piedmont Bank.) The bank had a note on witness of \$421.74, on which the Morganton Manufacturing & Trading Company was surety. Witness was one of the stockholders of said company. Witness had at same time a note on I. T. Avery and W. C. Ervin for \$1,500 (note shown witness, which he says is the note, and note put in evidence), which witness had given to Davis & Wiley (bankers) in payment of a security debt which witness had down there, with the understanding with Davis & Wiley that \$400 of that note could be used by witness in paying off the debt of \$421.74 the witness was due the Piedmont Bank. Witness went into bank, and told them of the arrangement, and paid them the \$21.74, leaving the \$400 unpaid, which they were to collect out of Avery & Ervin, and settle. Witness supposes that the bank did not collect it

pay on the following January \$1,500 and interest on the note Davis & Wiley held, and \$400 of it was to go to the plaintiff bank, and the balance to Davis & Wiley, and the bank agreed to this in payment of \$400. Witness had a talk with some of the officers of the bank. The interest on the \$1,500 was paid by the bank. Witness called at the bank to get payment on the Avery & Ervin note when it was due, and the bank officer gave witness to understand that Ervin, the maker, had the money to pay it, so witness made a deed for the property, and tendered it at the bank, and they declined to pay it. All the parties declined to pay it. Suit was then brought upon the \$1,500 note, and that case is still pending. Suit brought in favor of Davis & Wiley on this note. Davis & Wiley are still willing to carry out their part of the contract, and pay them \$400, when the parties pay them the \$1,500." This is the entire testimony of the witness Wilson, who was the only witness examined, as appears in the record. It was all objected to in apt time, admitted by the court, and excepted to by the plaintiffs. The defendants admit that the Davis & Wiley Bank have a suit pending for the \$1,500 note of Avery & Ervin, brought since the commencement of this action. Both notes were in evidence, that of Avery & Ervin bearing the following indorsements: "Jas. W. Wilson." "Pay to the order of G. P. Erwin, Pres't, for collection account Davis & Wiley Bank. O. D. Davis, Cashier." The latter indorsement had been stricken out. At the close of the evidence the plaintiff filed the following requests for instructions: "(1) That if the jury believe the evidence they will answer the issue 'No.' (2) That upon all the testimony the plaintiff is entitled to recover. (3) That there is no evidence of any assignment of any part of the Avery & Ervin note to the plaintiff bank by the Davis & Wiley Bank. (4) That there is no evidence that the plaintiff bank agreed to accept \$400 of the Avery & Ervin note in discharge of the note sued on; on the contrary, the evidence of defendant J. W. Wilson was that the bank 'agreed to collect the Avery & Ervin note, and apply \$400 on the debt sued on, but that the plaintiff bank did not collect the Avery & Ervin note.' (5) That, no consideration being shown for the alleged agreement, it was nudum pactum, and void. (6) That, even if there had been a consideration, the transaction testified to by J. W. Wilson was, in effect, a promise on the part of the plaintiff bank to pay the debt of Avery & Ervin, and was void under the statute of frauds. (7) That upon the testimony of J. W. Wilson the transaction or agreement with the bank was merely executory, was without consideration, and, being never executed, conferred no liability. If the jury believe that plaintiff bank did as testified by Wilson,—

ed to give either or any of the instructions prayed for by plaintiffs, and plaintiffs excepted to the refusal of the court to give each and every one of the instructions as prayed by plaintiffs. The court charged the jury as follows: "The burden of proving the affirmative of this issue by a greater weight of the evidence is upon the defendants. If the jury find that the plaintiff bank agreed, through its cashier, with the defendant J. W. Wilson, to take in payment of the balance of the note sued on an interest of \$400 in a \$1,500 note given said Wilson by I. T. Avery and W. C. Ervin, and assigned by said Wilson to the Davis & Wiley Bank, and further find that the said Davis & Wiley Bank consented and agreed that plaintiff bank should have the \$400 interest in the said \$1,500 note, and that the said Davis & Wiley Bank, in pursuance of said agreement, sent the said \$1,500 note to the plaintiff bank for collection, and that the said Davis & Wiley Bank are still willing to carry out the said agreement, then the jury will answer the issue, 'Yes.' If the plaintiff bank did not agree to take in payment of the \$400 balance on note sued on a \$400 interest in the said \$1,500, but only agreed to collect the \$1,500 and apply \$400 of the money collected to the payment of note sued on with the consent of Davis & Wiley Bank, in the event that they were able to collect it, and if the plaintiff bank has been unable to collect the said \$1,500 note, then there would be no payment, and the jury will answer the issue, 'No.' If the defendant has failed to prove by a greater weight of the evidence the affirmative of the issue, then the jury will answer the issue, 'No.'" Judgment was rendered for the defendants, and the plaintiff appealed.

Upon the foregoing facts, we are of the opinion that the plaintiff is entitled to a new trial. The execution of the note having been admitted, the burden shifted upon the defendants of showing matter in avoidance. Their plea is substantially that of payment, but we find no substantial evidence tending to prove actual payment. In arriving at this conclusion we have accepted the defendants' evidence as true, and construed it in the light most favorable for them, as it is our duty to do in a prayer for instruction in the nature of a demurrer to the evidence. *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848; *Cable v. Railway Co.*, 122 N. C. 892, 29 S. E. 377. At best the evidence tends to prove simply an executory agreement to pay. It is not contended that the note in suit has ever been actually paid, or that it has been canceled or surrendered. It was permitted to remain in the possession of the bank, and was turned over among its assets to the receiver. The testimony of the defendant Wilson that the Davis & Wiley Bank is still willing to carry out its part of the contract, if admissible,

admittedly on account of the Davis & Wiley Bank, without admission of any interest whatever belonging to the plaintiff. *Boykin v. Bank*, 118 N. C. 566, 24 S. E. 357; *National Citizens' Bank of New York v. Citizens' Nat. Bank of Raleigh*, 119 N. C. 307, 25 S. E. 971. We are not attempting to pass upon the weight of the evidence, for that function belongs to the jury; but we think that, in the absence of any evidence, more than a mere scintilla, tending to prove the contention of the defendants, on whom rested the burden of proof, the court should have directed a verdict in favor of the plaintiff. *Sprull v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39. But, if we are mistaken in our view of the evidence, we are still of the opinion that the alleged agreement was beyond the scope of the agency of a cashier, and without consideration, and therefore void. There is no pretense of consideration. The payment by the defendant Wilson of the \$21.74 was simply the payment of a small part of that for which he was bound. We do not think that a cashier can, without express authority, take in payment of a note a mere verbal assignment of an intangible interest in another note, already held by another bank as collateral security. If the alleged contract operated as payment in full of the note in suit, then the plaintiff bank has absolutely nothing to show for the unpaid debt originally owing to it by the defendants, and still owing by somebody. Such transactions are not within the ordinary dealings of a bank, and cannot be encouraged. It is scarcely necessary to cite authorities as to the effect of a nudum pactum, especially when made by an agent. Our view of the case renders it unnecessary for us to discuss the other questions raised by exception. For the reasons above stated, a new trial must be ordered. New trial.

Defendant's Appeal in Same Case.

This is the appeal of the defendant manufacturing company in the preceding case between the same parties, involving, however, an entirely different question of law. The plaintiff brought this action upon the promissory note of the defendant manufacturing company indorsed by said Wilson. The defendant company filed its separate answer, as follows: (1) "That, after the suit was brought in this case by the plaintiff bank, it failed, and the plaintiff L. A. Bristol was made permanent receiver, and is made party plaintiff at this term of the court; that he is now pressing this cause against defendants to create assets in his hands." (2) "That at the time of the failure of said bank, on the 2d of December, 1898, this defendant was a depositor, and had to its credit on the books of said bank the sum of \$100.36, which sum is still due and owing to this defendant, and defendant now pleads the said sum of \$100.36

and counterclaim was not in existence when this action was brought. The plaintiff admitted the facts alleged in the separate answer of the defendant company, but demurred onerous to the answer of said company on the ground that the said counterclaim was not in existence when this action was brought. The demurrer was sustained, and the defendant company appealed. We see no error in the ruling of the court below. As we have said in *Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288, the counterclaim, as it now exists, is the creature of the Code, being provided for in section 244, which is as follows: "The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." The counterclaim of the defendant company has no connection whatever with the plaintiff's original cause of action, and hence must come under the second class, which are available only when existing at the commencement of the action. We see no ground for equitable interference. The defendant company deposited money to its own credit with the plaintiff after the plaintiff had brought suit on a note in which the defendant company was the principal debtor. It may seem hard that the plaintiff should collect its own debt in full, and also keep the money of the defendant, but it is the defendant's own fault. It might have applied this money to the payment of its own debt; but, if it failed or refused to do so, it must abide the consequences of its own acts. It may be that it relied on the defense of its co-defendant, Wilson, and preferred to keep its money where it could be withdrawn in case of need. Whatever may have been the motive, it was a deposit, and not a payment, and, occurring after the bringing of the action, cannot be set up as a counterclaim. We see no error in this appeal. No error.

STATE v. KALE.

(Supreme Court of North Carolina. April 25, 1899.)

MURDER—INSTRUCTIONS—STATEMENT OF EVIDENCE—INTOXICATION—APPEAL—PRESUMPTIONS.

1. A charge, on a trial for murder, calling attention to each grade of the offense of murder and manslaughter, with instructions how the jury should find, according to their understanding of the evidence, sufficiently complies with Code, § 413, requiring the judge "to state,

of murder in the first degree, if his commission of the homicide was a rash act, caused by his being intoxicated, is erroneous, as leaving out of view the consideration whether defendant made himself drunk for the purpose of executing a premeditated intent to kill.

3. Where the jury were instructed to consider all of the evidence in determining whether a homicide was the outgrowth of premeditation, it will be presumed that evidence of defendant's intoxication was considered by the jury.

Appeal from superior court, Catawba county; Coble, Judge.

Avery Kale was convicted of murder, and he appeals. Affirmed.

A. S. Alley testified that he has known the prisoner all his life. Witness runs a government distillery about 200 feet from the prisoner's, who is a single man, a little over 18 years of age. Witness knew the deceased, George Travis, who lived near him. The deceased was a married man, and had five children. Prisoner has a brother, sister, and father. Prisoner last August had been back about two weeks. Deceased was working for witness, and he died about 14th of August. In his own house. Was shot in the top of the head about sundown, in witness' distillery, with a shotgun, and killed. There are five distillery buildings there. Both still houses were not used at the time of the killing. The branch still was being operated. Witness was in his whisky house when the killing occurred. Heard the firing, and went out, and saw the prisoner's father and the prisoner coming out of the still house with gun in his hand. Not more than two minutes after witness heard the gun fire, the prisoner's father spoke to witness. John Sherrill was there. Witness spoke to prisoner, who was in a rage, and wheeled the gun up, and pointed at his own head; but, before he pulled the trigger, his father wrenched it out of his hand. Prisoner said, "Oh, Lord, I have killed him!" repeating this two or three times. "I don't think he was cursing." Witness found the deceased just like a man squatting down. His eye was lying on the rock. He examined deceased, and he had no pulse. Witness told prisoner to go home. Witness had been in whisky room not more than three minutes, when he went out and called Travis and a black fellow who was chopping wood near by. Prisoner had gone to the depot for witness that day, and got in a buggy before the killing and rode with witness 200 or 400 yards. Prisoner had worked in the still for witness up to July 1st. Deceased was working a farm for witness at the time, and had been stilling for witness about two weeks. Witness thought the parties were friendly. Just after the shooting the prisoner used this language, "Now I have killed the damn scoundrel;" and that he could kill two more, and they could not hang him but once. He had a double-barrel breech-loading shotgun, and was cursing and crying. Wit-

told him that Travis was dead. After deceased was carried out of the still house, prisoner came back, and wanted two dollars in witness, and he told him he did not have it. Prisoner's father said, "Let me have it," witness paid his father two dollars, and put that in his son's hand, and dumped it he had in his pocket into prisoner's hand. Never saw the prisoner any more that night. Prisoner was gone about two weeks before his trial. Had a talk with prisoner and father in jail. Mr. Rowe told prisoner if he wanted to talk with his father privately, (Mr. Rowe) would step aside. Witness asked prisoner what shape Travis was in when he saw him, and he said he was standing up, witness told him that could not be, for he went through the top of his head, and a hog's head about four feet high. Prisoner said he thought he was standing up; he did not know hardly what happened. A couple of weeks ago witness went to see prisoner. Deceased was sober at the time he was killed, and was a sober man, and witness never knew him to have a fuss. The wound was about the size of a dollar. Brains were oozing out. The shot entered the right side of his head, and he fell sideways. Deceased's shirt was exhibited, which he had on when shot, a powder burn was on the hat. The one who shot him could not be far from him. The shot did not scatter as they went in. Saw the weapon in Travis' hand. There were a few small brickbats under the feet where they were killed around. Deceased lived until next morning at 10 o'clock. On cross-examination the witness stated that the deceased and the prisoner's father and mother lived on his place, that the prisoner had worked for him ever since the prisoner was a boy, and began working for him about five years ago. His father farmed on witness' place. The deceased was not 30 years old. It was about 20 yards from the witness' house to the prisoner's father's. Prisoner had some bad spells when he got liquor in him. He had gone into Gaston county. After he came back, he had been hunting. Deceased sent 75 cents that evening by prisoner for some produce. Before dinner the witness and prisoner and the deceased were standing in the still house. Prisoner had several drinks that day, and had been drinking all that week. He got one bottle of liquor that day, and during the same night the prisoner and deceased had worked the still by themselves. Witness always kept a gun in the liquor house, and the prisoner in charge of the house. The killing was on Monday. Prisoner had been there after that with his gun when he would come from stilling. He was crying and taking on, and seemed to regret what he had done, and frequently went in the house where deceased was shot, for cider, and never said that deceased had thrown a brick at him. Witness told prisoner that Travis was dead, and to go to the house. Witness never told prisoner that the best place for him to go was in the

mountains. On redirect examination: The bricks there were as large as a walnut. Prisoner came out of the still house. The gun which the witness kept there was in the liquor house at the time of the killing. The sheriff brought prisoner back from Jacksonville, Fla.

Dr. Little, admitted to be an expert, was called to see deceased about 9 o'clock that night, and when he got there he was lying on the floor unconscious. Witness stated that he examined the wound. Was shot on the right side of the head. Brains oozing out. Mortal wound. Lived until Sunday night about 10 o'clock. This shot killed him.

John Sherrill testified: "Was working for Mr. Alley. Saw prisoner just before the gun fired. When I first saw him, prisoner said, 'Where is he? I'll kill him.' He was about 25 steps from the still house when he said this. Don't know who was in the still house. Mr. Alley told me I could go home, and I started in there where Mr. Alley was, and Travis said to witness, 'You haven't got your bottle.' Witness went to still house to get a bottle, and saw prisoner's father speak to Travis, and say to prisoner, 'Avery, go back; don't do anything like this;' and prisoner said, 'Where is he, damn him? I'll kill him;' and just before this the witness had heard prisoner's father speak to Travis. Just after prisoner said, 'I'll kill him,' prisoner went towards still house. After witness got to where Mr. Alley was till the gun fired was a very short time. After the gun fired, witness saw the prisoner coming from the still house. He was clapping his hands, and saying, 'Oh, Lord!'"

Jack Johnson testified that on the occasion mentioned he saw prisoner come out of his father's house with a gun in his hand, and went towards the still house, and his mother said, "Oh, don't do that!" and she hoped he would get away. He was walking fast, and heard the report of a gun in the direction of the still house. He called for his clothes. Witness told him he could not go with him. He was going in a wagon with the witness to Iredell county to work, and witness refused to take him, and never saw him any more.

W. L. Alley testified that he saw prisoner the day Travis was shot at the still house. He had been off from home, and witness asked him when he was going back, and he said he was not going to Gastonia; he was going to South Carolina. Witness asked him who was stilling for Alley. He said, "Nobody." Witness said, "Is he doing it himself?" and prisoner said, "George Travis is there," and said he would get George's "mug" before he left here. Witness and prisoner were joking with each other. This was about two hours before sunset, at the distillery, about 2½ miles from where Travis was shot. On cross-examination: Witness gave prisoner a drink. "They were all running on in fun."

John Bost testified that he lived in Gastonia, and heard prisoner say he came there to

ne was going home to kill Travis or have his job back. Said his job was stilling. This was the day before he started back. On cross-examination, he stated that he told this conversation to his grandfather (Alley).

Mrs. Laura Bost testified that she was a sister of Alley. Prisoner was at her house last July, and she heard him say that he and Travis had a falling out, and that he was indicted, and that Travis was a witness against him, and that is what he left home for. Witness said he need not have left home for that; that he could not have been arrested yet; and he said he left to keep from killing Travis; that he did not want to kill him, and he was afraid he might get mad at him and would do it. At another time, after he quit working at the mill, prisoner said he was going back home to go to work,—to get his job back. The witness said to him that perhaps he could not get it, and prisoner said, "I will have my job or kill him." This was the evening before he left Gastonia.

Henry Moore testified that he had a talk with the prisoner last summer at Alley's barn, during the other court here, and prisoner said that Travis and his wife had gone to town on a little scrape they had some time ago, and he said: "If he bothers me hereafter, I will shoot the son of a bitch." It was also in evidence that there was an indictment against Avery Kale found at the last term of court, and the recollection of the witness (the clerk) was that George Travis' name was on the bill of indictment as a witness. The state rested its case.

Special instructions asked by prisoner:

"(1) That unless the jury are satisfied beyond a reasonable doubt that there was a deliberate, premeditated, and preconceived design on the part of the prisoner to take the life of the deceased, and that the act of killing was committed in pursuance of such fixed design, the prisoner would be guilty of no higher offense than murder in the second degree.

"(2) That the killing with a deadly weapon being admitted or proved, and nothing else appearing, it is not murder in the first degree, but murder in the second degree only.

"(3) That, if the jury have a reasonable doubt as to whether the prisoner formed a deliberate and premeditated design to take the life of deceased prior to the act of killing, it would then be their duty to give the prisoner the benefit of such doubt, and to convict only in the second degree, unless the prisoner showed such mitigating circumstances as to reduce the grade of the offense to manslaughter.

"(4) That, if the jury find from the evidence that prisoner was intoxicated at the time of the commission of the homicide or under the influence of liquor, they should take these facts into consideration in determining

mind, on the day of the homicide, as not be capable of judging of his acts and of forming in his mind a design, deliberately and with premeditation, he would not be guilty of murder in the first degree, but in that case if he intentionally shot and killed the deceased, he would be guilty of murder in the second degree, unless the evidence shows that he did it in self-defense, or under such circumstances as to mitigate the killing to manslaughter.

"(5) If the jury believe from the evidence that prisoner had been drinking to excess during the week in which the homicide occurred, and at the time of the homicide he was intoxicated, and by reason of these facts they believe that the homicide was the rash act of a drunken man rather than the vicious act of a sober man, then the prisoner would not be guilty of murder in the first degree."

The court gave all the above instructions, except No. 5, which was refused. After recapitulating the testimony, the court instructed the jury as follows:

"The prisoner is charged with murder. Under our law, as it now stands, where an intentional killing with a deadly weapon is proved beyond a reasonable doubt or admitted, the law presumes malice, and places the burden on the accused to show that he is not guilty of murder in the second degree, either by showing from the evidence such circumstances as will mitigate the killing to manslaughter, or by showing that it was done in self-defense. 'Malice' is the dictates of a wicked, depraved, and malignant heart. An intentional killing with a deadly weapon, nothing else appearing, is murder in the second degree. The law in this state divides murder into two degrees. All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torturing, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetration, or in the attempt to perpetrate, any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree. All other kinds of murder shall be deemed murder in the second degree. Under the law as it now stands, the jury may convict prisoner of murder in the first degree, or murder in the second degree, or manslaughter, or they may acquit him, accordingly as the evidence in the case, under the court's instructions, warrants the jury in finding. The jury are instructed that, under our statute, the prisoner cannot be found guilty of murder in the first degree unless they are satisfied from the evidence, beyond a reasonable doubt, not only that prisoner is guilty of intentionally and feloniously killing the deceased, but it must further appear from the evidence beyond a reasonable doubt that such killing was done willfully, deliberately, and with premeditation; that it was done inten-

der in the first degree, there must have been an unlawful killing, done purposely and with premeditated malice. By 'premeditation' is meant thought beforehand, for any length of time, however short.

"If a person has actually formed a purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. An intent to kill may exist in other degrees of unjustifiable homicide, but in no other degree is that intent formed into a fixed purpose by deliberation and premeditation. The intent is defined as a steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences. If prisoner intentionally killed deceased in pursuance of a fixed design and purpose to kill, formed upon premeditation and reflection, then he is guilty of murder in the first degree.

"If the jury find from the evidence, beyond a reasonable doubt, that he had a fixed design and purpose to kill the deceased, and that he had formed this purpose with premeditation, upon deliberation and reflection, and that, in pursuance of this purpose, he shot deceased and killed him, he would be guilty of murder in the first degree. The jury will consider the facts and circumstances connected with the homicide, and proved in the case, to determine whether the killing was the outgrowth of premeditation and deliberation. If they find as facts from the evidence that prisoner had made threats to kill deceased, and had prepared his weapon with which to kill him, these would be facts which the jury could consider as tending to show premeditation. If the state has shown beyond a reasonable doubt from the evidence that prisoner intentionally shot and killed deceased, and that he did it in pursuance of a fixed design and purpose to kill him, deliberately formed, upon premeditation and reflection, then they will find him guilty of murder in the first degree. If prisoner intentionally killed deceased, and if the state has failed to show that it was done with deliberation and premeditation, such killing, unexplained, would constitute murder in the second degree. If he intentionally shot and killed deceased, and if the state has failed to show beyond a reasonable doubt that the killing was done with premeditation and deliberation, then he would be guilty of murder in the second degree, unless the evidence shows that the killing was done in self-defense or under such circumstances that it was manslaughter.

"Now, as before the statute of 1893, dividing murder into two degrees, if the killing is proved beyond a reasonable doubt, malice is presumed, and, nothing else appearing unexplained, the killing would be murder in the

doubt, then he is guilty of murder in the second degree, unless the evidence shows facts and circumstances as will rebut the presumption of malice, and shows that the killing was either excusable homicide in self-defense or manslaughter, unless the state has shown beyond a reasonable doubt that it was done with such deliberation and premeditation as would make it murder in the first degree. If he intentionally slew deceased with a gun without premeditation and not in self-defense, then he is guilty of murder in the second degree, unless the evidence shows that the killing was done under such circumstances as to make it manslaughter.

"If prisoner is not guilty of murder in any degree, is he guilty of manslaughter? 'Manslaughter' is the unlawful killing of another without malice, either express or implied. Where two persons engage in mutual combat, and one of them kills the other in heat of passion, this is manslaughter. If the prisoner and deceased encountered each other in the still house, and engaged in mutual combat, and if prisoner, in the heat of passion, intentionally shot and killed deceased, not in self-defense, he would be guilty of manslaughter.

"The state insists that the prisoner is guilty of murder in the first degree, and that the evidence shows this beyond a reasonable doubt, and contends that prisoner had a motive to kill deceased. The state contends that the deceased had supplanted the prisoner as the distiller at Alley's distillery, and further contends that there had been some trouble between them, and that there was an indictment against the prisoner, and that the deceased was a witness in that case; and further contends that for these reasons the prisoner had become angered at the deceased, and that prisoner had made threats that he would kill deceased, and had prepared his weapon to kill him, and had a fixed design and purpose to kill him; and in pursuance of such fixed design and purpose the state contends that prisoner shot deceased intentionally, and killed him, and that he did this with deliberation and premeditation, and that he is guilty of murder in the first degree.

"Prisoner contends that he is not guilty of any crime, and that the evidence is not sufficient to satisfy the jury beyond a reasonable doubt that he killed deceased, and that, if the jury should find that he shot deceased, still the prisoner contends that he is not guilty of murder in the first degree, and that the evidence is not sufficient to satisfy the jury beyond a reasonable doubt that he did it with that deliberation and premeditation which is necessary to make the killing murder in the first degree, and contends that the jury should not lay too much stress or weight on any threats which the jury may find he may have made; for he contends that men often say things when they are angry or excited, and

prisoner contends that in this case that any threats the jury may find he made were not made with any intention to carry them into execution; and that, if the jury find beyond a reasonable doubt that he killed deceased, the evidence is not sufficient to satisfy them beyond a reasonable doubt that he had a fixed design to kill him, and that he did it with deliberation and premeditation, and that the jury cannot, in any event, find him guilty of murder in the first degree. He contends that, if he killed deceased, he did it without premeditation; that he was under the influence of liquor. When he saw deceased, he then and there formed the purpose to shoot, and that he did not kill him with premeditation and deliberation, and he contends that the jury cannot find him guilty of any higher crime than murder in the second degree.

"The jury will consider all the evidence, and if the state has shown beyond a reasonable doubt that prisoner intentionally killed deceased, and that he did it in pursuance of a fixed purpose and intent to kill him, joined with deliberation and premeditation, then the jury will find prisoner guilty of murder in the first degree. If the state has failed to show beyond a reasonable doubt that prisoner is guilty of murder in the first degree, and if prisoner intentionally killed deceased with a deadly weapon, and if the evidence fails to show that he did it in self-defense, then the jury will find him guilty of murder in the second degree. If they have any reasonable doubt as to whether the prisoner intentionally shot and killed deceased, as charged, then the jury will find him not guilty.

"If the jury find prisoner guilty of murder in the first degree, they will return for their verdict that they find the prisoner guilty of murder in the first degree; if they find him guilty of murder in the second degree, then they will return for their verdict that they find the prisoner guilty of murder in the second degree; if they find him guilty of manslaughter, then they will return for their verdict that they find the prisoner guilty of manslaughter; if the jury have any reasonable doubt of the prisoner's guilt, then they will return for their verdict that they find him not guilty.

"The fact that prisoner did not go upon the witness stand cannot be considered by the jury. The law allows a prisoner to go upon the witness stand in his own behalf, but it allows him this as a privilege, and the fact that he does not cannot be considered as prejudicial to him."

Verdict of guilty of murder in the first degree.

Prisoner moved for a new trial for the following reasons: "(1) For that the court failed to instruct the jury that evidence of an old grudge having been introduced, and a subsequent reconciliation having been proved, the

to give the prisoner's request for special instruction No. 5." Motion overruled. Prisoner excepted, and appealed from the judgment pronounced.

Felmster & Yount, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. The prisoner was indicted and convicted of murder in the first degree. The first exception is that the judge failed "to state, in a plain and correct manner, the evidence given in the case, and declare and explain the law arising thereon," as required by section 413 of the Code. This section imposes an important duty on the judge, and one of vital interest to the prisoner when on trial under a charge of a capital felony. We have carefully read the evidence in detail and the charge. The charge is elaborate, calling attention distinctly to each grade of the offense of murder and manslaughter, with distinct instructions how the jury should find, according to their understanding and belief of the evidence. It is a faithful compliance with section 413, and this puts the first exception out of the way.

Second exception: "That his honor erred in refusing to give prisoner's fifth prayer for special instructions." That prayer was in these words: "That if the jury believe from the evidence that the prisoner had been drinking to excess during the week in which the homicide occurred, and that at the time of committing the homicide was really intoxicated, and if, by reason of these facts, they believe the homicide was the rash act of a drunken man, rather than the vicious act of a sober man, then the prisoner would not be guilty of murder in the first degree." Condensed, this means, if the prisoner was really intoxicated when the rash act was committed, he would not be guilty of murder in the first degree. As a legal proposition, this prayer could not be given, because it leaves out of view the consideration whether the prisoner had made himself drunk for the purpose of executing a premeditated, wicked intent to kill, or whether he availed himself of a drunken condition to execute a premeditated resolution to do the act. If one voluntarily becomes drunk and kills, without justification, he is guilty of murder. *State v. Wilson*, 104 N. C. 868, 10 S. E. 315. The test of accountability is the ability of the accused to distinguish right from wrong, and that in doing a criminal act he is doing wrong. When killing with a deadly weapon is admitted or proved, the law implies malice, and the burden of showing the absence of malice is upon the prisoner. Drunkenness at the time the crime is committed, nothing else appearing, does not repel malice nor lower the grade of the crime. The law recognizes the dethronement of reason, as in insanity, for

crime." State v. Keath, 83 N. C. 626. One charged with murder has premeditated and deliberately formed the intention to kill, and did kill, the deceased, when drunk, the offense is not reduced to murder in the second degree. State v. McDaniel, 115 N. C. 807, 20 S. E. 622. Of course, the killing and its manner, the intent, intoxication, how it comes about, and for what purpose drunkenness takes place, and the like, are questions for the jury, under the court's instructions as to the law applicable thereto. There was evidence of the prisoner's declared purpose and intent, at different times, to kill the deceased, tending to show deliberate premeditation. One witness testified that the "prisoner had some bad spells when he got liquor in him. * * * Prisoner had several drams that day, and had been drinking all the week. He got one bottle of liquor that day." This was the only evidence offered to show intoxication. No witness said he was drunk when he fired the fatal shot, and there was no evidence of provocation. His honor, after charging the jury as before stated, said: "The jury will consider the facts and circumstances connected with the homicide and proved in the case, to determine whether the killing was the outgrowth of premeditation and deliberation. * * * The jury will consider all the evidence, and if the state has shown beyond a reasonable doubt that the prisoner intentionally killed the deceased, and that he did it in pursuance of a fixed purpose and intent to kill him, joined with deliberation and premeditation, then the jury will find the prisoner guilty of murder in the first degree." When the jury were instructed to "consider all the evidence," we must assume that the evidence of drinking or drunkenness relied on by the prisoner passed in review, and was considered by the jury,—that is, to what extent it existed, if at all, and its bearing upon the alleged premeditated purpose and present purpose of the prisoner,—before their verdict was rendered. We have given the case appearing in the record our best attention, and fail to find anything in the course of the trial prejudicial to the prisoner's rights. Affirmed.

EFIRD et al. v. IREDELL et al.

(Supreme Court of South Carolina. May 3, 1899.)

CORPORATIONS—STOCKHOLDERS' LIABILITY—COMPLAINT—EVIDENCE—RECOVERY.

Where a complaint to recover of the original stockholders in a corporation assessments on their stock sets forth their names and the amount subscribed, with the exception of one, who, however, is joined as a defendant, and the original subscription list, introduced in evidence without objection, shows such defendant to have been an original stockholder, recovery may be had against him.

On petition for a rehearing. Dismissed.

32 S.E.—57

Sloan filed a petition for a rehearing in this case on the following grounds: "That your petitioner was named as a party defendant in the above-entitled cause, and it was alleged in the complaint, in the fifteenth paragraph, that the five shares of stock of G. Leaphart had been transferred to him by the executors of said Leaphart, but it was nowhere alleged in said complaint that this petitioner was a subscriber to the capital stock of said company; that the master reported * * * that your petitioner was an original subscriber to the stock of said company to the extent of ten shares, but your petitioner excepted to said finding, and, his exception being disregarded, your petitioner again excepted to the circuit decree on account thereof; * * * and your petitioner respectfully submits that the failure of the court to pass upon this exception was due to oversight on its part." The complaint sets forth the names of the original subscribers, and the amounts severally subscribed by them, but for some reason the name of John T. Sloan is not mentioned in said list. When, however, the original subscription list was introduced in evidence, it appeared therefrom that John T. Sloan was an original subscriber for 10 shares. No objection was made to this testimony, and the master accordingly reported that John T. Sloan was an original subscriber for 10 shares of stock. John T. Sloan excepted to the report of the master, not on the ground that the master erred in finding that he was an original subscriber, but on the ground that there are no allegations in the complaint charging him with liability as an original subscriber, nor asking for judgment for any such amount. He excepted to the decree of the circuit court on the same ground. It was evidently the intention of the plaintiffs to recover judgment against all the original subscribers to the capital stock of the company, and, as the testimony clearly showed that John T. Sloan was a subscriber to the capital stock, it would be inequitable to allow him to escape liability. The petition for rehearing is therefore dismissed.

EFIRD et al. v. IREDELL et al.

(Supreme Court of South Carolina. May 3, 1899.)

APPEAL—WITHDRAWAL OF EXCEPTIONS—EFFECT—REHEARING—NECESSITY.

1. Where exceptions to that part of a decree which is in favor of some of the defendants are withdrawn, such defendants cannot be held liable on appeal.

2. Where part of a decree in favor of certain defendants is reversed on appeal, but their petition for rehearing shows that the exceptions to such part were withdrawn, a rehearing is unnecessary in order to give such defendants relief.

On petition for rehearing. Dismissed.

For former opinion, see 32 S. E. 758.

case on the grounds set forth in their petition. They brought to the attention of the court that the exceptions to that part of the decree releasing the said defendants from liability in the manner set forth in the petition were withdrawn. They are therefore not liable as transferees of the shares of stock described in the complaint. It will not be necessary to order a rehearing in order that the petitioners may have this relief. The judgment of this court is hereby modified in accordance with these views, and the petition for a rehearing is dismissed.

ERNEST v. MERRITT et al.

(Supreme Court of Georgia. March 17, 1899.)

CREDITORS' SUIT—WHEN MAINTAINABLE—FRAUDULENT CONVEYANCE—RIGHTS OF GRANTEE—DECLARATIONS AS EVIDENCE.

1. An equitable petition brought by creditors of a husband against him and his wife, alleging a conspiracy by them to defeat his creditors by fraudulently placing in her the title to property belonging to him, and justly subject to the payment of his debts, setting up divers and complicated transactions, including the making of various deeds by the husband to the wife, the object and purpose of which, according to the averments of the petition, were to accomplish the end stated, and praying that portions of the property described be decreed subject to the petitioners' claims, was not demurrable. In such a case, the remedy at law would not be adequate and complete.

2. A voluntary deed, executed when the grantor is insolvent, is void against existing creditors. Such a deed is likewise void as to creditors, though the grantor be not insolvent at the time of making the deed, if his purpose in so doing is to hinder, delay, or defraud creditors; and this would be true whether the donee knew of the fraudulent intention or not.

3. One who takes a deed based on a valuable consideration, not so grossly inadequate as to suggest fraud, is not affected by an intention to defraud in the mind of the grantor, but unknown to the grantee. (a) A charge contrary to the principle just laid down is not, however, in a given case, cause for new trial, when the evidence demanded a finding that the grantor's fraudulent intention was in fact known to the grantee.

4. When a conspiracy between a husband and wife to defraud his creditors has been established, evidence of declarations made by him while the conspiracy was pending, and tending to show the intent to defraud, are admissible against the wife; especially so, when the husband remains in possession of the property which his creditors are seeking to subject, and which he had conveyed to her.

5. On the trial of a case of the nature above indicated, evidence of admissions by the wife tending to establish the fraud of the husband, and her knowledge of and connivance in the same are, of course, admissible against her.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Bill by R. A. Merritt and others against Laura A. Ernest. Judgment for plaintiffs. Defendant brings error. Affirmed.

LATILE, J. The headnotes preceding this opinion do not seem to require elaboration at our hands. To the first of these notes the case of *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97, is directly applicable. The second is supported by two cases heretofore adjudicated by this court. The first is that of *Wise v. Moore*, 31 Ga. 148; the second, is that of *Westmoreland v. Powell*, 59 Ga. 256. If it should be said that these cases were decided anterior to the adoption of our present Code, the reply is that the Case of *Westmoreland*, supra, was decided in 1877, under the provisions of the Code then in force. By reference to the Code of 1873, in force in 1877, it will be found that the provisions of that body of laws were the same as now found in our Code of 1895. See Code 1873, § 1952, para. 1-3, and the Case of *Westmoreland* must be held as an explanation of the law on this subject as found in the Code of 1895. The third headnote is supported by the second sentence of paragraph 2, § 2695, Civ. Code. The principle stated in the fourth headnote is elementary law. 1 Greenl. Ev. § 8; 3 Greenl. Ev. § 94. Judgment affirmed. All the justices concurring.

BOYD v. COLLINS.

(Supreme Court of Georgia. March 17, 1899.)

APPEAL—REVIEW.

There being no error of law complained of, and the verdict not being without evidence to support it, this court will not interfere with the discretion of the trial judge in overruling a motion for a new trial upon general grounds. (Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action between Carrie Boyd and R. S. Collins, administrator. From the judgment, Boyd brings error. Affirmed.

M. G. Bayne, for plaintiff in error. Smith & Jones, for defendant in error.

PER CURIAM. Judgment affirmed.

WEGMAN PIANO CO. v. IRVINE et al.

(Supreme Court of Georgia. March 17, 1899.)

RES JUDICATA—BENEFICIARIES OF HOMESTEAD.

1. A homestead estate is in the nature of a trust estate, of which the head of the family is the trustee; and a judgment rendered in a suit brought against the head of the family as such, seeking to subject the homestead estate to the payment of a debt alleged to belong to the class of debts for the payment of which the homestead could be rendered liable, will be binding upon the beneficiaries of the homestead, although they are not parties to the action.

2. In a suit of the character above described, where, under the pleadings, the effect of a

gment in favor of the plaintiff is to hold the debt upon which the proceeding was ended was one for which the homestead was liable, the judgment upon this question is conclusive against the beneficiaries of the homestead as well as the head of the family.

Syllabus by the Court.)

Error from superior court, Bibb county; W. Felton, Jr., Judge.

Suit by Sallie C. Irvine and others against Wegman Piano Company. Judgment for plaintiffs. Defendant brings error. Revers-

asher, Park & Gerdine, for plaintiff in error. H. F. Strohecker, for defendants in error.

ROBB, J. The Wegman Piano Company brought suit in the city court of Macon against E. D. Irvine, alleging in its petition that on 15th day of October, 1883, Irvine had set out to him, as the head of a family, consisting of his mother and infant brother, an exemption of personality; that the proceeds arising from a sale of the exempted property were vested by Irvine, as head of a family, in a main stock of pianos, organs, and other musical instruments and supplies; that he carried on a mercantile business with the stock goods so purchased and added to from time to time, under the name of the "Georgia Music House, E. D. Irvine, Agt."; that in the course of business he became indebted to petitioner in the sum of \$437.11, besides interest, evidenced by eight promissory notes, signed by "E. D. Irvine, Agent"; that the notes were given for the purchase of a number of pianos from petitioner, which were disposed of by Irvine in due course of business; that repeated demands have been made upon Irvine, as the head of a family, to pay the indebtedness, but that he refuses to pay the same; and that he is insolvent. The prayer of the petition was that the exempted property might be subjected to the payment of the indebtedness due petitioner. No defense having been filed to this suit, judgment was rendered against the defendant, as "the head of a family," for the amount sued for; it being declared therein "that the homestead estate" was liable for the debt sued on, and that the judgment was "a lien upon the stock pianos, organs, and musical goods in the hands of the 'Georgia Music House, E. D. Irvine, Agt.,' said stock being the property owned by said E. D. Irvine as a head of a family, under an exemption of personality."

Judgment concluded with these words: "The sums for which judgment are hereby given to be levied of said above-described exempt property. This March 6, 1897." Upon judgment a *fi. fa.* was issued against E. D. Irvine, head of a family," and was ordered to be levied especially of "the stock pianos, organs, and musical goods in the hands of the Georgia Music House, E. D. Irvine, Agt." On June 11, 1898, the defendant filed a motion to set aside the judgment upon

the following grounds: "(1) Because the pleadings do not make out such a case as would authorize the court to render the judgment had. (2) Because the judgment finds the homestead subject to the debt, and makes the judgment a lien on the homestead, when the pleadings show that the debt sued on was not such a debt as the homestead was liable for under the constitution and laws of Georgia. (3) Because the pleadings do not show that the money arising from the sale of the articles bought from plaintiffs, and for which the notes sued on were given, ever went into the homestead property, or became a part of the homestead, and was at the time of the suit a part of the homestead, or had in any way actually benefited the homestead estate. (4) Because there is no way by which the homestead estate can be subjected, by common-law or statute-law proceedings, to any debt contracted by the head of a family. (5) Because the declaration in the suit wherein the judgment complained of was rendered failed to set out the beneficiaries of the homestead, at the time of said suit said movant having a wife and three minor children, who are beneficiaries." On June 18, 1898, after notice to the plaintiff, and a hearing on the motion, the same was overruled. No exception was taken to the order overruling this motion. On August 1, 1898, Sallie C. Irvine, in behalf of herself and her minor children, presented a petition to the judge of the superior court in substance alleging: Petitioner is the wife of E. D. Irvine, having intermarried with him on January 10, 1887, and there are now living five minor children, as the issue of this marriage. The petition alleges the facts which have been hereinbefore set out, as to the exemption having been set apart to her husband as the head of a family consisting of his mother and infant brother, as to the suit by the Wegman Piano Company, and the result of that suit. It is alleged that petitioner and her children are the beneficiaries of the homestead estate, and that the execution issued in the suit in the city court, above referred to, has been levied upon the homestead estate, and the same will be sold, unless the sale is enjoined by the court; also that the declaration in the suit against "E. D. Irvine, Agt.," does not make out a case wherein the homestead estate is liable; that it fails to set out the names of the cestui que trust, and fails to describe any specific property which is liable for the debt sued on; and that the court rendering the judgment was without jurisdiction. It is further alleged that two of the notes sued on had been paid before suit was brought, but never surrendered, and that all of the judgment and execution, except about \$15, and the amount of the two notes above alluded to, has been paid by Irvine since the judgment. Waiving discovery, petitioner prays that the execution be perpetually enjoined from proceeding against the homestead estate; that the judgment be declared null and void; and that the execu-

tion the defendant filed a demurrer and an answer. Upon the hearing, the judge enjoined the execution from proceeding against the homestead property. To this ruling the Wegman Piano Company excepted.

The suit by the Wegman Piano Company against Irvine was an effort to render the homestead estate liable for a debt for which it was claimed in the petition the law authorized a judgment condemning the homestead property. It was evidently the intention of the pleader to bring a suit under the provisions of section 3202 et seq. of the Civil Code, declaring the way in which suits against trust estates should be brought. The failure to set out the names of all of the beneficiaries, and the informal way in which the property of the homestead estate was described, are defects which would be amendable before, and which would be cured by, a judgment in the case. Civ. Code, § 5365; *Artope v. Barker*, 74 Ga. 462. Especially is this true where the judgment sets up a special lien upon the property, and the same is described therein with sufficient certainty to enable the levying officer to locate and seize it. When judgment was rendered in the case, the court had before it a petition alleging that there was a homestead estate, some of the beneficiaries being named, and a claim that, under the law, the homestead estate could be charged with the payments of plaintiff's debt. In order for the court to render a judgment in favor of the plaintiff in such a case, it was necessary, not only that he should decide that there was a homestead estate, but that the debt of the plaintiff belonged to that class of debts which the law authorized to be enforced by judgment against estates of this character. Such being the case, if the court had before it a person authorized by law to represent the homestead estate, the judgment would be conclusive upon all questions which were necessary to be determined in order to render the judgment. Irvine, the head of the family, had an opportunity to be heard before the judgment was rendered. He has been heard since the judgment was rendered on a motion to set the same aside. The question presented is whether the beneficiaries of the homestead can be heard now to impeach this judgment which was rendered against the head of the family of which they are members, and who was the owner of the property out of which the homestead estate was carved. If Irvine represented the beneficiaries, the judgment is binding upon them; if he did not, the levy of the execution upon the homestead was properly enjoined. In the case of *Willingham v. Maynard*, 59 Ga. 330, it was held that "the title to land set apart as a homestead is for the use and benefit of the family, and is in the nature of a trust estate, the mere legal title being in the head of the family, as trustee or agent." In the case of *Shat-*

act of 1876, and that a bill filed in the name of the beneficiaries, which failed to allege any reason why the head of the family was not a party complainant, was demurrable. In the case of *Brady v. Brady*, 67 Ga. 368, it was held that it was more regular for the husband, as the head of the family, to interpose a claim to a levy on the homestead, seeking to subject the same to his debt, but that the wife had such an interest that a claim by her would not be dismissed. In *Barfield v. Jefferson*, 84 Ga. 609, 11 S. E. 149, it was ruled that "where land was sold in April, 1883, and in the next December the vendor, as head of a family, applied for and had set apart to him a homestead therein, and in 1885 the vendee brought complaint for the land, which action was defended by the vendor with pleas of not guilty and usury in his deed, he represented, not only his own interest in the legal title, but also that of his family in the use, and the judgment rendered bound his family as well as himself." Justice Simmons in the opinion uses this language: "*Barfield sold the land to Jefferson in April, 1883, and the homestead was granted to him, as head of a family, in December, 1883. In 1885, Jefferson brought his action against Barfield to recover the land, and succeeded. At the time this action was commenced, and during its pendency, if Barfield's homestead was valid, he held the land as head of his family, and represented them. If the homestead was valid, the legal title was in Barfield, and the use in his family; and when the ejectment was brought against him to recover the land, and he defended the same by filing his pleas, he represented, not only his interest in the legal title to the land, but the interest of his family in the use thereof; and the judgment against him in that suit was, in our opinion, under the facts of this case, not only binding upon him, but binding upon his family also. His family claimed under him, and judgments bind, not only parties to the suit, but all who claim under them.*" These authorities show that the law of this state recognizes the head of a family as the representative of the beneficiaries, and when a judgment is rendered against him in a suit relating to the homestead property, if he is bound, the beneficiaries are also bound. As Irvine is undoubtedly bound by the judgment rendered in the original suit, as well as by the judgment rendered in the motion to set it aside, his wife and minor children, if they are beneficiaries of this homestead, are alike concluded, and the injunction should not have been granted at their instance. See, in this connection, *Sanders v. Warehouse Co.* (Ga.; this day decided) 32 S. E. 610. Whether the wife and children of Irvine are beneficiaries of the homestead set apart to him as the head of a family, consisting of his mother and infant brother, is not necessary to be decided, under the view we take of the present case;

HICKS v. MATHER.

(Supreme Court of Georgia. March 18, 1899.)

NEW TRIAL—ASSIGNMENTS OF ERROR—USURY.

1. An assignment of error in a motion for a new trial upon a ruling of the court in admitting evidence will not be considered, unless the evidence objected to is set forth in the motion in such a way that the question presented can be decided without reference to other parts of the record.

2. This case, upon its merits, is controlled by the decisions of this court in *Hughes v. Griswold*, 9 S. E. 1092, 82 Ga. 299, and *Stansell v. Trust Co.*, 22 S. E. 898, 96 Ga. 227.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Jr., Judge.

Action by Mary S. Mather against Ella W. Hicks. Judgment for plaintiff. Defendant brings error. Affirmed.

R. D. Smith and M. G. Bayne, for plaintiff in error. H. A. Mathews and Anderson, Anderson & Grace, for defendant in error.

COBB, J. Mary S. Mather brought suit in the superior court of Crawford county against Ella Hicks to recover a tract of land situated in that county. The trial resulted in a verdict for the plaintiff, and, defendant's motion for a new trial being overruled, she excepted.

The first three grounds of the motion were the general grounds. The fourth ground was as follows: "Because the court erred in admitting in evidence, over defendant's objection, the deed from the Georgia Loan & Trust Company to Mary S. Mather; the objection being on the grounds (1) that there was no proof that O. A. Coleman, treasurer, had the authority to sign the name of the Georgia Loan & Trust Company to deeds and instruments like this; and (2) because there was no proof of proper execution; the deed being made in Georgia (Sumter county), and being witnessed by Chas. N. Walker and Louis B. Smith, there being certain hieroglyphics after the name of Louis B. Smith, which were indistinguishable, and nearly as follows: * * *; there being no seal or other device to tell or show what said hieroglyphics meant, or that said Louis B. Smith was an officer authorized to execute deeds." The trial judge appends to this ground the following note: "The letters referred to were fairly plain,— 'N. P. S. Co. Ga.,'—and the deed had been recorded in Sumter county." There is nothing in this ground of the motion to indicate what deed was objected to, there being no abstract of the deed in the motion; and, according to the well-settled practice in this court, where the ground of a motion for a new trial complaining of the admission or rejection of evidence requires an examination of other parts of the record, such ground will not be

considered unless the ground is stated in a way which will not be clear. But, even if it would be incumbent upon us to look into the brief of evidence, in the present case it would not avail the plaintiff in error; because, while there is in the brief of evidence an abstract of a deed from the Georgia Loan & Trust Company to Mary S. Mather, it conveys land lying in Crawford county; and it appears from the ground of the motion above quoted, and the certificate of the judge thereto, that the deed which was objected to had as a caption "Georgia, Sumter County," was executed before a notary public of Sumter county, and was recorded in that county. There was nothing to indicate what land the deed objected to embraced, but it might be inferred from what is stated in the motion that it must have conveyed land in Sumter county; and, this being true, it would not be admissible in evidence, being irrelevant to the issue on trial; but its admission in evidence would not be such an error as to require the granting of a new trial. But, be this as it may, it cannot be clearly ascertained from the ground of the motion itself what the document was that was objected to, and therefore we cannot consider the assignment of error in that ground of the motion. *Stovall v. State* (Ga.) 32 S. E. 586.

The fifth ground of the motion for a new trial was as follows: "Because the court erred in admitting, over objection of defendant, the evidence of O. A. Coleman that the loan was not made by the Georgia Loan & Trust Company; the ground of objection being that the papers, note, and deed showed that the loan was made by the Georgia Loan & Trust Company, and that the plaintiff was estopped from denying it, and that parol testimony was inadmissible to contradict it." The sixth ground was as follows: "Because the court erred in admitting, over defendant's objection, the evidence of O. A. Coleman as to the intention of the Georgia Loan & Trust Company to exact usury in dating the papers back; the ground of objection being that the question of intention was for the jury, and that the witness could only state the facts, and it was the province of the jury to find the intention." It can be seen at a glance that these two grounds of the motion, standing alone, present no question which can be dealt with by the court. It may be that a search through the brief of evidence, or other parts of the record, would enable us to ascertain what assignment of error is intended to be made; but, according to the repeated rulings of this court, we will not do this. Assignments of error, either in motions for new trials or bills of exception, must be sufficiently clear and distinct that the questions presented can be decided without reference to the other parts of the record. One of the more recent rulings to this effect was made in the case of *Herz v. Clafin*, 101 Ga. 615, 29 S. E. 33.

2. The charges complained of were not er-

**BRUSH ELECTRIC LIGHT & POWER CO.
v. SIMONSOHN.**

(Supreme Court of Georgia. March 18, 1899.)

**NEGLECT—ELECTRIC WIRES—PLEADING—
EVIDENCE—DAMAGES.**

1. The allegations of negligence in the petition were sufficiently specific and distinct to withstand the demurrer which was filed to the same.

2. In the trial of an action for personal injuries, where there was evidence tending to show a permanent disability, it was not error, after having charged generally upon the subject of physical and mental suffering, to add: "You have the right to give damages for that mental suffering which a man may have from the consciousness that his earning capacity is injured for life. That is one element of damage."

3. The evidence, though conflicting, authorized the verdict. The charges complained of, when taken in connection with the general charge, were not erroneous, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by C. Simonsohn against the Brush Electric Light & Power Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. L. Whatley and A. C. Wright, for plaintiff in error. Seabrook & Morgan and R. R. Richards, for defendant in error.

COBB, J. Simonsohn sued the Brush electric Light & Power Company for damages, alleging, in substance, that he was an employe of the Savannah Hospital, and as such had right of ingress and egress to and from the grounds of such hospital; that the defendant is engaged in furnishing electricity for lighting the streets of the city of Savannah, and for use in lighting the stores and dwellings of the city; that on a day named the defendant "negligently permitted or suffered one of its said wires, heavily charged with electricity, to lie in a fallen or detached condition in the yard or grounds of said hospital, and so carelessly and negligently kept and maintained its said apparatus on said public streets near said hospital that said wire became detached from the pole or poles upon which same was strung, whereby it fell from the public street into said yard or grounds, where it had no right to be, and there it was carelessly and negligently suffered to remain"; that, not being aware of the presence of the wire or of the danger therefrom, petitioner accidentally came in contact therewith, and in consequence of such contact he was by the electricity with which it was charged at the time stricken down and shocked into a state

ly; that he remained sick and disabled for months after the happening of the accident; and that his health and constitution are seriously impaired. There are also allegations as to the age, condition of the health of petitioner before he received the injuries, and as to decrease in his earning capacity; it being alleged that since receiving the injuries petitioner has been incapacitated from securing remunerative employment. The damages were laid at \$10,000. To this petition, the defendant demurred upon the following grounds: (1) It does not appear from the petition that plaintiff has any cause of action against this defendant. (2) The petition does not set out plaintiff's cause of action, if any he has, fully and distinctly as to the negligence charged against the defendant. The demurrer was overruled, and upon the trial which followed a verdict was rendered in favor of plaintiff for \$5,000. A motion for a new trial filed by the defendant was overruled, and the case is here upon a bill of exceptions assigning error upon the judgment of the court overruling the motion for a new trial, and the decision overruling the demurrer.

1. Counsel for defendant in error contended that the demurrer filed was a general demurrer, while counsel for plaintiff in error insisted in his brief that the same was a special demurrer. If it were necessary to decide this question, we would be inclined to hold that the demurrer was general. But no matter how we treat it, we think it was properly overruled, as the allegations of negligence in the declaration are sufficiently explicit to put the defendant upon notice of what it was called upon to answer, and the demurrer does not point out a single particular in which the petition was defective.

2. Complaint is made that the court erred in charging as follows: "You have the right to give damages for that mental suffering which a man may have from the consciousness that his earning capacity is injured for life. That is one element of damage." That this is an element of damage was conceded by counsel for plaintiff in error in his brief; but complaint is made that the charge was error because the court had already charged in reference to the subject of damages resulting from mental suffering, and the effect of the language quoted was to lead the jury into giving double damages for this item; the language of the assignment being that "mental suffering arising from knowledge of diminished earning capacity is compensated for when the jury determine how much damages shall be awarded for such diminution, and is not proper subject of independent compensation." We do not think that the charge complained of was error, nor was it misleading, when taken in connection with that portion of the charge of which it is an extract, which is as follows: "Upon the question of dam-

you find there are permanent injuries, you have the right to give damages for that as a distinct item. If you find there was physical pain and suffering, you have the right to give damages for that as a distinct item. If you find there was mental suffering, you have the right to give damages for that as a distinct item. You have the right to give damages for that mental suffering which a man may have from the consciousness that his earning capacity is injured for life. That is one element of damages. The fact that a man is not able to work, or may be damaged for life, is a matter that the jury may take into consideration. You can give damages for diminution of earning capacity, if the evidence justifies you to find that his earning capacity has been diminished, and that defendant is liable therefor." See, in this connection, Railroad Co. v. Jacobs, 88 Ga. 647, 15 S. E. 825.

3. The evidence was conflicting upon all of the material issues in the case. There was, however, sufficient evidence to authorize the jury to find for the plaintiff, and assess the damages at the amount fixed by them; and we cannot say, as matter of law, that the verdict was excessive. The charges complained of which are not specifically dealt with above were not erroneous for any of the reasons assigned, and, when taken in connection with the general charge, were not calculated to mislead the jury. We have found no error which would justify us in controlling the discretion of the trial judge in refusing to grant a new trial in the case.

Judgment affirmed. All the justices concurring.

HARRIS v. MATHEWS.

(Supreme Court of Georgia. March 17, 1899.)

LIMITATIONS—CLAIMS BETWEEN PARTNERS—DEATH OF PARTIES.

1. As to a claim or demand by one partner against another, arising out of the partnership business, the statute of limitations does not, in any event, begin to run until after a dissolution of the partnership; and this is true although for a considerable period before dissolution the firm had not been actively engaged in the prosecution of its business, but had placed its assets in the hands of an agent for the purpose of collecting the same and paying the partnership debts.

2. It follows that where a firm was composed of two partners, both of whom died before a dissolution by agreement had been made, or the partnership affairs settled, a suit, upon a demand of the nature above indicated, by the representative of one partner against the representative of the other, was in time, if brought within four years of the death of the partner who died first.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by William H. Harris against H. A.

A. Mathews, in pro. per.

SIMMONS, C. J. The executor of Harris sued the executor of Visscher on account for a balance due the estate of the former's testator, and arising out of a partnership between Harris and Visscher. It appears that the account was more than four years old, and that the executor of Visscher filed a plea of the statute of limitations. Under an agreed statement of facts, the court found in favor of the defendant, and the plaintiff excepted. The record shows that Harris and Visscher entered into a partnership for the purpose of building railroads. In 1890 the partnership ceased active business, and the members of the firm appointed one Marshall as their agent to collect the assets of the firm and pay the debts. Harris had advanced to the firm, and Marshall made several payments on this indebtedness of the firm to Harris; the last being made in March, 1894. Harris died in 1894, and Visscher in 1895. This suit was filed in 1897. There had never been a dissolution of the partnership up to the time of Harris' death, nor had there been an accounting between the partners. This action was for the balance due Harris by Visscher for the one-half of the balance due Harris by the firm after all the assets had been applied to the debt. The partnership had both assets and debts up to the last payment made by the agent, and this debt due to Harris is still unpaid.

On this state of facts, we think the court erred in finding that the suit was barred by the statute of limitations. We think that the cases of Hammond v. Hammond, 20 Ga. 556, and Prentice v. Elliott, 72 Ga. 154, rule contrary to the views of the trial judge in this case. In the former, this court held that "the statute of limitations does not commence to run in favor of one partner against another, even after a dissolution of the partnership, as long as there are debts due from the partnership to be paid, or debts due to it to be collected." The latter case announces the same principle. The case now under consideration is stronger than either of these. In both of them a dissolution of the partnership had taken place before the time when the statute was held to commence to run. Here there was no dissolution until the death of Harris, in 1894, and this suit was brought within four years from that time. The other partner died after the death of Harris. "When the partnership affairs are being wound up without antagonism between the parties, and assets are being realized and debts paid, the statute does not begin to run." 2 Wood, Lim. (2d Ed.) p. 528. The fact that the partnership ceased to do active business in 1890 did not work a dissolution. There was no agreement that the partnership should be dis-

such dissolution, we think that the statute did not begin to run. The present suit was therefore brought in time. Judgment reversed. All the justices concurring.

HARDISON et al. v. THOMPSON.

(Supreme Court of Georgia. March 17, 1899.)

APPEAL—REVIEW.

The record does not show that any error was committed in admitting evidence. The verdict was not contrary to law, and was fully sustained by the decided weight of the evidence. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by H. G. Hardison and others against Leila Thompson. From the judgment, Hardison and others bring error. Affirmed.

A. T. Harper and M. G. Bayne, for plaintiffs in error. W. C. Davis and D. L. Henderson, for defendant in error.

PER CURIAM. Judgment affirmed.

CENTRAL OF GEORGIA RY. CO. v. ROSS.

(Supreme Court of Georgia. March 18, 1899.)

RAILROADS—KILLING STOCK—EVIDENCE—PREJUDICIAL ERROR.

1. It was, in the trial of an action against a railway company for killing a mule, erroneous to permit, over a proper objection by counsel for defendant, a witness to testify: "They killed a good many stock out in that way. They kill the mules and cows. It has not been a year since they killed a mule right below where they killed mine."

2. This being a case in which the evidence on the main and controlling issue was close and conflicting, such an error as that above indicated entitled the defendant, against whom the verdict was rendered, to a new trial. This is so because the evidence illegally admitted tended to prejudice the jury against the company.

3. A new trial is the more readily ordered, because the liability of the defendant depended upon whether or not the plaintiff's mule was killed upon a public-road crossing, and it was not clearly shown that, even if the killing occurred upon the crossing at all, it was one of the kind just mentioned.

4. The court erred in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by Jerre Ross against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Steed & Wimberly, John R. Cooper, and R. C. Jordan, for plaintiff in error. Hope Polhill, for defendant in error.

damages for killing a mule. The case was tried before a jury in the justice's court, and a verdict for \$50 and costs was rendered against the company. A certiorari was sanctioned by the judge of the superior court, and on the hearing the certiorari was overruled by the superior court; and to that judgment the plaintiff in error excepted.

The plaintiff in the justice's court testified that his mule was killed at a road crossing (and, inasmuch as the engineer, for the defendant, testified that he blew the whistle for this crossing, it will be taken that it was a public-road crossing); that it could have been seen over 120 yards by the engineer before it was struck; that no whistle was blown, bell rung, or other signal given; and that the place at which the mule was killed was within the limits of the city of Macon. For the defendant, the engineer in charge of the train testified that the place where the mule was struck was outside of the city limits; that he blew his whistle for the crossing, and that the mule was 25 or 30 yards from the crossing, coming up the track on which the engine was approaching; that the mule was on the edge of an embankment 15 or 18 feet high; that he could not stop within the distance from where he first saw the mule; that he did not blow the whistle, and directed the fireman not to ring the bell, which might have frightened the mule and made him run on the track; the animal did not appear to be frightened; he thought that he could pass the mule, but that the animal must have shied back, and the step of the tender struck him; that the train was running on a very fast schedule at the time he saw the animal, which was about 100 yards away, and he did not think that he could have stopped the train within the distance, by reversing, without injuring the passengers; that, if the mule had not stepped back, he would not have been stricken; he was not thrown down; there were signs of blood and hair on the step of the tender, which must have struck the mule as it passed. The fireman, who was on the engine, testified practically to the same facts as the engineer. There was thus conflict in the evidence on a very material point, to wit, whether the mule was killed on a public-road crossing, or not; for, if he was, and it was outside of the city limits, the omission to signal the crossing by blowing the whistle, and the failure to check the speed of the train, as testified to by the plaintiff in the justice's court, would have been such negligence as would have authorized the owner of the mule to recover, if the animal was killed in consequence of such omission. If, however, the animal was not at the road crossing, but some distance from it, walking, on the side of the track, towards the approaching train, as testified to by the engineer and fireman, then the omission to give the signals required by law

68. And the liability of the company must be determined by the proof, or want of proof, of other negligent acts. *Railway Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550; *Railroad Co. v. Clary* (Ga.) 30 S. E. 433.

Whether the animal was killed at the crossing, or away from the crossing, was a question of fact, to be determined by the jury under the evidence; and, if nothing else appeared, their finding should stand as a proper determination of the facts of the case. *Railway Co. v. Burney*, 85 Ga. 635, 11 S. E. 1028. But on the trial the plaintiff, in the justice court, was allowed to testify, over the objection of defendant's counsel, as follows: "They killed a good many stock out in that way. They kill the mules and cows. It has not been a year since they killed a mule right below where they killed mine." This evidence was clearly inadmissible. It might have been perfectly true that mules and cows had theretofore been killed by the running of trains on the same road at the place where the animal, for the killing of which damages are sought, was killed, and yet there might be no liability on the part of the company for this killing. The plaintiff was not entitled to recover at all, unless the killing was occasioned by the negligence of the employees of the company, and that question was not properly illustrated by evidence of the killing of other mules and cows. To sustain the admission of this evidence, we are cited to the case of *Railway Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471. In that case a witness was allowed to testify to the habitual high rate of speed with which a particular engine was previously run by the same engineer on the same street. In passing on the admissibility of this evidence, Chief Justice Bleckley said that such evidence was of doubtful admissibility, but that, on "so doubtful a question, we think the court did not err in admitting the evidence." But the ruling in that case does not support the admissibility of the testimony which was received in this case. There the testimony was confined to the same engine, run by the same engineer, on the same street; and Chief Justice Bleckley, in the *Flannagan* Case, above, cited a large number of cases pro and con on the admissibility of such evidence when it was confined to the identical same place, the identical same locomotive, and operated by the same person. The admissibility of the evidence must have been sustained alone to show the habitual negligence of the particular person who it was charged was guilty of the particular act. See, also, *Railway Co. v. Kane*, 92 Ga. 187, 18 S. E. 18.

The proposition here, in effect, would be that all of the engines of this company were, by the different engineers, accustomed to kill mules and cows at this place. The ruling in the *Flannagan* Case was quoted as authority in the case of *Railroad Co. v. Smith*, 94 Ga.

business, for the purpose of showing that he was habitually reckless; and this court, through Mr. Justice Lumpkin, said: "Chief Justice Bleckley said it was of doubtful admissibility; and, besides, there is some difference between proving habitual acts of recklessness or negligence at particular times and places, and proving the general character of a particular person for recklessness, or the contrary." Inasmuch as the diligence of the company to prevent killing the animal varied in character according to the fact as to where the killing did occur (that is to say, whether it occurred on a public railroad crossing, or on the embankment, where the company's track was laid away from the crossing), and this material question was closely contested, the admissibility of this illegal testimony had a tendency to prejudice the case of the defendant; and for this reason the certiorari should have been sustained. Judgment reversed. All the justices concurring.

BROWN v. WILEY, Ordinary.

(Supreme Court of Georgia. March 18, 1899.)

GARNISHMENT—PROPERTY SUBJECT—JUDGMENT
—RES JUDICATA.

1. One whose debtor is the administrator of the estate of a deceased person, in which such debtor is interested as a distributee, may, when the debtor is insolvent, reach his share in the estate by a process of garnishment, duly sued out. In such a case, the debtor as an individual, and the same person as administrator, are to be treated as different and distinct persons.

2. A judgment rendered in favor of a creditor of a distributee, on such a garnishment proceeding, is conclusive upon the administrator when it appears that he filed an answer denying indebtedness, and, on a traverse thereto, the issue was found against him. Such a judgment is *prima facie* valid and binding upon the sureties on the administrator's bond, and, in the trial of an action thereon brought by the plaintiff in such judgment, the burden is on them to prove the contrary.

3. Applying the above rules to the facts of the present case, the judgment rendered by the court, without the intervention of a jury, was right, and there was no error in refusing to set it aside.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by C. M. Wiley, ordinary, for the use of Nathams & Stalker, against H. R. Brown. Judgment for plaintiff. Defendant brings error. Affirmed.

Dessau, Bartlett & Ellis, for plaintiff in error. S. A. Reid, for defendant in error.

SIMMONS, C. J. Nathams & Stalker obtained a judgment against G. I. Johns, execution was issued, and a return of nulla bona made thereon. G. I. Johns was made administrator of the estate of Warren Johns. Nathams & Stalker sued out, in due form under

answered the summons of garnishment, denying indebtedness, and denying that he, as administrator, had any property or effects belonging to him as an individual. This answer was traversed by the plaintiffs in garnishment, and on the trial of the case the jury returned a verdict that G. I. Johns, as administrator, had money and effects in his hands belonging to him as an individual in a certain amount. The administrator moved for a new trial in that case. This motion was denied by the court, and there the matter rested. Afterwards a suit was brought upon the bond of the administrator against him and his sureties, for the purpose of recovering from them an amount sufficient to pay the recovery in the garnishment proceedings. To this suit the sureties pleaded that Johns, as administrator, was not indebted to himself as an individual in any amount, and that the administrator had in his hands no money, property, or effects that came within the operation of the process of garnishment. On the trial of the suit on the bond, the plaintiffs introduced the judgment and execution against Johns individually, the proceedings in the garnishment case, and the judgment on the traverse to the answer of the administrator. Various objections were made to the introduction of these papers, but the motion for a new trial, made by one of the defendants when the case had been adjudicated in favor of the plaintiffs, did not state the grounds of these objections, nor when they were made, and they cannot be considered.

1. We are called upon to decide whether an administrator who has in his hands money belonging to the estate of the decedent, and who individually is entitled to a part of that money as a creditor, heir at law, or legatee of the decedent, can be garnished. It was claimed in the garnishment proceedings that Johns was an heir at law of the decedent, and as such heir at law was entitled to a distributive share of the estate. The jury so found upon the trial of the traverse of his answer to the summons of garnishment. It is certainly true that, without the aid of a statute, an administrator or executor cannot be garnished for funds which he holds as such administrator or executor. The reason is that he is an officer of the court, and, as such, must account to the court for all funds in his hands, and it would be improper and against public policy for another court to interfere with the administration. Many of the states of the Union have changed this rule by special statutes. Among those which have done so is this state. Our Civil Code provides (sections 4734, 4735): "As a general rule, the interest of a legatee or distributee is not the subject of garnishment issued against an executor or administrator, but if the legacy has been assented to by the executor, and such legacy is not defeated by debts against the estate, and

or the distributee or heir may be reached by process of garnishment, at the instance of a creditor of such legatee, distributee, or heir at law, as the case may be. In every case a garnishment may be issued against an executor or administrator for a legacy or distributive share, or for any debt or demand owing by said estate to any other person, if the creditor will swear—in addition to the oath required in ordinary cases—that his debtor resides without the state, or is insolvent. In such cases the executor or administrator shall not be compelled to answer the garnishment until the estate in his hands is sufficiently administered to enable him safely to answer the same."

Section 4735 fully authorizes the issuance of a summons of garnishment against an executor or administrator for the distributive share of a legatee or distributee, when a creditor complies with its terms. It is general in its provisions, and makes no exception of an administrator who is also a distributee of the estate. In contemplation of law, G. I. Johns as an individual, and G. I. Johns as administrator of the estate of Warren Johns, are entirely different persons. As an individual he acts for himself; as an administrator he is an officer of the law, and his duties are prescribed by law. He acts in two capacities, one as an individual and one as the representative of an estate (*Tillinghast v. Johnson*, 5 Ala. 514, and *Carter v. Ingraham*, 43 Ala. 78), and we see no good reason why he cannot be garnished as an administrator for a debt the estate owes him as an individual. In the case of *Dudley v. Falkner*, 49 Ala. 143, the supreme court of Alabama held, under a statute not nearly so broad as ours, that "a garnishment on a judgment may be sued out against an executor in his official capacity, although the judgment is against himself personally." And, in the opinion, *Peters, J.*, cites the following authorities to sustain that ruling: *Grayson v. Veeche*, 12 Mart. (La.) 688; 1 Rolle, Abr. 554; *Graighe v. Notnagle*, 1 Pet. C. C. 245, Fed. Cas. No. 5,679. These cases we have examined, and they go so far as to hold that a plaintiff in garnishment may attach funds in his own hands to pay a debt due him from the person to whom the estate is indebted. See, also, *Coble v. Nonemaker*, 78 Pa. St. 501; *Lyman v. Wood*, 42 Vt. 113; *Boyd v. Bayless*, 4 Humph. 386. We are aware that other states have taken a contrary view of this question, but their decisions are founded upon the phraseology of their particular statutes. See *Knight v. Clyde*, 12 R. I. 119, and *Shepherd v. Bridestine*, 80 Iowa, 225, 45 N. W. 746. Our Code gives the express right to garnish an administrator for the distributive share of one of the heirs, and makes no exception when the administrator is himself a distributee, and we therefore are of opinion that the garnishment in this case was legal.

against the sureties. They had the right to show that the judgment was improperly rendered, for the reason that Johns, as administrator, had no money or effects belonging to himself as an individual. They claimed in their answer that this was so, but there appears in the record no evidence to show that Johns, as administrator, had no money or effects in his hands, at the time of the service of the summons of garnishment upon him, belonging to him as an individual. There was not a particle of evidence, so far as the record discloses, introduced upon that subject. They relied solely upon the defense that a garnishment would not lie in such a case. The judgment being prima facie good as against them, and they having utterly failed to carry the burden of showing it improper, it is clear that their defense on this line was not made out.

3. This case was tried before the judge without the intervention of a jury. He found in favor of the plaintiffs, and refused, upon motion for a new trial, to set aside this finding. We think that the proceeding and judgment in garnishment were not void, and the defendants failed to show that the judgment was erroneous or improper. It follows that the finding of the trial judge was correct, and that he was right in refusing to grant a new trial. Judgment affirmed. All the justices concurring.

CITY COUNCIL OF DAWSON v. DAWSON WATERWORKS CO.

(Supreme Court of Georgia. March 14, 1899.)

MUNICIPAL EXPENDITURES—CONTRACT FOR WATER SUPPLY—VALIDITY—ELECTIONS—MANNER OF HOLDING—BONDED INDEBTEDNESS—ESTOPPEL—ULTRA VIRES CONTRACT—DIRECTING VERDICT.

1. Without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of water on the credit of the city for a longer period than 1 year; and a contract which by its terms is to run for 20 years, each year's supply to be paid for semiannually from year to year, is operative from year to year, so long as neither party renounces or repudiates it. (a) *Cartersville Improvement, Gas & Water Co. v. City of Cartersville*, 16 S. E. 25, 89 Ga. 683; *Cartersville Waterworks Co. v. Same*, 16 S. E. 70, 89 Ga. 689; *Lewis v. Lofley*, 19 S. E. 57, 92 Ga. 804; *Board Com'rs Habersham Co. v. Porter Mfg. Co.*, 30 S. E. 547, 103 Ga. 613,—followed and approved. *Spann v. Board*, 64 Ga. 498; *Cabaniss v. Hill*, 74 Ga. 845,—overruled in part.

2. Is it not absolutely essential to the validity of an election held under that provision of the constitution of this state (article 7) which declares that "no * * * municipality * * * shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of the taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law," that there should be an act of the general assembly prescribing the manner of such election?

3. The manner of holding such election, where

describing the manner of holding elections where the debt proposed to be incurred is not a bonded indebtedness, nor is there any local law expressly authorizing the city council of Dawson to prescribe the method of holding such election.

5. Even if no legislation is necessary to authorize a municipal corporation to hold an election to determine whether a debt other than a bonded indebtedness shall be incurred, an election held pursuant to an ordinance and notice which does not state the amount of the debt to be incurred will not be sufficient to authorize the execution of a contract incurring an indebtedness.

6. Where one enters with a municipal corporation into a contract which is void because opposed to the constitution and laws of this state, and contrary to its settled public policy, complete performance of such contract on the part of such person will not prevent the municipal corporation from pleading its want of power or the illegality of the contract.

7. There is nothing in the decision of this case when it was here before in conflict with the rulings now made.

8. The city council of Dawson has a right to make a contract to supply the city with water for one year, provided there is in the treasury of the city a sum sufficient to pay therefor which may be lawfully appropriated for that purpose, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer space of time is illegal, yet where the other parties to such a contract have complied with their part by erecting a plant at great expense in order to furnish the city with water, the city is liable for the amount stipulated in the contract for each year that it received the benefits thereof.

9. The evidence being conflicting as to whether, during the year for which compensation is claimed by the water company for water furnished to the city, the latter received the benefit to be derived under the contract in such a way as to make it liable to pay the annual rental stipulated therein, the case should have been submitted to a jury under proper instructions, and it was error to direct a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Terrell county; H. C. Sheffield, Judge.

Action by the Dawson Waterworks Company against the city council of Dawson. Judgment for plaintiff. Defendant brings error. Reversed.

M. C. Edwards, J. A. Laing, and Guerry & Hall, for plaintiff in error. Hall & Wimberly, and J. G. Parks, for defendant in error.

COBB, J. The Dawson Waterworks Company brought suit against the city council of Dawson, claiming that the defendant was indebted to it in the sum of \$2,000, besides interest, for water furnished during the year 1895 for the purpose of protecting the inhabitants of the city against fire. At the trial there was introduced in evidence an extract from the minutes of the city council of the proceedings at a meeting held on May 10, 1896, which was as follows: "A motion was made and carried that the question of incurring expense of waterworks be submitted to the citizens of the city, and that notice of an election be run in the Dawson Journal for

dence four issues of the Dawson Journal, the official gazette of the city and county, for the four weeks preceding June 11, 1886, to wit, the issues of May 13th, 20th, and 27th, and June 3d, respectively, showing the election notice, which was as follows: "Election Notice. Notice is hereby given that there will be an election held in the city of Dawson on the 11th day of June, 1886, to determine whether the city of Dawson shall incur the expense of waterworks." It was admitted that at the election held pursuant to this notice more than two-thirds of the qualified voters of the city voted in favor of incurring the expense of waterworks. It was also admitted that the value of the taxable property of the city of Dawson in 1886 and each succeeding year was over \$1,000,000.

The contract relied upon by the plaintiff, which was in the form of an ordinance, appearing in the Book of Ordinances of the City of Dawson, was introduced in evidence. The material parts of this contract are as follows:

Section 231 grants to R. L. Bennett, of Philadelphia, Pa., his associates, their successors and assigns, who are to organize a company to be styled the "Dawson Waterworks Company," the exclusive right and privilege, for a period of 99 years, to construct, maintain, and operate a system of waterworks for supplying said city and its inhabitants, and for protection against fire, and for domestic and sanitary and other purposes.

Section 232 grants authority to lay water pipes and mains in the streets and avenues of said city, as the same are now open or may be extended, and to dig ditches and trenches in the streets.

Section 233 grants the right to erect buildings and tanks, lay pipes, erect other structures, and make improvements on lands owned and controlled by the city, except public squares.

Section 234: The said company, its successors and assigns, is to build and have in operation, in 18 months, a complete and thorough system of waterworks, laying 4.8 miles of pipe, sizes 8, 6, and 4 inches in diameter, with reservoir of not less than 40,000 gallons capacity, and of sufficient height to produce a pressure on the mains such that, from any hydrant located in the principal streets, a stream of water will be projected 50 feet vertically in still air, through 100 feet of fire hose with a 1-inch nozzle attached. Said company, or assigns, from completion of system of waterworks until its charter shall cease, shall be required to furnish a sufficient supply of water for the purposes before and hereafter mentioned, unless prevented by unavoidable and providential causes. In such an event, it shall be allowed a reasonable time to make repairs, and if, after such reasonable time shall have been allowed, it should still fail

mains and pipes, and enlarge plant of system generally, to meet increasing demands from growth of city.

Section 236: The city of Dawson, in consideration of said company guarantying to it, for the period of 20 years, and as long thereafter as the said company or its successors and assigns shall continue to operate the waterworks, a free and unrestricted use of its water in case of fire, and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains fire plugs of approved pattern, not to exceed 50 in all, until the corporate limits of said city are extended, and the population of said city increases so that there are 500 persons living in said extension, after which they shall be increased proportionately, if required, and, as an additional fire protection, also to furnish water to fill the present public cisterns, if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of the said company, except in case of fire, obligates itself to pay to the said company, or to such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for its bonds, the sum of \$2,000 annually for 20 years, in semiannual payments of \$1,000 each, on the 1st days of January and July of each year, the first payment to be made on such of said days as occur after the completion of said works as provided in section 234 of this ordinance; and in case said city shall not have sufficient funds at any of such times to make said payments, or for any cause does not pay said money at times fixed as aforesaid, then in that case warrants shall be issued on the city treasurer in favor of the company for the amount due.

Section 237: The council shall, and they are hereby required to, make provision each year for the payment of \$2,000, as provided in the foregoing section, by levying a tax sufficient for that purpose upon the taxable property of the city.

Section 238: The company and its successors and assigns is granted the right to make reasonable rates and regulations for the government of private consumers in the use of its water; and to charge such rates for its use as it may from time to time establish: provided, the rates charged per annum shall not exceed those named in the schedule attached, which schedule is immaterial.

Section 239: In consideration of said company agreeing to furnish water to the public municipal buildings, and further agreeing to furnish water to two public fountains of one-inch nozzle each, the city of Dawson obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues, and charges which may at any time hereafter be levied or assessed by said city

given to a charter to be granted by the legislature of the state to said Bennett and his associates, and their successors or assigns, or to be obtained by them under the general incorporation laws of said state, incorporating them into a body politic, to be known as the "Dawson Waterworks Company," and granting said company the exclusive right to contract, etc., as herein stated.

Section 241 provides that the ordinance shall be mutually binding upon the city of Dawson and R. L. Bennett and associates, and the company to be organized, and to have the same force and effect as a contract between the respective parties as if drawn in the form of a contract and signed by the contracting parties.

Date of ordinance, February 21, 1890.

It was shown that R. L. Bennett and his associates were, subsequent to the execution of the contract, incorporated under the name of the Dawson Waterworks Company. It was admitted that the only fire which occurred in the city during the year 1895 occurred on the 19th of February. There was evidence that the city authorities had accepted the works which were built by the Dawson Waterworks Company, and that the same cost about \$40,000; that during the year 1895 the waterworks company had maintained the system in conformity to the contract, and were ready at all times to supply the quantity of water and the pressure required by the contract. It also appeared that, at the fire above referred to, water from the hydrants of the waterworks company was used in extinguishing the fire, and that the mayor and other city officials were present at the fire, and assisted in extinguishing the same with the water drawn from the system of the waterworks company. It was shown that in December, 1894, the city authorities passed a resolution declaring their intention to abandon the contract, and that notice of such intention was given to the company. There was also evidence offered from which it might be inferred that during the year 1895 the city maintained a fire department as it had existed in former years, and that it was the duty of the officers and members of such department to attend all fires, and use appliances placed in their hands by the city to extinguish the same; that, without the water furnished by the waterworks company, such fire department would be useless. There was, however, evidence that some of the officers of the city understood that they had no authority to use, during the year 1895, the water furnished by the waterworks company to extinguish fires. Different members of the fire companies recognized by the city were called as witnesses, some testifying to the effect that they had never received any information as to a change in their status towards the city, or in their duties in reference to

by the defendants that the efforts of the city officials to extinguish the fire on the occasion above referred to were purely voluntary, and not in any way intended by them as a recognition of an existing contract between the city and the waterworks company. The court directed the jury to return a verdict in favor of the plaintiff for the amount sued for, with interest, and the defendants excepted.

1. The present constitution of the state provides (article 7, § 7, par. 1): "The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation." Civ. Code, § 5893. The contract in the present case provides for annual payments of specified amounts, to continue during a period of 20 years; and the question arises, is such a contract the incurring by the city authorities of a debt, within the meaning of the clause of the constitution above quoted, so as to render the contract invalid, unless the same shall have been sanctioned by a vote of two-thirds of the qualified voters of the city at an election held for that purpose? In the case of *Ford v. City of Cartersville*, 84 Ga. 213, 10 S. E. 732, and in the case of *Lott v. City of Waycross*, 84 Ga. 681, 11 S. E. 558, a similar question was raised, but not decided by this court, because the facts of those cases did not require an adjudication of the question. The same question arose in the case of *Cartersville Improvement, Gas & Water Co. v. City of Cartersville*, 89 Ga. 683, 16 S. E. 25, and was then decided,—it being there held that "without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of gas on the credit of the city for a longer period than one year; and a contract which by its terms is to run for twenty years, each year's supply to be paid for quarterly during the year, is operative from year to year only so long as neither of the parties renounces or repudiates it." This ruling was followed in the case of *Cartersville Waterworks Co. v. Same*, 89 Ga. 689, 16 S. E. 70. The present case having been ordered by the court to be

court on the question as to what was meant by the word "debt" in the clause of the constitution above quoted. Under this permission the decisions specially brought under review are *Spann v. Board*, 64 Ga. 498; *Cabaniss v. Hill*, 74 Ga. 845; *Cartersville Improvement, Gas & Water Co. v. City of Cartersville*, 89 Ga. 683, 16 S. E. 125; *Cartersville Waterworks Co. v. Same*, 89 Ga. 689, 16 S. E. 70; *Lewis v. Lodey*, 92 Ga. 804, 19 S. E. 57, and *Board Com'rs Habersham Co. v. Porter Mfg. Co.*, 103 Ga. 613, 30 S. E. 547. We are thus to deal with the question now before us in all respects as if it was before this court for the first time, no ruling heretofore made being absolutely binding upon us.

In order to determine what was the purpose of the framers of the constitution in placing the prohibition contained in the section above quoted upon the various subordinate political divisions of the state, and therefore what they intended to prohibit under the name of "debt," it is necessary to take into consideration, not only that clause upon which a construction is invoked, but also all the provisions of the constitution relating to the same subject-matter, as well as others relating generally to the matter of public debt. All of these are embraced in article 7 of the constitution (Civ. Code, §§ 5882-5905). This article deals with the subjects of "finance, taxation, and public debt." The powers of taxation over the whole state which can be exercised by the general assembly are limited to certain specific purposes,—support of government and public institutions, payment of the public debt, suppression of insurrection, repelling of invasion, defense of the state in time of war, and pensions for soldiers and widows of deceased soldiers who served in the Confederate army. The power to delegate to counties the right to levy a tax is restricted, so that a county can never be authorized to impose a public burden upon its inhabitants, except for education, expense of public buildings and bridges, maintaining and supporting prisoners, payment of jurors and coroners, and for litigation, quarantine, roads, expenses of courts, support of paupers, and payment of debts existing at the time of the adoption of the constitution. Even the state itself is prohibited from incurring any debt, except to supply casual deficiencies of revenue, to repel invasion, to suppress insurrection, to defend itself in time of war, and to pay the public debt existing at the time of the adoption of the constitution. The state cannot pledge its credit to any person or corporation, and is not allowed to become a joint owner or stockholder in any company, association, or corporation. The bonded debt of the state can never be increased, except to repel invasion, suppress insurrection, and defend the state in time of war. It is expressly declared that, when any public property of the state is sold, the proceeds of the sale shall be

any bonded debt. Provision is made for a sinking fund to pay off and retire the bonds of the state which had not matured when the constitution was adopted. In addition to the clause above quoted in reference to incurring new debts by municipal corporations, the following provisions are to be looked to in determining the question now under consideration: "Any county, municipal corporation, or political division of this state, which shall incur any bonded indebtedness under the provisions of this constitution, shall, at or before the time of so doing, provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." Civ. Code, § 5894. "Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government." *Id.* § 5897. We are to determine what was the intention of the framers of the constitution, as well as what was the scheme of government they sought to put into operation, so far as it relates to the power of the public authorities to incur debts in behalf of the public. This must be derived from the various provisions of the instrument itself, read in the light of antecedent and concurrent public history. All of these provisions which are material to the question now under consideration have either been quoted or referred to in such a way as that their import can be clearly ascertained. It is not only proper, but it is our duty, to consider any and all facts and circumstances, connected with the public affairs of the state, which will throw any light upon the question of the intention of the framers of the constitution in reference to the matter now under consideration. It is a matter of public history that, at the time that this constitution was framed by the convention and adopted by the people, there was an outstanding public debt which the state had contracted for various purposes. There were towns and cities in the state burdened with debts which had been contracted by the public authorities of these corporations, and the manifest tendency was rather to the increase of this class of public burdens than otherwise. There were political divisions in the state where the people were so burdened by debts created by the public authorities that it was clearly apparent that, unless some check was placed upon the power of the governing authorities to incur debts, the rates of taxation which would be required in the future to meet the debts would be ruinous. It was also a matter of public history, and it appears in the constitution itself, that, a few years before the constitution was adopted, there had been an attempt to impose upon the state a debt which had never been legally authorized, and that the state had, in the exercise of its sovereign authority, declared that such debt was

same, or any part thereof.

Taking into review, as the framers of the constitution did, the condition of the public debt of the state, and the condition of the public debt of the various subordinate political divisions of the state, nothing can be plainer than that the power to create debt, incur liabilities, and impose burdens to be discharged in the future was liable to be grossly abused, if the same existed without restrictions, either in the hands of the general assembly or the authorities of the subordinate public corporations of the state. In the light of all these facts, what is meant by the various provisions of the constitution we have above referred to? What was the plan to be followed in the future in regard to the public debt of the state itself? Nothing can be clearer. The public debt of the state must not be increased for any purpose, except those few above mentioned. No new bonds shall ever be issued, except for these purposes, or to take the place of existing bonds that have matured; and the railroads and other property owned by the state, whenever it was deemed best to sell any part of the same, must be used to reduce this bonded debt,—the proceeds of the sale, whenever there was a sale, being required to be paid upon the public debt. It is true that the state has plenary power to tax in order to pay the debt, but it is obvious that it was the intention of the makers of the constitution that the taxing power should be so used that this burden should be at some time in the future finally discharged. The state was not to be a perpetual interest paying debtor. The provision relating to the proceeds of the sale of public property and those creating the sinking fund demonstrated that it was intended that there should be a time when the state would be free from debt. Not only was it the intention of the framers of this instrument that this debt should be paid, but it was equally their intention that no new debt should be incurred by the state, except for the purposes heretofore referred to. In brief, the state was in debt, and the constitution recognized this fact. The rule laid down for the future was: Pay the debt, and incur no new obligation. The state must not, in the future, engage in any work of internal improvement, except those of a purely governmental nature. The various departments of government must be supported from year to year by taxation, and only in two instances is the state authorized to incur a debt,—the one, when it may be necessary to defend itself when attacked either by a foreign enemy from without or a domestic enemy from within; and the other, in case it was necessary to make a loan to supply a casual deficiency in the treasury, and the amount of such loan is expressly limited. It was not contemplated that it would ever be necessary for the state to in-

In the case of the subordinate public corporations of the state, it was seen that in the future, as these corporations grew in population, it might be best to permit them to incur debts in some instances, rather than to impose upon the people resident therein a heavy burden of taxation for any one year. There are many things which are needed by municipal corporations which the state would never need, and therefore the fact that it would be wisest sometimes for municipal corporations to supply themselves with these needed things by borrowing money was recognized by the framers of the constitution, and they did not entirely deprive these subordinate public corporations of the power to incur debts, but simply prescribed that the debt should be incurred in a given way, after the consent of the people had been obtained, and that, when incurred, it should not exceed a certain percentage upon the assessed value of the taxable property embraced within its limits.

The power of a municipality to incur a debt is hedged around with such safeguards that it is not probable that the conditions imposed can be complied with unless it is manifest that the purpose for which the debt is to be incurred is a proper one, and that the amount of the debt is such that the tax required to discharge it would not be unreasonable and burdensome. While these corporations were not deprived entirely of the power to incur debts, as is the state, the same controlling idea in reference to indebtedness by the state is apparent in regard to indebtedness by these subordinate corporations; that is, that there is to be no plan by which a debt is to be perpetually carried by counties and cities. Municipal corporations cannot incur a debt until they provide for paying the same, and they cannot incur a bonded debt unless, "at or before the time of so doing," provision is made "for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." The purpose manifested in the section of the constitution from which the above quotation is taken is that the liability upon the municipal corporation growing out of the incurring of a bonded debt should be met by an accumulation made up of sums taken from the taxpayer in annual installments. They may postpone the payment of the principal of the debt 1 year, 2 years, or even to the limit of 30 years, but no further can they go; and no matter what be the period fixed by the municipality, in its discretion, in which the bonds are to be paid, and no matter when the bonds mature within this period, the terms of the constitution are mandatory. There shall be each year levied a tax, which shall be sufficient in amount to pay the interest due during the current

make a sinking fund which by the end of the bond period will be sufficient to discharge the entire principal of the debt. To illustrate: If 60 bonds are issued, one maturing each year during a period of 29 years, and all of the balance maturing at the end of 30 years, there must be a tax levied each year which shall be sufficient in amount to pay the interest falling due during the current year on all unmatured bonds, and to pay off the principal and interest of the bond maturing that year, as well as to raise a sum which, going into a sinking fund, and being added to each year, will, with its accumulations, under proper management, produce an amount sufficient, at the end of the 30 years, to pay off the principal of all the bonds falling due at that time. The controlling idea is that, so far as the taxpayer is concerned, he is to contribute his proportion annually, whether it go directly to the creditor, or whether it go into the hands of the public officers, to be held in trust for the creditor, to be paid to him when the debt matures. As has been said, no municipal corporation can incur a bonded debt, except one that is to mature within 30 years from its date, and to be paid off and discharged within that time. It is true, as has been stated, that a municipal corporation may incur a debt other than a bonded debt, and the constitution recognizes that it may do so; but it does not say, in terms, how long such debt may run, nor that it shall be provided for by annual taxation. But is not this necessarily to be inferred? If the constitution is so precise and particular in its terms in dealing with the subject of bonded indebtedness by a municipal corporation, would it be reasonable to say that the municipal corporations are to have more latitude in incurring debts of less dignity? If the bonded debt, the contract by specialty, the contract under seal, is to be discharged by annual contributions within a fixed period, is it not necessarily to be presumed that it was intended that the simple contract, the promissory note, and the open account must be provided for in a similar way, and, if differing at all in its duration, from the time of contracting to maturity, should be less than that allowed for the bonded debt?

The authority of the general assembly to confer upon municipal corporations the power to tax is restricted, but it exists to the extent that a municipal corporation may be authorized to levy taxes for any purpose which is purely public and municipal in its nature. That a municipal corporation may exercise the power of taxation for the purpose of providing its inhabitants with water for domestic use, as well as to provide the city with water to protect the inhabitants from fire, is the settled law of this state, and is not questioned in the present case. *Frederick v. City of Augusta*, 5 Ga. 561; *Mayor, etc., v. Cabot*, 28 Ga.

by building itself the works necessary for the purpose, or by making a contract with other persons to supply the same. In *Lott v. City of Waycross*, supra, this court held that a municipal corporation could contract an indebtedness for supplying lights to a town without submitting the question to a vote of the people. That case was dealing, it is true, with a contract which was to run for a term of 10 years; but all that the court held was that, if the amount stipulated to be paid annually was paid during the year in which the service for which the municipal corporation contracted was performed, no indebtedness was incurred by the town. Justice Blandford, in the opinion in that case, says: "Whether this contract incurs an indebtedness which is required to be submitted to the voters of the town under the constitution it is not necessary for us now to decide. It may be that the question may never arise, even under this contract, if the sum stipulated to be paid annually for the supply of lights is paid as it becomes due; and if this is a reasonable expense to be incurred by the city, and we do not see why it is not, then the question will never arise. Should the city make default of payment, then the question might arise, and it would have to be decided whether this was such a contract as imposed upon the city an indebtedness such as is contemplated by the constitution to be submitted to the people. 'Sufficient unto the day is the evil thereof.' Let the light shine in Waycross." That case cannot be used as an authority to uphold as valid the contract under consideration in the present case, except to the extent that, if the waterworks company in any year complies with its contract, and furnishes water, and the city uses the water, and thus receives the benefit of the contract, it can, and ought to, pay for the service out of the taxes levied during the year in which the water was used. The only effect of the ruling in that case was that no "debt," within the meaning of that term as it is used in the constitution, is incurred by a municipal corporation for a current expense of this character, if the liability growing out of the transaction can be discharged by the payment of money raised by taxation during the current year.

The word "debt" is defined in various ways. According to the *Standard Dictionary*, it is "that which one owes to another; any money, goods, or service that one is bound to pay to another; a pecuniary due." "A thing owed; obligation; liability." *Webst. Dict.* "A liquidated demand; a sum of money due by certain and express agreement." *Anal. Law Dict.*; 3 Bl. Comm. 154. "All that is due a man under any form of obligation or promise." *Bouvier*. From the foregoing definitions it is apparent that the word, when taken in a broad and comprehensive sense, in-

tion is undertaken, and continues until discharged by payment. Therefore, in this broad and comprehensive sense, if any time elapses between the performance of the service on the one hand, and the payment of the money or thing of value which the contract for that service calls for on the other, the relation of the parties to each other will be that of debtor and creditor, and the thing which is owed by one to the other will be a debt. If the word "debt" is to be given this meaning in the clause of the constitution now under consideration, then no officer of any public corporation is authorized to purchase for the public any article, no matter how small and trifling, unless payment for the same is made in cash at the time the article is delivered, and no article of necessity in the administration of the various public offices in counties and cities in this state can be ordered to be paid for at any time in the future, no matter how short the time may be between the order for the goods and the delivery of the same. Was it the intention of the framers of the constitution that this strict construction should be given to the words that they have used? It is a matter of public history that, from the very organization of the first subordinate public corporation in this state, the sums necessary to pay the expenses incident to the administration of public business was raised by taxation levied from year to year upon the person and property of the inhabitants. Public burdens of every nature were divided into annual sums, and were discharged by annual taxes collected for the purpose. Almost without exception, this was, and has been, the rule, not only in regard to the subordinate public corporations of the state, but in regard to the state itself. As a general rule, public officers are compensated by sums which are paid annually; in other words, it is now, and has always been, the rule that salaries and all expenses of government are paid by the year, out of taxes raised during the year in which the service to be compensated was rendered. The constitution was framed and adopted in the light of this fact, and it is not to be presumed that it was intended, by the use of the word "debt," that an interpretation should be placed upon it which would have the effect of entirely revolutionizing the practice of nearly a century in relation to the way in which public expenses were incurred and discharged. Especially would this meaning not be given to the word when the constitution itself, in one of the clauses above quoted, not only expressly recognizes that this is the method of dealing with matters of public expense and public debt, but directly declares that that shall be the rule to be followed as to one class of debts which it authorizes municipal corporations to incur. "Debt," therefore, as used in the constitution, is to be understood as a liability which is undertaken, and which must

be undertaken. The purpose of the framers of the constitution was to prevent an accumulation of liabilities upon municipal corporations, which could be enforced against such corporations in the future by the compulsory levy of taxes.

The policy of the constitution is not only against the incurring of liabilities to be discharged in the future, for services rendered concurrently with the liability incurred or previous thereto, but it is equally against the incurring of a liability which is to be discharged in the future, notwithstanding that it depends upon the performance of some service to be rendered in the future. If the character of the undertaking is such that he who deals with a municipal corporation can, under the contract, in the future, of his own volition, and without the consent and over the protest of the authorities of the municipality, place upon it a liability which must be discharged by the levy of a tax in the future, such an undertaking creates a debt within the meaning of the constitution of this state, and one of the very classes of debts which the constitutional provision was made to guard against. If the authorities of a municipal corporation of this state are to be allowed to anticipate far into the future the needs and expenses during each year, and to fix in advance an amount that shall be paid for current expenses, and make a contract under which the other contracting party has a right from year to year, by a simple performance, to put himself in a position where he can demand of the authorities a discharge of the obligation, then it seems to us that the framers of the constitution have done only a vain and idle thing in placing in the fundamental law of the land the clause now under consideration. Apart from the policy of allowing the authorities of municipal corporations to anticipate what should be incurred as a current expense 10, 15, or 20 years in the future, we cannot bring our minds to the conclusion that such an undertaking was ever intended to be authorized by the framers of the constitution. Nay, more; we are convinced that just such undertakings, the consequences of which are just as disastrous as those obligations under which a present liability is incurred, were in contemplation by the framers of the constitution, and intended to be prohibited by this provision.

Taking into consideration all of the provisions of the constitution which deal with this subject of debts to be incurred by the public, and taking into consideration the matters of public history above referred to, we are brought to these conclusions as to what was the intention of the framers of the constitution in the matter of debts to be incurred by municipal corporations: (1) The word "debt" is not to be construed in its broad and unrestricted sense of a liability by one person to pay money or other thing of value to another. (2)

ring the liability, a sufficient sum in the treasury of the city which might lawfully be appropriated to the payment of the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year; and such a transaction would not create a "debt," within the meaning of that word as it is used in the constitution. (3) It was the purpose of the constitution to provide a system of finance for subordinate public corporations under which there should be, each year, contracts made for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year; that is, each year's expense should be paid by taxes levied during the year, and no item of expense was to be paid, except out of the taxes levied during the year in which the contract for such expense was made. (4) Any liability which was not to be discharged by money already in the treasury, or by taxes to be levied during the year in which the contract under which the liability arose was made, is a "debt," within the meaning of the constitution, and cannot be incurred without the preliminary sanction of a popular vote, unless it be for a temporary loan to supply casual deficiencies of revenue. If we are correct in these conclusions, then the contract under consideration in the present case created a "debt," within the meaning of the constitution, the aggregate amount of which was the sum of the annual rentals therein stipulated to be paid; and it is therefore illegal, and not binding except for the first year in which the contract was entered into, and for any subsequent years in which the municipality sees proper to receive at the hands of the waterworks company the benefit which the city might derive from the contract.

Counsel for defendant in error earnestly insisted that, as it was determined by the supreme court of the United States, in the case of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, that contracts of this character did not create debts, and that this decision was so well supported by reason as well as by the current of American authority, we should follow the same, although it was upon a question on which the decisions of that court are not binding upon this court. Notwithstanding the great respect we have for the decisions of that court, we are constrained to disagree with it in the conclusions reached in the case referred to. We cannot, without doing violence to what we believe to be the manifest intention of the framers of the constitution, follow the rulings made by that court and other courts of respectable standing throughout the Union. That the ruling which we make in the present case is in direct conflict with a decision of the highest court in the land, as well as with the current of American authority on the subject, is the best evidence that can be offered to show how strong our convictions must be as to

this state which are added to above. In the case above referred to the court had under consideration a contract very similar to the one involved in the present case, made by the city of Walla Walla with a water company. The charter of the city provided that "the limit of the indebtedness of the city of Walla Walla is hereby fixed at \$50,000." The court comes to the conclusion that the aggregate amount to become due under the contract was not to be added to the existing indebtedness of the city in determining whether the charter limit of indebtedness had been reached, and that there was no indebtedness under the contract until the services therein provided for had been actually rendered. Mr. Justice Brown, in the opinion, says: "There is a considerable conflict of authority respecting the proper construction of such limitations in municipal charters. There can be no doubt that if the city proposes to purchase outright, or establish a system of waterworks of its own, the section would apply, though bonds were issued therefor, made payable in the future [citing authorities]. There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum, if the aggregate amount payable under such agreement exceeds the amount limited by the charter. * * * But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas, or a like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case, the indebtedness is not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment being only postponed. In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all; and, while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation, * * * A different construction might be disastrous to the interests of the

y, since it is obviously debarred from purchasing or establishing a plant of its own extending in value the limited amount, and is forced to contract with some company, which is willing to incur the large expense necessary in erecting waterworks upon the faith of the city paying its annual rentals [citing authorities]. The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to the debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employes, to whom the city necessarily comes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers, they are at liberty to make contracts, regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires and the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor." The learned justice, in the opinion, cites the case of *Lott v. City of Waycross*, supra, as one of the authorities to sustain his position. He has entirely misconceived the scope of that decision. The question dealt with by him is expressly left open and undecided.

Upon two propositions we are compelled to agree with the learned justice who delivered the opinion: First, we cannot agree that there is such a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party performs the agreement out of which the debt may arise, as that a municipal corporation may make a contract of the latter character, when it is expressly prohibited from creating debt. In the consequences resulting, in the event upon the taxpayers, and in every way in which it either may be productive of harm, the two are identical. In each a liability is incurred, and the party contracting with the city, no matter what we may call him,—creditor, or contracting party in an agreement for future indebtedness,—has, by the simple performance on his part of some act provided for in the agreement, the right to use the long arm of the law to compel the city to pay him therefor. A city thus situated is under an obligation that it cannot throw off; and upon it the weight of a burden that it is unable to carry; is powerless to defeat, if it desired to do so, the claim of him with whom it has contracted; is in debt, and no argument founded upon sound reason can ever make it otherwise. Second, we cannot agree to the obvious purpose of limitations of this character is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It

seems to us clear, from what we have stated, that the almost expressly avowed purpose of the framers of the constitution was, not only to prevent the improvident contracting of debts for other than the ordinary current expenses, but also to prevent the improvident contracting of debts for all purposes, whether for current expenses or otherwise, except by the sanction of a popular vote, unless for some reason there should be during the year a deficiency in the revenue raised for the purpose of paying the current expenses of the municipality. If contracts of the kind now under consideration are to be allowed, on the ground that they are for current expenses, then it would seem that there was no reason for that provision in the section which authorizes a temporary loan to supply a casual deficiency. The power to make a temporary loan for a casual deficiency, being expressly conferred, but emphasizes the fact that the constitutional plan was that there should be a balancing of accounts at stated periods of time, at the end of the calendar year or the fiscal year of the corporation, when the amounts raised by taxation, on the one hand, should be applied to the sums incurred as expenses, on the other; and if, during the period in which the expense was incurred and the tax was levied, by some oversight the levy was not of sufficient amount to pay the expenses, the deficiency, casual in its nature, which was contemplated by the constitution arose, and could be supplied by a temporary loan. The period, marked by the calendar year or an arbitrary fiscal year, was evidently in contemplation by the framers of the constitution, as that is in accord with the custom so long existing in this state.

The conclusion reached by the supreme court of the United States in the *Walla Walla Case* seems to be sustained by the decisions in the following cases: *Grant v. City of Davenport*, 36 Iowa, 306; *Budd v. Budd*, 59 Fed. 735; *City of Valparaiso v. Gardner* (Ind.) 49 Am. Rep. 416; *Raton Waterworks Co. v. Town of Raton* (N. M.) 49 Pac. 898; *Creston Waterworks Co. v. City of Creston* (Iowa) 70 N. W. 739; *Wade v. Borough of Oakmont* (Pa. Sup.) 30 Atl. 959; *Utica Waterworks Co. v. City of Utica*, 31 Hun, 426; *Woods v. City of Oklahoma*, 2 Okl. 158, 37 Pac. 1004; *Dively v. City of Cedar Falls*, 27 Iowa, 227; *Dwyer v. City of Brenham*, 65 Tex. 526; *Lamar Water & Electric Light Co. v. City of Lamar*, 128 Mo. 188, 26 S. W. 1025, and 31 S. W. 756; *Weston v. City of Syracuse*, 17 N. Y. 110; *Stedman v. City of Berlin* (Wis.) 73 N. W. 57; *New Orleans Gaslight Co. v. City of New Orleans* (La.) 7 South. 559; *City of East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415; *McBean v. City of Fresno*, 112 Cal. 159, 44 Pac. 358; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782; *Seitzinger v. Borough of Tamaqua* (Pa. Sup.) 41 Atl. 454. In the following cases the conclusion reached seems to sustain the ruling made in the present case: *Appeal of City of Erie*, 91

Water Co. v. City of Salem, 5 Or. 29. In none of the cases was the constitutional or charter provision, in which the word "debt" was used, exactly identical with the words of our constitution; but in some of them there is no material difference, and this is true of a greater number of the cases cited on each side of the question. Believing that no other conclusion would carry into effect the constitution as its framers intended, we have nothing to do with the argument that the result reached by us may be disastrous to municipal corporations desiring to make public improvements. We do not believe, however, that the consequences will ever be so disastrous as seems to be anticipated by counsel in the present case, or by justices in decisions in cases where a contrary view to that expressed by us is taken. So far as we are concerned, we are satisfied with the policy of the constitution, which, as we believe, demands annual adjustments of municipal expenses and municipal taxes, with the requirement that the expenses each year shall be discharged by the taxes of that year, save only in the two cases provided for in the constitution,—consent of the inhabitants of the municipality, and a casual deficiency in the revenue. All of the cases heretofore decided by this court, in which the matter now under consideration was directly dealt with, will now be considered in the light of what we have said, and attention will be directed to the effect of the ruling made in the present case, whatever it may be, upon each of the rulings heretofore made by this court.

The first case on this question that came before this court after the adoption of the constitution of 1877 seems to have been *Hudson v. City of Marietta*, 64 Ga. 286. Only two justices participated in this decision, and therefore, if it is in conflict with the views now entertained by us, it need not be formally overruled. All that is in this case that bears at all upon the question now under consideration is the language of Chief Justice Jackson, quoted in another part of this opinion, as to the intention of the framers of the constitution; and his views, therein expressed, seem to be entirely in accord with those now entertained by us.

In *Spann v. Board*, 64 Ga. 498, it was held that under the constitution of 1877 a county could not levy a tax "to buy a safe without the assent of two-thirds of the voters at an election held for that purpose." Justice Jackson, in the opinion, says: "The levy of twenty-two per centum for iron safes is not mentioned in the purposes enumerated in the second paragraph of the sixth section of the seventh article; nor are there words therein which, without much latitude of construction, can be construed to authorize the tax. Besides, the purchase of these safes is the creation of a new debt since the adoption of the

of the qualified voters of the county at an election for that purpose, to be held as may be prescribed by law.' No such election has been held, and a new debt, without its sanction as a condition precedent, cannot be imposed. * * * It was the purpose of the framers of that constitution to tap the root of that system of indebtedness, by counties, cities, and towns, which was growing into immense proportions, and spreading mildew and blight everywhere over the land; and it is made our duty by the same constitution to declare all laws in violation of its provisions and prohibitions to be null and void. * * * These safes might have been bought on a credit, and a debt incurred therefor, prior to this constitution (Code, §§ 497-502); and they may be bought still, if the county should have surplus funds from any source to pay cash for them (Id. § 528), or if the debt be incurred with the assent of two-thirds of the voters of the county, but not otherwise." So far as that case may be authority for the position that a contract for the purchase of articles of the nature therein dealt with will not be lawful, notwithstanding there has been, or may be, during the current year in which the contract of purchase is made, a tax levied which will realize a sufficient amount which can be lawfully appropriated to discharge the obligation, the same is overruled, as being in conflict with the views hereinbefore presented.

In *Mayor, etc., v. McWilliams*, 67 Ga. 106, it was held by two justices that, "where a tax has been levied by a municipal corporation sufficient to cover an anticipated expenditure for city offices or the like, it is not necessary to delay taking any steps towards securing such improvements until the money is actually in the treasury. To have work done, and pay for it at its completion, or by installments during its progress, having the money ready when the time of payment arrives, is not to incur a 'debt,' within the meaning of the constitutional prohibition on that subject." In the opinion Justice Speer uses this language: "An obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future does not constitute or ripen into an indebtedness, within the meaning of the constitution, till at least the performance of the work. * * * If this were not so, then it would be impossible, in a majority of instances, to even contract for the most necessary public building without a prior levy and deposit of money in the treasury. The obligation to pay, so far as the time of its inception as between the parties is concerned, is one thing, and an actual indebtedness, within the meaning of the constitution, is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so, if I pay him as he progresses, I will not be his debtor; so,

I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if, on its fulfillment, I discharge I cannot be said to have incurred a 'debt,' in the sense the constitution prohibits corporations from incurring." Chief Justice Jackson, in a concurring opinion, distinguishes this case from *Hudson v. City of Marietta* and *Ann v. Board*, supra; and in reference to the latter case he uses this language: "It is evident that in the county case, in delivering the opinion, I do also invoke the other clause of the constitution, and use expressions going to show that something like this,—iron safes,—to be paid for by taxes, is a 'debt,' in the sense the constitution; but I say there that, if the county had money legitimately drawn from other sources, it could pay for the safe. In this case this money will be in the treasury, legitimately put there by taxation for current ordinary expenses,—the prime necessity of municipal government, a city hall and appurtenances; and I think that the constitutional prohibition against new debts does not cover such a case." Justice Crawford, in his dissenting opinion, after referring to the constitutional provision under consideration, says: "It is admitted that a new debt could not be incurred, except as above provided. Then the question is whether a city can levy a tax with which to pay a future liability that it could not legally incur. If the right exists to make such contract, the time when the payment is to be made is wholly immaterial. It neither enlarges the power, nor changes the nature of the liability. It is the incurring of a new debt, whether paid when the work is done, or years thereafter. It is a debt from the moment of the bargain until paid, be that when it may. To say that for a new debt to be incurred with which to build a town hall without first submitting it to the people would be unconstitutional, and to say that the levy of a tax to build a town hall without submitting it to the people would be constitutional, does not seem to me to be either law or logic. This provision in the constitution was intended to give the taxpayers the right to say whether any expenditure should be made, and to require their assent before the taxes should be levied for such expenditure." Some of the language of Justice Speer is in direct conflict with the views now entertained by us, and we decline to follow his reasoning. Taking the case in the light of the concurring opinion of Chief Justice, the judgment in that case does not conflict with the ruling now made. The views entertained by the dissenting judges go much further in the line of strict construction than we are ourselves prepared to

While no ruling was made directly on the question now before us in *Walsh v. City of Marietta*, 67 Ga. 293, the clause of the constitution with which we are now dealing is under consideration, and it may not be inappropriate to quote here some of the language of Chief Justice Jackson, where he

calls attention to the evil which was intended to be remedied by the clause of the constitution now under consideration. After referring to the law in relation to such matters as it existed before the adoption of the constitution, he says: "What was the evil? It was the evil attendant upon all people who handle money not their own. The cities of the state incurred a very heavy indebtedness. Some of them became insolvent. To levy taxes enough to pay them would work the ruin of the citizens and blight the prospects of the city. Not to levy and pay them would be to destroy credit and soil honor. The cities are the arteries of the body politic. With them destroyed or sluggish, the heart, the very life of the republic, would cease to beat, or pulsate with a feeble supply of vital fluid. So that in their health is involved that of the entire commonwealth, and to suffer their honor to be tarnished is to soil that of the state. Therefore the strong language used by this court in 64 Ga. 286, 498, in respect to the evils resulting from this unlimited power to incur city indebtedness with only the slight check of the sanction of a majority of the voters, without regard to their property or intelligence, is sober, though figurative. It is stern truth, and no flight of fancy. One of the largest cities of a sister state actually surrendered her franchises and ceased to be corporate because of the extravagant debts her authorities had incurred and her total inability to meet them, and one of our own was almost in the throes of death because of the burden under which she staggered. To stop this tide of evil, which always swells in the calm of prosperity and peace, rather than in the storm of adverse weather, when all eyes are watching the danger, the framers of the constitution of 1877 inserted this paragraph and the succeeding paragraph of this section; and, reading them in the light of the old constitution, the mischief, and the remedy, we think the meaning will become apparent, despite the confusion which arises from the inaccurate use of the words. The framers of it could not extinguish past indebtedness of cities. The constitution of the United States prohibited their doing so, because the obligation of contracts would be destroyed. But they did everything else which they had power to do to stay this tide, and keep Georgia above its flood. They prohibited all cities from making any new debt, unless sanctioned by two-thirds, instead of a majority, of the voters, except small loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum upon the taxable property thereof. They then, even with this sanction of two-thirds of the citizens to a new debt, required a provision for the payment of this debt by the assessment and collection of an annual tax sufficient to pay the principal and interest of the debt within 30 years. * * * Thus determined to preserve the honor and credit of the state by preserving that of her minor governments, the framers of the constitution of 1877 inserted these checks on

voter, when he deposits his ballot, must know that he puts no burden on posterity which he will not assume himself, but every year he must pay his quota for interest and a sinking fund for principal, to be levied and collected on his property."

In *Pennington v. Gammon*, 67 Ga. 456, it was held that a county may organize a chain gang, to be composed of convicts, to work on the public roads, streets, or other public works, and that provision may be made for their safe-keeping and employment, and that if, when engaged in a work of this character, there should arise a necessity to purchase tools and implements necessary for the work, the county could, when too late to levy a tax for this purpose, incur a debt,—this being a "casual deficiency in the revenue," within the meaning of that expression as it is used in the constitution. The amount of such debt, however, is not to exceed the limit fixed by the constitution; that is, one-fifth of 1 per centum upon the assessed value of the taxable property of the county. There is nothing in this decision which conflicts with what we now rule, but it seems to be in line with the argument which we have pursued.

In *Butts v. Little*, 68 Ga. 272, it was held that a contract by a county for the erection of a building at a specified price, to be completed by a given date and payment to be made as the work progressed, was, in effect, a contract to pay the price agreed on by the date of completion fixed, and that where the amount of such price was more than could be lawfully raised by taxation, a debt was incurred, within the meaning of the constitution, and the contract was invalid, because it had not been authorized by a popular vote in the manner prescribed by the constitution. While the contract under consideration in that case was thus declared to be void, the judgment was reversed on terms; the effect of the decision being to authorize the making of a contract which would provide that the cost of the building as it fell due should be met annually by the levy of one-fifth of 1 per centum on the assessed value of the taxable property of the county. This part of the decision seems to be based upon the idea that a county would have a right to anticipate a casual deficiency in the revenue which might arise in future years. It is not necessary to refer further to this decision, as anything said therein which is in conflict with the present decision was overruled in *Lewis v. Lofley*, supra.

In *Cabaniss v. Hill*, 74 Ga. 845, the ruling made in the case of *Spann v. Board*, supra, was followed, and in the opinion of Chief Justice Jackson, after a ruling to that effect, in referring to the particular facts of the case then under consideration, says: "But even if this contract does not create a debt, these orders were made payable only out of the proceeds of the taxes for the new jail in the

satisfactory,—these orders are on the treasurer, not to be paid out of any general fund, or future levy of taxes, but out of a tax already levied for the jail, into which the work was to go and of which it was to become a part; and it may be that this provision in the orders, as payable out of money in sight already provided for, might be construed into a sort of cash arrangement, and not a debt, in the sense of the constitution. If anything can save it from being a new debt, it is this arrangement to pay out of funds, not in the treasury, it is true, but on the way to it." It is true it was held in that case that a county would not be compelled by mandamus to pay the claim, because the fund upon which the orders were drawn had been exhausted, and there was no fund with which to pay the debt, either in the treasury or on its way thereto. So far as the ruling in the case is concerned, it is in conflict with the views we now entertain, and the case must be, therefore, overruled, for the same reason that the case upon which the ruling was based is overruled.

In *City of Conyers v. Kirk*, 78 Ga. 480, 3 S. E. 442, it was held that "a municipal corporation can make a cash contract for current supplies, such as lamps and gasoline for lighting the streets, through its appropriate officers or committees, as effectually as by formal order or resolution entered on its minutes." Chief Justice Bleckley, in the opinion, says: "The facts of this case, taken most strongly in favor of the prevailing party, as they must be after verdict, do not show any purpose or intention to create a debt. The debt resulted from a breach of the contract, not from the making of it. Against paying a debt so originating, there is no constitutional impediment. When a cash purchase is made, there is no expectation that any debt will exist; and there was no such contemplation in this case. If we take the evidence, as we do, most favorably for the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered, and the reason indicated in the record why payment was not then in fact made was the accidental absence of the city treasurer from his office; so that this debt (and it is a debt now) became such, not by virtue of making the contract, but by virtue of breaking the contract, and surely there never can be, and never will be, any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it, the cash sufficient for the purpose being then in the debtor's treasury." The decision, and the reasoning upon which it is based, is not in conflict with what we now rule, but both tend rather to support our conclusions than otherwise.

In *Cartersville Improvement, Gas & Water*

v. City of Cartersville, 89 Ga. 683, 16 S. 25, the conclusion reached was expressed in headnote, which is as follows: "Without a preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of gas the credit of the city for a longer period in 1 year; and a contract which by its terms to run for 20 years, each year's supply to be paid for quarterly during the year, is operative from year to year only so long as neither of the parties renounces or repudiates it, either of them can terminate it at the end of any year; but so long as it stands, and is implied with by one party, the other party must comply also." There was no opinion reached in the case. The conclusion reached in that case was, in our opinion, correct, and we believe that the reasons which have been heretofore given are sufficient to show that such the case, and therefore we approve the ruling therein made and decline to overrule the decision. The decision in the case just referred to was followed in the case of Cartersville Waterworks Co. v. Same, 89 Ga. 689, 16 S. 70.

In *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57, a case of *Butts v. Little*, supra, was overruled so far as it was in conflict with what is then ruled. The court there held that, without the preliminary sanction of a popular vote, as required by the constitution, the public authorities of a county cannot contract for the building of a court house on the credit of the county for an amount in excess of funds on hand and the proceeds of taxation applicable to the object for the year in which the contract is made." Justice Simmons, in the opinion, says: "We see no reason, therefore, why the county authorities in this case may not levy a sufficient tax in one year to pay for the erection of a court house, if the tax be not exorbitant; and, if they can do this, no reason now occurs to us why they cannot make a contract for its erection, the cost to be paid out of the taxes thus levied. If there are funds in the county treasury sufficient for the purpose, the county authorities may contract for its erection, payment to be made when the building is completed, or in installments as the work progresses; or, if taxes are levied, they can legally be levied, for the year, sufficient for the purpose, they may contract to pay for it out of such taxes, although they are uncollected." There was no ruling at all in the question now under consideration in the case of Dawson Waterworks Co. v. Carver, Ga. 565, 20 S. E. 502.

In *Board Com'rs Habersham Co. v. Porter & Co.*, 103 Ga. 613, 30 S. E. 547, the decision in *Lewis v. Lofley* was under review, and was in that case adhered to and reaffirmed. When we had under consideration the case last cited we saw no reason why the conclusion reached in *Lewis v. Lofley* was not sound, and we do not now see any reason for overruling or modifying either decision. Both of them seem to be in accord with our views

as above expressed, and for that reason the conclusion reached in each case is adhered to and reaffirmed. It appears, therefore, that nothing that is herein said is in conflict with what has been heretofore ruled by this court, excepting the cases of *Spann v. Board*, *Cabanius v. Hill*, and *Butts v. Little*. The first two cases are now overruled, so far as there is anything in either to conflict with what we now hold; and *Butts v. Little*, so far as it is inconsistent with the ruling now made, has never been followed, and has been to that extent expressly overruled, as we have seen, in *Lewis v. Lofley*. The conclusions reached, as well as the reasoning upon which such conclusions are based in all other cases, is not only not in conflict with what we now rule, but in entire accord with the same. It may, therefore, be now accepted as the settled law of this state that contracts of the character under consideration in the present case, so far as they attempt to provide for the payment of any sum other than that for the year in which the contract is made, create a debt, within the meaning of the constitution, and are subject, after the expiration of the first year, to repudiation by either party.

2. While it may not be necessary in the present case to decide whether the clause of the constitution under consideration requires legislative action prescribing the way in which the election therein provided for shall be held, my investigations have satisfied me that such legislative action is essential to the validity of the election. The reasons which bring me to this conclusion will be stated, but on this question I am speaking for myself alone. Any liability which is a debt, within the meaning of the constitutional provision above quoted, cannot be incurred without the assent of two-thirds of the qualified voters of the municipal corporation "at an election for that purpose, to be held as may be prescribed by law." In the case of *Hudson v. City of Marietta*, 64 Ga. 286, it was held, in a decision rendered by two justices, that, until the general assembly had by an act prescribed the manner of holding the election, a municipal corporation had no authority to incur a debt in order to make an exchange of fire engines in the fire department of the city. It was further held that "a mere vote on the question of exchange or no exchange, held under no law passed by the general assembly to carry into effect the mode of avoiding this prohibition on new debts, and held under no law of the state or the city prescribed for such an election at any time, cannot be held to be such an authorization of a new debt as will comply with the constitution and relieve the city from the prohibition." Justice Jackson, speaking almost in the very atmosphere of the convention which adopted this constitution, after quoting the section with which we are dealing, uses this language: "It is not pretended that any law has been passed authorizing such increase of debt, or to hold such an election as is con-

the part of this city to make a new debt, incurred to procure a steam fire engine in the place of an old hand engine, at a considerable cost, without complying with that provision of our present constitution. It cannot be done. The provision is inserted therein to stop—to dam up—this deluge of city and county debts, which is flooding the country and sinking the best interests of the people." When the constitution provides that no municipal corporation shall incur a debt until an election for that purpose shall be held "as may be prescribed by law," it undoubtedly contemplates that action by the general assembly is necessary in order to carry into effect the provision which authorizes municipal corporations, under certain conditions, to incur new debts. The decision above referred to clearly establishes this proposition. See, in this connection, *Elliott v. Gammon*, 76 Ga. 766. There must be either a general law prescribing the manner of holding the election, or, in the absence of such general law, each municipal corporation desiring to incur a new debt must have express legislative authority prescribing the manner in which the election shall be held. The constitutional provision does not empower either municipal corporations existing at the time of its adoption or those created thereafter to deal with the subject of elections to incur debts. The constitution further contemplates that the debt incurred by municipal corporations may belong to that class known as a "bonded indebtedness," and it prescribes what shall be done by the municipality when the debt belongs to that class. Civ. Code, § 5894. That municipal corporations may incur debts other than a bonded indebtedness is also contemplated by the constitution, for it is therein provided that "municipal corporations shall not incur any debt until provision shall have been made by the municipal government." *Id.* § 5897. If a municipal corporation incurs a bonded indebtedness, it is required that there shall be the "assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." *Id.* § 5894. If the debt to be incurred is one other than a bonded debt, the constitution still requires, as above shown, that provision shall be made for the payment of the same, but the limitation placed upon the corporation in regard to bonded indebtedness is not imposed in regard to other debts. While municipal corporations may incur debts, both bonded and otherwise, still, whatever the character of the debt may be, if it does not come within the exception referred to in the clause of the constitution first quoted, the debt cannot be incurred until the assent of two-thirds of the qualified voters has been obtained at an election held in the manner prescribed by law.

debt. Pol. Code, § 377 et seq. It is provided that the city authorities shall give notice for the space of 30 days next preceding the day of the election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named the election shall be held. In the notice the amount of bonds to be issued, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off, shall be specified. The election shall be held at all of the voting precincts within the limits of the municipality, and shall be held in the same manner, by the same persons, and under the same rules and regulations that elections for municipal officers are held; and the returns shall be made to the officers calling the election. In determining the question whether or not two-thirds of the qualified voters of the municipality voted in favor of the issuance of the bonds, the tally sheets of the last general election held in the municipality shall be taken as a correct enumeration of the qualified voters. Whether or not a registry of the voters is necessary at any such election depends upon the charter provisions of each city, as will be seen by reference to the following cases: *Bell v. City of Americus*, 79 Ga. 153, 3 S. E. 612; *Gavin v. City of Atlanta*, 86 Ga. 132, 12 S. E. 262; *Kaigler v. Roberts*, 89 Ga. 476, 15 S. E. 542; *Howell v. City of Athens*, 91 Ga. 139, 16 S. E. 966; *Heilbron v. City of Cuthbert*, 96 Ga. 312, 23 S. E. 206.

4. There is no general law of this state prescribing the manner in which an election shall be held by a municipal corporation on the question of incurring a debt other than a bonded debt, within the meaning of the constitutional provision above referred to. The general assembly has never expressly conferred upon the city council of Dawson the power to prescribe the manner of holding an election in that city for this purpose. In the absence of a general law providing for such election, and in the absence of a special law expressly conferring upon the municipality power to deal with this subject, is not any election held clearly without authority of law? See *Hudson v. City of Marietta*, cited supra. If it was necessary to so hold in the present case, there would be nothing in such a ruling to conflict with the decision of this court in *Mayor, etc., v. Inman*, 57 Ga. 370. The city authorities of Griffin had express legislative power, on a recommendation of a majority of citizens, either in public meeting or by public election, to subscribe for the stock of railroads, to borrow money on the faith and credit of the city to pay for the same, and to impose a special tax to meet the debt thus created. It was held that an amendment to the charter of the city, passed in 1859, which contained the provision above referred to, was not repealed by that clause of the constitu-

sent, directly or indirectly, to become a stockholder in, or contribute to, any railroad, * * * except in the case of the inhabitants of a corporate town or city. In such cases, the general assembly may permit the corporate authorities to take such stock or make such contribution, * * * after a majority of the qualified voters, of such town or city, voting at an election held for the purpose, shall have voted in favor of the same, but not otherwise." It was further held that the amendment should be construed in connection with the clause of the constitution above quoted, and, thus construing the two together, the proper mode of taking the sense of the citizens in 1871 was to order a public election by all of the qualified voters of the city, with the privilege to each and every qualified voter to vote for or against the proposed subscription. The question as to whether, in such a case, a legislative act was necessary, was not involved, because there was a legislative act authorizing the city to hold the election, and the only question was as to who was embraced within the meaning of the term "citizen," as it was used in that act.

5. But, even conceding, for the sake of the argument, that no legislative action was necessary in order to authorize a municipal corporation to call an election, we cannot hold that what was done by the city authorities of Dawson in this case was, in any sense of the word, a compliance with either the letter or the spirit of the constitution. The purpose of the constitution was to limit the amount of indebtedness that could be incurred by cities within the limit thus fixed, and to provide, with one single exception,—that is, the case of casual deficiencies of revenue,—that all debts incurred should have the assent of two-thirds of the qualified voters of the municipality. If the ordinance calling the election does not prescribe the amount of indebtedness to be incurred, and if the notice of the election does not fix an amount, no matter whether the vote be unanimous or not, the whole purpose of the constitutional provision is thwarted. To hold that such an ordinance and such a notice would give a municipal corporation the power to incur whatever debt is necessary to accomplish the object referred to in the ordinance and the notice would be simply conferring upon the city authorities unlimited power to do that which the constitution says that they shall not have authority to do. If two-thirds of the qualified voters of a city can confer upon municipal officers the power to incur an unlimited debt in order to provide waterworks, why may not the voters, instead of dealing with the subject of municipal expenses separately, simply empower the authorities to incur expenses necessary for waterworks, electric lights, police, and all other things needful for the successful administration of the city government, and thus avoid

necessary to establish the proposition that an election held under such a notice would be practically a nullification of the constitutional provision. If we are correct in this, the ordinance passed by the city authorities of Dawson, providing for an election, and the notice published in pursuance thereof, was not such a compliance with the constitution as would authorize them to incur any debt whatever. And this view of the case is strengthened when we take into consideration that the election was held in 1886, and the contract claimed to have been made pursuant to that election was not made until 1890, four years later, and that there is nothing to indicate that the people who voted at the election had the slightest conception of the amount of debt to be incurred, when to be paid, or of the details of the contract of indebtedness, which it is claimed they assented to by voting in the election. The policy of the constitution is against the incurring of municipal debts, and therefore the constitutional provision prescribing the manner in which debts must be incurred is to be strictly construed. It has been the uniform ruling of this court that, not only the constitutional provision must be strictly construed, but that the act of the general assembly prescribing the manner in which an election shall be held on the question of bonded indebtedness shall be also strictly construed. *Walsh v. City of Augusta*, 67 Ga. 293; *Cabaniss v. Hill*, 74 Ga. 845; *Bowen v. City of Greensboro*, 79 Ga. 709, 4 S. E. 159; *Hemerick v. City of Athens*, 80 Ga. 674, 16 S. E. 72; *Ponder v. City of Forsyth*, 96 Ga. 572, 23 S. E. 498; *Mayor, etc., of Perry v. Norwood*, 99 Ga. 300, 25 S. E. 648. While an examination of the cases cited will probably show that in the later cases there has been some departure from the very strict rule of construction laid down in the earlier decisions, no such departure has taken place as would justify us in holding that the notice of an election where the question of incurring a debt is to be decided would be sufficient when the amount of the debt to be incurred was not in any way specified, either in the ordinance calling for the election or in the notice. In the case of *Irvin v. Gregory*, 86 Ga. 605, 13 S. E. 120, it was held that, in an election held to determine whether a school law should be adopted, a failure to publish the notice of the election the number of times required by law would be held to be a mere irregularity after the election had been held and the result acquiesced in by the citizens. In the case of *Brand v. Town of Lawrenceville (Ga.)* 30 S. E. 954, it was held that, "though the notice of the election provided for by such an act may not in the clearest and most unequivocal terms have submitted to the qualified voters the question of adopting the act itself, yet, where the terms of the notice were such as to show that this question

ters, being sufficient) will, after the election has taken place, and after the bonds in pursuance of its result have been issued and sold, and their proceeds applied as required by the act, be treated as a mere irregularity, not invalidating the bonds, and one of which it is too late for a taxpayer, who participated in the election and who had knowledge of all the facts, to complain."

6. It is contended, however, that the city authorities should not be allowed to set up the defense insisted upon in this case, because the waterworks company, upon the faith of the contract, has expended a large amount of money in constructing the plant necessary to operate the system, and that it would be such a fraud upon them to now refuse to pay that the municipal authorities should be estopped from setting up the want of power to make the contract sued upon. All persons who deal with public officers act at their peril, and are charged by law with notice of the authority of the officers with whom they deal. If the city authorities of Dawson had no power under the constitution and laws of this state to hold the election, and make the debt claimed to have been incurred in pursuance thereof, the waterworks company is charged with notice of such want of power; and it cannot be said to be a fraud upon it to set up a defense based upon a fact of which it was charged by law with notice. Even if a benefit has been received by one of the contracting parties from a contract which is void because prohibited by the constitution, or because contrary to public policy, the receiving of such benefit will not prevent the party receiving it from setting up against a suit to enforce the contract the defense that the contract was illegal and void. See *Covington & M. R. Co. v. City of Athens*, 85 Ga. 387, 11 S. E. 663. To establish the rule that all that is necessary to prevent a city from pleading that under the constitution and laws of the state it could not incur the indebtedness sought to be charged against it would be to show that the alleged illegal contract had been fully performed on one side would place entirely within the power of persons desiring to make illegal contracts the determination of the question as to whether the constitution of the state shall be enforced in a particular instance. Where a municipal corporation has the power to incur a debt, and the debt is incurred in an irregular way, it is settled law that the innocent holder of a negotiable instrument issued by the authorities of such city, and which recites a compliance with the law in regard to the incurring of the debt, will be entitled to prevail in a suit to enforce the collection of such instrument, notwithstanding a defense setting up the irregularities in the manner in which the debt was incurred. *Black v. Cohen*, 52 Ga. 621. The contest in the present case being between

ers of such instruments has no application whatever. The promoters, who were afterwards incorporated as the Dawson Waterworks Company, were charged by law with knowledge of what the constitution and statutes of this state required in regard to such contracts, as well as what had transpired in the city of Dawson, and now claimed by them to be a compliance with the law in regard to the incurring of debts; and it being, as we have shown, not within the power of the city of Dawson to make the contract, no estoppel is raised by law to prevent the city authorities from calling in question the legality of the contract relied on by the defendant in error.

7. When this case was here before (29 S. E. 755), it was ruled that, "this being an action against a municipal corporation for a year's supply of water, in which the plaintiff's right of recovery depended upon the validity of an alleged contract between it and the defendant, covering a period of years, and the evidence not affirmatively disclosing that when the contract was originally made the municipal corporation had, in the manner prescribed by the constitution of this state, made due and lawful provision for the payment of the yearly sums to become due on such contract. It was error to direct a verdict for the plaintiff." There is nothing in our present ruling which conflicts with this decision. Upon an investigation of the case as then presented, it was found that one absolutely essential element necessary to constitute a cause of action was wanting, and the case was reversed because the direction of a verdict for the plaintiff was erroneous for that reason. There was no ruling made on any of the questions now decided, although such questions were made in the record. The record in the case did not disclose an ordinance which made provision for the debt; and if all of the other constitutional and statutory requirements had been present, the absence of this ordinance would have required a reversal of the case. The extent of the ruling in that case was simply that without such an ordinance there could be no cause of action, and whether the other elements necessary to constitute the cause of action were present was not passed upon.

8. While either party to the contract in question can terminate it at the end of any year, as long as it stands and is complied with by one party, the other must comply also. *Ford v. City of Cartersville*, 84 Ga. 213, 10 S. E. 732; *Lott v. City of Waycross*, 84 Ga. 681, 11 S. E. 558; *Cartersville Improvement Gas & Water Co. v. City of Cartersville*, 89 Ga. 683, 16 S. E. 25; *Dawson Waterworks Co. v. Carver*, 95 Ga. 565, 20 S. E. 502.

9. As the judge was not authorized to direct a verdict for the plaintiff on the ground that the contract was valid, and therefore the

a finding in favor of the plaintiff upon the theory that the defendant had received benefits from the contract during the year 1895, and was for that reason liable for the amount stipulated in the contract to be paid annually? After a careful examination of this record, we cannot say that the evidence demanded this finding. While the great preponderance of the evidence is in favor of such finding, there is some evidence upon which a jury could base a finding in favor of the defendant; and we think that the case should have been submitted to a jury under proper instructions. If the jury should believe that the city council of Dawson maintained its fire department intact during the year 1895, without any substantial change as to its organization or rules from what it had been in previous years, and had failed to notify the officers and members of this department of its intention to abandon the contract with the waterworks company, and also failed to provide any appliances or means to extinguish fires independently of the water which would be furnished by the waterworks company, and did in fact, during the year in question, make use of the water of the plaintiff company to extinguish a fire or fires, they would be authorized to find that the resolution, passed in 1894, terminating the contract with the waterworks company at the end of that year, even if passed in good faith, was not adhered to in good faith, and that the acts above recited, if true in fact, amounted to a waiver of the resolution, so far as payment of the amount due under the contract for 1895 was concerned. If, on the other hand, a jury should believe that the resolution terminating the contract was passed in good faith, that the city authorities did all in their power to carry it into effect, and that they notified the officers and members of the fire department that the contract was terminated, and that the water was not to be used, and persisted in the refusal to use the water, or to permit any one to use the water, in behalf of the city, on any occasion, a verdict in favor of the defendant would not be without evidence to support it. Judgment reversed. All the justices concurring; SIMMONS, C. J., specially.

SIMMONS, C. J. (concurring specially). This court having held, when this case was here before, that the contract between the city and the waterworks company created a debt, I am bound by that decision. It is the law of this case, whether it was right or wrong. The majority of the court having determined not to overrule the cases on the same line, I am likewise bound by them. If it were an original question, I should hold, in accordance with nearly all the other courts of the Union, including the supreme court of the United States, when construing similar

or water for a term of years, for a certain sum to be paid annually, is not a debt, within the meaning of the constitution. It is difficult for me to understand now, after full argument and reflection, how the making of the same contract by the same authority for one year, when there is no money in the treasury to pay it, and taxes are to be levied to meet the obligation, is not a debt, when, if the same authority makes a contract for the same purpose for two years, or five years, it is a debt.

PULLMAN'S PALACE-CAR CO. v. HALL.

(Supreme Court of Georgia. March 16, 1899.)

SLEEPING-CAR COMPANY—LIABILITY TO PASSENGER —LOSS BY THEFT—REASONABLE CARE.

1. A sleeping-car company is not liable to a passenger for the loss by theft of personal effects taken into the car by the passenger for his own use, and of which he retains possession, either under the rules which apply to an innkeeper for the loss of the goods of his guest, nor those of a carrier for the loss of baggage intrusted to it to transport. Such a company owes to a passenger the duty of exercising reasonable care to guard the property of the passenger from theft, and if, through the want of such care, the personal effects of the passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor. But if such reasonable care shall have been used, and such personal goods are stolen by one not its employé, such company is not responsible for the loss.

2. The company having shown in this case that after the car had gone about one mile from the station, and in crossing another road, the speed had been reduced to about five or six miles an hour, that the rear door was securely locked, that the conductor and porter were guarding the open door in front, when it appears that a thief on the outside caught onto the moving car, and, standing on a rod underneath the car, took the valise from the seat and drew it through the window, the loss of the valise is not to be attributed, under the circumstances of the theft, to the want of reasonable care exercised by the company for its protection. The company not being an insurer of the goods against theft, nor having the exclusive custody of the valise for transportation, and showing its servants to be on watch at the only open entrance to the car at the time, reasonable care would not require it also to specially guard the windows of a moving train.

3. In view of the admitted facts upon which this case was tried before a jury in a justice's court, and the legitimate inferences that may be drawn therefrom, as well as in view of an absence of proof on material points which the admission leaves in doubt, there was testimony authorizing the conclusion that the defendant company had not overcome the burden resting upon it, to show it was in the exercise of reasonable care in protecting the property of the passenger from theft. Such questions being peculiarly for the jury, and the only error assigned in the petition for certiorari being that the verdict was contrary to law and evidence, the judge of the superior court did not abuse his discretion in overruling the petition. Per Lewis, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Dorsey, Brewster & Howell and Hugh M. Dorsey, for plaintiff in error. W. J. Spealrs, for defendant in error.

LITTLE, J. The defendant in error brought suit in a justice's court against the car company for \$30.50, being the value of a valise and its contents. Judgment in his favor was rendered for the amount for which he sued. The car company filed its petition for certiorari, after hearing which, the judge of the superior court sustained the judgment rendered in the justice's court, and dismissed the certiorari. The car company excepted.

The case was tried in the justice's court on an agreed statement of facts, as follows: "It is agreed: That L. H. Hall, the plaintiff, was a passenger on the car Suwanee on October 25, 1894; said car leaving Cincinnati at 8 p. m. That said passenger, Hall, occupied room H, assigned him by porter; porter placing valise therein in said car. Said passenger, Hall, took on board the articles set out in the bill of particulars attached to the suit, and it is agreed that the valuation therein placed on said articles is correct and reasonable. L. H. Hall was accompanied by W. C. Rawson. They engaged two lower berths in the same state room, and, on going into the state room, found the window up, and put the window down. They together left their valises in the state room, and went forward to the smoking room, just before the train started. Afterwards, as they were leaving the station, and as they were passing through yard, and as train No. 3 on the Q. & O. (this being train Hall was on) was slowing up at the C., H. & D. crossing, about one mile from the Central Depot, from which they started, and from where plaintiff boarded the train, the porter, Wright, caught young man taking a large and small valise from the room H. When the thief saw the porter, he dropped the large valise, but succeeded in getting away with the small valise; this being the valise of the plaintiff. At this point the porter ran forward to the smoking room and pulled the air cord, and was asked at that time by Mr. Rawson what he was doing that for, when he informed Rawson that some one had stolen a valise out of one of the state rooms. Rawson and Hall went back to see, and found that the thief had gotten Mr. Hall's, and would have gotten Rawson's but for the efforts of the porter, who caught Rawson's valise as the thief was taking it through the window. One door of the car was locked, and the conductor and the porter stood at the open end of the car; and Rawson does not know how the thief could have gotten in the car, as every one was required to show a ticket before entering station, and a sleeping-car ticket before getting on board the car. Valise was taken from open window in the side of car from room H; the

and saw two tramps hanging on the outside of car, and ran them off. Conductor's attention was immediately called to same, and train was stopped, but too late to get the valise. By the time the train had stopped, the men had gotten too far away, and it was impossible to catch them. No suspicious person was noticed by the conductor or porter in the car. As train passed by Big Four yards, where the valise was stolen, it was going at the rate of from five to six miles an hour. Conductor and porter did all they could to save valise after thief was discovered."

1. Under these admitted facts, the question arises, first, what is the liability of a sleeping-car company to its passengers for personal baggage which the passenger takes with him in the sleeping car? This court has, in two cases heretofore considered, ruled upon the liability of a sleeping-car company for the loss of goods of a passenger, when the same were lost at night, when the passenger was sleeping. In the case of *Kates v. Car Co.*, 95 Ga. 810, 23 S. E. 186, the action was to recover the value of certain money and papers which it was alleged were taken from the pocket of the plaintiff's clothing at night. This court in that case did not undertake to define the precise relation which existed between a sleeping-car company and a passenger, but ruled that, from the character of the business in which the company was engaged, a duty on the part of the company was created, to exercise some watch and care over the passenger, and, within certain reasonable limits over his property as well, and that, if a loss occurs, the burden of proof is on the company of showing that it exercised such reasonable care during the hours of the night as was necessary to secure the safety of the passenger's property, and that the loss was not occasioned because of the failure on the part of the employees of the company to do so. The other case to which we refer is that of *Car Co. v. Harvey*, 101 Ga. 733, 28 S. E. 989. There this court was asked to reverse the ruling made in the *Kates Case*, supra, but, after consideration, adhered to such ruling. Chief Justice Simmons, in rendering the opinion in that case, said that: "The law as to the liability of sleeping-car companies is not well settled. Courts in different states have laid down different rules as to their liability." And it suggests that legislation should be had, defining the exact liability of sleeping-car companies to a passenger for loss of goods. Determining the question now under consideration, it seems to be necessary to define and fix the rule of liability which attaches to sleeping-car company for the loss of goods which were stolen by some one not in the employ of the company, and while the passenger was awake. A fair examination of the question renders it necessary to note that a passenger whose valise was taken from

ary, and that the valise had been taken to the state room or berth which had been assigned to the passenger, and in his presence there deposited; that, finding the window to the berth or state room open, the passenger closed it, and then, leaving his valise, went forward to the smoking room; that in no other manner did the company, by its employes, have charge of such baggage. Also, the other facts, that the rear door of the car was locked, and the conductor and porter stood at the front door of the car; that while the car was in motion the valise was taken by a thief, who stood on a rod underneath the car, on the outside, and abstracted it through the window. In the case of *Blum v. Car Co.*, 1 Flp. 500, Fed. Cas. No. 1,574, as cited in *Voss v. Railway Co.* (Ind. App.) 43 N. E. 20, a number of reasons are given why a sleeping-car company is not liable as an innkeeper. Among those reasons are the following: "The peculiar construction of sleeping cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections." That the innkeeper is given a lien upon the goods of his guests for the price of their entertainment. That the innkeeper is obliged to receive every guest who applies for entertainment, while the sleeping-car company receives only first-class passengers. That the innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount, while the sleeping-car company contracts to furnish a bed only. That the conveniences of the inn are imperative necessities to the traveler; a sleeping-car is not. That the innkeeper has a right to exclude from his house all but his guests and servants; the sleeping-car company must admit the employes of the train, to collect fares and control its movements. That the sleeping-car company cannot protect its guests in all particulars, because the conductor of the train has a right to put them off for nonpayment of fare or for a violation of rules. The court in that case then ruled that sleeping-car companies are not subject to a passenger, as an innkeeper. The cases of *Car Co. v. Smith*, 73 Ill. 360, and *Same v. Gaylord*, 23 Am. Law Reg. (N. S.) 788, held that a sleeping-car company is not liable for loss of the effects of a passenger, as a carrier, because it is not a carrier; that the railway company is the carrier; that the carrier's liability depends upon his possession of the goods; that a sleeping-car company does not have possession of the goods,—they are in the control of the passenger. It was also ruled in *Lewis v. Sleeping-Car Co.* (Mass.) 9 N. E. 615, that a sleeping-car company was not liable as a common carrier nor as an innholder. But each of

theft, and if, through want of such care, such as he might reasonably carry with him are stolen, the company is liable. The rule of liability is stated by the Texas supreme court in the case of *Car Co. v. Pollock* (Tex. Sup.) 5 S. W. 814, as follows: "While a sleeping-car company does not assume towards personal baggage taken into a car by a passenger the duties and liabilities which the common law imposes upon common carriers as to ordinary freight, or upon an innkeeper as to guests, it is responsible in the same way as any common carrier for a failure to perform the duties which devolve upon a common carrier in relation to baggage of a passenger which is not given into its exclusive custody; and if, through a failure of the company to exercise reasonable care, the passenger's baggage is stolen, the company is liable therefor." In 2 *Shear. & R. Neg.* (5th Ed.) § 526, the author, discussing this subject, says, "For obvious reasons, the rule of absolute liability of a carrier of goods or innkeeper is not extended to cases of theft from passengers occupying berths in a sleeping-car;" and, citing *Carpenter v. Railroad Co.*, 124 N. Y. 58, 28 N. E. 277, says, "It is properly held, in view of such arrangements [of berths], and of the powerlessness of a sleeping passenger to defend his property from theft, or his person from assault, that it is part of the contract of hiring the privilege of occupying a berth that protection should be afforded him by the car proprietor, with a degree of care and vigilance commensurate with the danger to which he is exposed." Mr. Wharton, in his *Law of Negligence* (7th Ed., § 610), says: "It has been urged that such a proprietor [sleeping-car company] is, if not a common carrier, at least an innkeeper, and therefore an insurer of the property of his guests. But it has been ruled in several cases that such a proprietor is not either a common carrier or an innkeeper, but is a special bailee, who is not an insurer, but is charged with the duty of exercising in his business a degree of care and diligence proportioned to risks to which those engaging places in his cars are exposed." 4 *Elliott, R. R.* § 1623, sums up from the rules in adjudicated cases as follows: "Our conclusion is that where the passenger takes his baggage into the coach with him, and does not place it in charge of the railroad company or of the sleeping-car company, that neither company is liable, unless the loss of the baggage was caused by the negligence of one of the companies." Ray, in his work on *Negligence of Imposed Duties, Passenger Carriers* (pp. 241, 242), citing authorities, says: "While it [the sleeping-car company] is not liable as a common carrier or as an innholder, as is said by some of the authorities, * * * it is its duty to use reasonable care to guard the passenger from personal injury, and his property from theft; and if, through want of

thereof. See, also, *Stevenson v. Car Co.* (Tex. Civ. App.) 26 S. W. 112; *Car Co. v. Smith*, 73 Ill. 360; *Chamberlain v. Car Co.*, 55 Mo. App. 474; *Henderson v. Railroad Co.*, 20 Fed. 437; *Belden v. Car Co.* (Tex. Civ. App.) 43 S. W. 22. While there are decisions of a number of courts which have held sleeping-car companies liable to a passenger for the loss of his baggage, as a common carrier, and others which apply the law of liability as that of innkeepers, the weight of authority, as we understand it, is that such companies are not liable as innkeepers, nor as carriers, for personal effects taken with the passenger into the car, and of which he retains possession. But it is the duty of such a company to use reasonable care to guard the property of the passenger from theft, and if, through the want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.

2. Such being the rule, the question which next arises is, was the property of the passenger stolen through the failure of the employes of the company to exercise reasonable care for the protection of his property? It will be borne in mind that the passenger was not sleeping when his goods were stolen. A higher degree of care to protect the goods of a sleeping passenger would seem to be required than that which it is necessary to exercise when the passenger is awake and able to protect it himself; and while extraordinary diligence is not, under the law, required in either case, because the passenger does not intrust his effects to the company, but retains possession himself, for his own comfort and convenience, yet, having engaged the accommodations offered by the company for the purpose of sleep during proper hours, and paid for the same, and the company having accepted him with the implied agreement that he should do so, the care which is reasonable, to protect the goods of a sleeping passenger, must be exercised. And, while the same degree of care in the case of a passenger awake might not be required, yet in each case such care as is reasonable under the circumstances is required. For the want of it, the company is liable. Having exercised it, it is not. The court of appeals of Missouri, in the case of *Chamberlain v. Car Co.*, 55 Mo. App. 474, held that, in a case where the porter in charge of the car was not directed to look after the effects of a passenger in his absence, "a passenger on a sleeping car, who leaves his watch in his berth while he is in the toilet room, is, as a matter of law, guilty of contributory negligence, if it is stolen in his absence, and therefore cannot recover from the company for the loss." Whether or not the property of the passenger in the case at bar was stolen because of the failure of the company to exercise reasonable care for its protection must,

agreed statement of facts found in the record is somewhat confused. When critically examined, however, it appears: That the train to which the sleeping car was attached had left the station where the passenger boarded the car, and proceeded about a mile on its journey. The train reduced its speed to five or six miles an hour when it approached the crossing of another railroad. At that time one of the car doors was locked, and the other guarded by an employé of the sleeping-car company. That the valise was taken from the seat of the passenger on which it had been placed, through an open window, by a thief who was on the outside, clinging to the window, and standing on the hog chain of the car. The porter of the car was in the aisle, and ran off two tramps whom he saw hanging on the outside of the car, and discovered that another thief had seized two valises. The porter caught one of the valises as the thief was taking it through the window. The other one he could not recover. Immediately the employes of the car pulled the air cord, and had the train stopped, but the thief had gotten away with one of the valises. The circumstances of the theft were remarkable, and showed the perpetrator to have been a very daring lawbreaker,—willing to incur, not only the risk of violating the law, but his personal safety as well. To guard all the windows of a moving car from rogues who did not hesitate to risk their lives in catching hold of a moving train with the hope of abstracting valuables, would have required extraordinary diligence. Such acts ordinarily are not to be anticipated, and, without such a degree of diligence, could not have been prevented. To have securely fastened one of the doors of the car, and guarded the other, while another employé stood in the aisle, was certainly as much as any anticipated danger would have required. Such precautions, in our judgment, amounted at least to reasonable care; and no greater diligence than this being required, under the rule, the company should not be held liable for the loss.

For these reasons, it is our opinion that the certiorari should have been sustained, and the judgment rendered in the justice's court set aside. Judgment reversed.

LEWIS, J. (dissenting). Under the view I take of this case, the question decided by the first headnote is not involved. There is no error of law complained of on account of any ruling or view of the court below to the effect that a sleeping-car company is liable to its passenger for loss by theft of his baggage, to the same extent as an innkeeper would be for the loss of the goods of his guest, or a common carrier for the loss of baggage intrusted to it by a passenger for transportation. The case was tried on an agreed statement of facts before a jury in a justice's court. The

does not indicate that he exercised a different view of the degree of diligence required of the company than is expressed by a majority of this court. That order is as follows: "After hearing and considering this case, the verdict and judgment in the magistrate's court are affirmed, and the certiorari dismissed. Negligence and diligence are peculiarly questions for the jury, and they may not only consider the facts admitted, but may draw inferences therefrom. Whether the porter was negligent in placing the valises where he did place them, whether the agents exercised due diligence in guarding the property, whether the window itself had proper catches or safeguards,—in fact, all questions touching the conduct of the company and its employés,—were for the jury. I think there was enough to sustain their finding."

In addition to the suggestions contained in the above judgment, attention is directed to the following points in the evidence: The sleeping-car porter placed the two valises in the state room of the two passengers. At this room was a window in the side of the car, which was open, and the passengers closed it down,—probably to protect their goods from thieves. They then went into the smoker, and never left there till after the larceny; hence, never opened the window. The inference is reasonable that it was opened either by the porter or the thief. If by the former, he voluntarily and unnecessarily removed the protection given the baggage by the passengers. If by the latter,—the evidence negating the fact that the thief was inside of the car,—he must have opened the window by force from the outside of the car, while it was in motion,—a very improbable theory; and, if that was done, it does seem that the porter, standing in the aisle, by the exercise of ordinary diligence would have had his attention attracted to the elevation of the window by the trespasser in time to have prevented the theft,—it being admitted that the porter was at the time standing in the aisle. The train started from the Central Depot of Cincinnati. It had gone but a mile, and was running at a slow rate of speed, and the presumption is that it had not gone to the limits of a populous portion of that large city. Besides these facts, it does not appear where the conductor was at this time, and what he was doing. It is true, it is stated that he and the porter were at the door, where they were receiving passengers who were entering. If it refers to the entire time, then it contradicts other facts admitted. In one portion of the admission it is stated that the porter, at the time of the theft, was in the aisle, and seized the larger valise; thus preventing the thief from getting that also. In another portion it is stated that at that time he saw two tramps on the outside of the car, and ran them off. It is difficult to understand how he could do

proof on the company to show the exercise of reasonable care and diligence. Could not the jury have inferred, both from the evidence and the want of evidence, that this burden had not been successfully carried? I only allude to some of these points on the facts, with a view of showing, to say the least of it, that whether the company was negligent or not is a reasonably debatable question; and this should be an end of the matter, so far as the power of this court is concerned, after the jury have passed upon that issue, and the judge of the superior court, having carefully considered their finding and the evidence upon which it was based, has approved their verdict. I therefore believe that the judgment of the court below should be affirmed, and respectfully dissent from the decision rendered by a majority of the court.

ALLEN et al. v. HUGHES et al.

(Supreme Court of Georgia. March 16, 1899.)

DEED—CONSTRUCTION—DELIVERY—PRESUMPTION.

1. A deed executed in 1858, conveying certain described property to C. in trust for the sole and separate use of M. G. H., the grantor's wife, for and during her natural life, and at her death to her children, the issue of the existing marriage between her and the grantor,—said children to share equally in the same,—vested in the trustee named the title to the life estate only, and not to the estate in remainder.

2. Such a deed is in proper custody when held by the wife, and the fact that after the death of the grantor the instrument was found in a trunk which contained papers, both of the grantor and the life tenant, does not rebut the presumption of delivery raised by the due record of the instrument.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Suit by J. H. Hughes and others against Oliver Allen and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

Candler & Thomson and E. M. & G. F. Mitchell, for plaintiffs in error. Goodwin & Westmoreland and Hamilton Douglas, for defendants in error.

LITTLE, J. Suit was brought in the court below to recover the possession of a certain lot of land in the city of Atlanta. The title set out by plaintiffs was based on a deed made by Hughes, their father, to Hayden Coe, trustee, on September 8, 1858. The preamble to the deed of conveyance is as follows: "Whereas, the said Peter A. Hughes has recently become possessed of some money which his said wife inherited from her uncle, the late Caswell Mimms, of Charleston district, South Carolina, deceased, and said money having been invested in the real and personal property hereinafter described, by the said Peter A. Hughes, and he being desirous of making provision for his said wife, Mary

cles and misfortune, and for their support and maintenance; and whereas, the said Peter A. Hughes is desirous of securing the said real and personal property hereinafter described to the said Mary Grace, wife of the said Peter A. Hughes, that she may enjoy the same during her natural life, together with the rents, issues, and profits arising therefrom,—at her death, to the children, born and to be born, of the present marriage, in remainder, share and share alike." Then follow the words of the conveyance: "Now, for and in consideration of the natural love and affection which the said Peter A. Hughes has for his said wife, Mary Grace, and her children aforesaid, as well as the premises considered, * * * hath granted, bargained, and sold, and doth by these presents grant, bargain, sell, and deliver, unto * * * Hayden Coe, in trust for the sole and separate use of the said Mary Grace Hughes, wife of the said Peter A. Hughes, for and during her natural life, and at her death to her children, the issue of the present marriage,—said children to share equally in the same,—the following described real estate," etc. (describing it). The habendum clause in said instrument is in the following language: "To have and to hold * * * to the said Hayden Coe in trust for the said Mary Grace Hughes for life, to her sole and separate use, and to her children, issue of the present marriage, born and to be born, in remainder,—to their own proper use, benefit, and behoof forever, in fee simple," etc. It was alleged and proven that the plaintiffs T. H. Hughes and Fanny C. H. Wilson were the children of Peter A. and Mary Grace Hughes; that their sister, Mrs. Emma M. H. Jackson, who was one of the original plaintiffs, died since the suit had been instituted, and that H. H. Jackson, the administrator of her estate, was made a party plaintiff; that Mrs. Williams is deceased; that she left H. J. Williams as her sole heir at law, and that he, before the institution of this suit, conveyed all his interest in the property to the plaintiffs; that Hayden Coe, the trustee, died in 1862; that Peter A. Hughes died in 1893; that Mary Grace Hughes, the life tenant, died on the 14th day of April, 1896. The petition was filed the 15th day of August, 1896. On the trial the plaintiffs introduced a deed from Paden to Ivy, dated January 1, 1839, and successive conveyances in regular order to Peter A. Hughes, prior to the execution of the deed from Hughes to Coe, trustee, and proved Hughes to have been in possession of the property under the title so conveyed. The conveyance to the trustee was duly recorded. There was also introduced in evidence a deed from H. J. Williams to the plaintiffs, bearing date May 18, 1896, recorded June 26, 1896, conveying all the interest and title of Williams in the property to the plaintiffs. The

they claim title, had been in the public, continuous, exclusive, uninterrupted, and peaceable possession of the land sued for, under a claim of right, for more than 20 years. They also introduced deeds made by Peter A. Hughes and Mary Grace Hughes to E. R. Sasseen, bearing dates, respectively, July 13, 1863, and July 25, 1863, duly recorded, conveying the property in dispute; also, deeds from Sasseen to Jones, from Jones to Orme, from Orme to Grant, from Grant to Mercer, and from Mercer to Badger, purporting to convey the property in dispute, each for a valuable consideration, duly recorded, and forming successive links in a chain of title from Peter A. Hughes and Mary Grace Hughes to Badger, the lessor of the defendant Allen. It was shown, also, in behalf of the defendants, that Badger died on December 20, 1890, being represented in this suit by John S. Candler, administrator, one of the defendants; that Badger went into the possession of the property some 27 years before the trial, under the deed from Mercer, and had been continuously in the peaceable possession of the same from the date of his entry, and had made valuable improvements on the land. There was also evidence concerning the delivery of the trust deed, and the defendants insisted that no title ever passed to the grantees, because of the nondelivery of that deed. The evidence pertaining to that issue will be hereafter considered. At the conclusion of the evidence and argument the court directed a verdict in favor of the plaintiffs for the land sued for, and judgment was rendered accordingly. The defendants moved for a new trial; alleging, in substance, that the verdict was contrary to evidence and to the law, and because no title was shown to be in the plaintiffs, but that the evidence showed title by prescription to have been in defendants, and because the court directed a verdict. The motion for new trial was overruled, and the defendants excepted. These propositions will be considered in their order.

1. It will be seen, by reference to the paper title, that both plaintiffs and defendants claim from a common source. When the plaintiffs exhibited a conveyance from Peter A. Hughes to Coe, and proved, as they did, that Hughes was in possession at the time of the execution of the deed, title in the grantees was sufficiently shown to authorize a recovery, in the absence of proof of outstanding title paramount. The original paper title on which the defendants relied was the deed from Hughes and his wife to Sasseen, bearing date subsequent to the deed from Hughes to Coe, trustee, and successive conveyances ending in the conveyance to Badger. Therefore, regarding the mere paper title alone, the plaintiffs were entitled to recover. Hughes having parted with his title to the land under the deed to Coe, trustee, in 1863, the defendants could

plaintiffs in error. There, the trust created was for the sole and separate use of a daughter of the testator for life, and at her death the property was to vest absolutely in fee simple in such child or children as she might have then living; but this will conferred upon the trustee power to sell the trust property, to reinvest the proceeds, and to use the corpus of the estate for certain specified purposes; and the court held in that case, "The trust created by the will was for the benefit of those entitled to take in remainder, as well as for the life tenant, although the trustee was not invested with the legal title to the estate in remainder, beyond what was involved in the execution of those powers." The purposes and uses for which the trust property was held in the cases cited were entirely different from those expressed in the deed now under consideration. In that of Brady, the trust created was not that of a life estate to the wife, and remainder to the children, but it was for the sole and separate use of the wife and the children, born and to be born; and such trust was not executed until the possibility of the birth of any more children had become extinct. In that of Crawley, the trust was made expressly to continue until the son became of age. The attempted alienation of the property was during his minority, and there was no question made as to the existence of a trust at the time of the alienation, nor that the legal title was in the trustee for the purpose of the execution of the trust. In the Case of Cushman, the property was conveyed to the trustee and his heirs forever, in fee simple. Not only so, but the grantor, after creating a trust for the benefit of the wife during her life, uses this language: "And at her death in trust to be equally divided between such children of her and her present husband." By the terms of this deed the trust could not be limited by implication to the life estate of the wife, because the grantor, in express words, continued the trust until the division between the children should be made. In the Case of Henderson, while a portion of the will would seem to limit the trust to the life estate of his daughter, and provided that at her death the property was to vest absolutely in the children she might leave, its provisions went further, and gave to the named trustees and their successors full power to sell and reinvest, or change the investment of, any or all of the trust property, without an order of the court, and allowed the trustees named, or their successors, upon the application and consent of the cestui que trust, to use any part of the corpus of the estate for its improvement, and for the more comfortable support of such cestui que trust. Manifestly, the exercise of the powers given to the trustees in this case required them to possess the right to convey the property in fee, for otherwise the powers could not be executed; and the court in that case expressly

so far as was essential to a due execution of the trust. In the deed under consideration it was declared by the grantor that the money of his wife had paid for the property which he conveyed. He specified the source from which it came, and declared it was his intention that she should enjoy the property during her natural life, and have the rents, issues, and profits arising therefrom, and at her death the same should go in remainder to their children which were born, and such as might be thereafter born, and that the trust was for the sole and separate use of his wife for and during her natural life, and at her death to her children, the issue of their marriage, who should share equally in the property. The trust was for the said Mary Grace Hughes for life, to her sole and separate use, with remainder to her children, issue of their marriage. In the case of Bull v. Walker, 71 Ga. 166, a trust was created in the following language: "It is my will and desire that at my death all of my property, both real and personal, * * * should go into the possession of my daughter Susan P., * * * and be for her sole use and benefit for and during her life, * * * and at her death to be divided among my grandchildren, the children of the said Susan P. Howard, in such manner * * * as she may think most equitable and just, at her death." And this court held that the named trustee was made trustee of Susan P. alone, and his powers extended only to her life estate, and continued only to her death. In Rogers v. Pace, 75 Ga. 438, where an owner of land conveyed it by deed to P., to enjoy and have the rents and profits during her life, the grantor consenting to be trustee for said P., to have and to hold said land during her life, and at her death to her children, this court held that the only trust estate created was for the life tenant, and her children took a vested remainder. In the case of Carswell v. Lovett, 80 Ga. 36, 4 S. E. 806, a testator gave, after the death of his wife, all his estate to the children of his stepson,—those born and that may hereafter be born to him in wedlock,—and directed that his executors should, in dividing that part of his estate which should be the share of the female children, hold the same in trust for the sole and separate use of said female children, and that in no event should it be subject to the debts, liabilities, or contracts of any husbands whom they should marry, but that said female children should have the use of said property during their natural lives, and at their death "It is my wish that it be divided between her children and their representatives." This court, through our present Chief Justice, held that the appointed trustee was not a trustee for the remainder-men, and that the trust was executed by the death of the husband in 1867. In McDonald v. McCall, 91 Ga. 304, 18 S. E. 157, where a trust was created in the follow-

language: "The share going to my said granddaughter to be held by her husband in trust for her sole and separate use during her life, and at her death to be equally divided between her children,"—this court held that "it created a trust which extends to the life of the granddaughter only, and does not embrace the remainder devised to her children." The last case to which we refer is that of *Fleming v. Hughes*, 99 Ga. 441, 27 S. 791. There property was devised and bequeathed to a named person, to be held by him in trust for the sole and separate use of the daughter of the testator for and during the term of her natural life, with remainder to the said or children of such daughter living at the time of her death, and, in default of such said or children, then to the right heirs of the daughter. It was held that the legal title passed to the trustee as to the life estate only, and that the estate of the remainder-men so created was a legal, and not an equitable, estate. In an elaborate and well-considered opinion, the present Chief Justice, speaking for the court, said: "The extent of a trust estate is measured by the purposes of the trust, whether the estate is granted or devised to the trustee alone, or to him and his heirs." That, "there being no need of a trust to preserve the contingent interests in this case, * * * it follows that the purposes of the trust in this case were—First, to protect the estate of the life tenant during her minority; and, secondly, from the marital rights of any husband with whom she might marry. For these purposes the trust, when created, in the year 1865, was good. * * * But when those objects ceased, by the life tenant arriving at the age of twenty years, after the married woman's act of September 13, 1866, without marrying, the estate of the original trustee, were he then in, would have become wholly passive and protected, and the life tenant and contingent beneficiaries would have then held legal estates, just the same as if the testator had finally devised the property to 'Emma De Gle during her natural life, with remainder to such child or children as she might be living at the time of her death.' "

We do not deem it necessary for us to cite other authorities. The last case cited, in our opinion, controls the construction to be given to the words of this deed. At the time of its execution, not only could a subsisting trust be declared in favor of a married woman, but, indeed, it was necessary to do so, if the grantor desired to set aside the property for her separate use, and free from the contracts or claims of any husband. It was therefore not only legal, but proper, if the husband chose: his wife, during her life, should have the benefit of the property which her money purchased, to vest the title in a trustee for sole and separate use during her life; and when, having done so, he further stipulated that at her death it should go in remainder to the children born of their marriage, no ne-

cessity existed, in order to accomplish this object, for the services of a trustee; and on the authority of the case of *Fleming v. Hughes*, supra, the trust created in 1858 was executed by the act of 1866; and the words creating the trust under consideration bear exactly the same import that they would, if, since the act of 1866, a grantor had conveyed property to his wife for life, with remainder to her children, without the interposition of any named trustee. Such being our construction of this deed, it must be held that, under the trust deed, title only vested in the trustee as to the life estate of Mrs. Hughes, and did not extend to the estate in remainder. This being true, the remainder-men had no right of entry until the death of the life tenant, and consequently no possession, however long and continuous, open and peaceable, could affect the rights of the remainder-men before the death of the life tenant, and prescription did not begin to run in favor of the defendants until that event happened; and, under the law as we construe it, the verdict was demanded, by the evidence, against this contention of plaintiffs in error.

2. It is contended, however, that delivery of the trust deed was never made. It appears from the record that the deed was made September 8, 1858, and recorded October 29, 1858. On its face, it purports to have been delivered. It was held in the case of *Rushin v. Shields*, 11 Ga. 640, that the deed, being recorded, was admissible in evidence, without further proof, not only to show that it was signed, but that it was also delivered. The record of a deed is, itself, presumptive proof of its delivery. *Wellborn v. Weaver*, 17 Ga. 275; *Harvill v. Lowe*, 47 Ga. 217. See, also, *Young v. Guilbeau*, 3 Wall. 686; *Tied. Real Prop.* § 812; *Highfield v. Phelps*, 58 Ga. 59; *Watson v. Myers*, 73 Ga. 138. We find nothing in the evidence which would authorize a jury to find that the deed was not delivered. It is true that it was found among the papers belonging to the grantor and his wife, the life tenant. No presumption inconsistent with delivery will be raised from this fact. The trustee had long since died. The wife, being the life tenant, was the proper custodian of this instrument. It was natural that the papers belonging to the husband and the wife should be kept together. At least, when so done, no discredit can be thrown upon a paper in which she had an interest, and no presumption of nondelivery will follow. The question of delivery was one of fact. With the evidence contained in the record, any other finding than that the deed was delivered could not have been sustained. Judgment affirmed. All the justices concurring.

JOHNSTONE v. TALIAFERRO.

(Supreme Court of Georgia. March 17, 1899.)

DEED—CONSTRUCTION—GRANTEES.

The words "child" and "children," appearing in a deed conveying to an unmarried female

years after the making of the deed, unless it plainly appears from the language of the instrument that it was the intention of the grantor that an illegitimate child was to take thereunder. (a) The word "issue," used in a subsequent part of the deed under consideration in the present case, is to be given the same meaning as the words "child" or "children."

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Florence B. Johnstone against C. C. Talliaferro. Judgment for defendant, and plaintiff brings error. Affirmed.

Burton Smith, Mercer & Mercer, and Spencer R. Atkinson, for plaintiff in error. Sausy & Sausy, Erwin Du Bignon, and Chisholm & Clay, for defendant in error.

COBB, J. Florence Barclay Johnstone filed a petition to the superior court of Chatham county against C. C. Talliaferro, as an individual, and as trustee under a deed hereinafter referred to, alleging that Margaret Marshall was a foundling left by some one unknown upon the steps of the residence of Mary M. Marshall; that it was never known who were the parents of Margaret Marshall, but it was supposed that she was a natural child, born out of wedlock; that Mary M. Marshall became so attached to her that she was adopted as her child, and given the name of "Marshall"; that she was known as "Maggie Moonshine," because of the fact that she was discovered on the doorstep on a bright moonlight night; that the supposed circumstances of her birth and parentage did not interfere in any way with Mary M. Marshall becoming sincerely attached to her, and treating her as if she were her own child; that Margaret Marshall intermarried with A. A. E. W. Barclay, and a daughter, Mary M. Barclay, was the offspring of the union. On the 30th day of May, 1874, Mary M. Marshall executed a trust deed, the following being a copy of all the provisions in the same that are material in the present case: "Whereas, on the 23rd day of December, in the year of our Lord one thousand eight hundred and sixty-eight, the said Mary M. Marshall, in the presence of George W. Wylly, W. W. Palne, and John Cooper, did make and publish her last will and testament, disposing of her property in manner and form set out in the following language [the provisions contained in items 1, 2, and 3 are immaterial to the proper consideration of this case]: 'Item Fourth. All the rest and residue of my estate, of whatever kind and character and description, either real, personal, or mixed, and wherever situated, which I may leave at the time of my death, I give, devise, and bequeath unto my executors hereinafter named, in trust, nevertheless, to and for the sole and separate use of Mary M. Barclay, the daughter of my adopted

any husband with whom she may hereafter intermarry, and, from and after the death of the said Mary M. Barclay, then in trust for such child or children of the said Mary M. Barclay as she may leave living at the time of her death, share and share alike, if more than one, as tenants in common, their heirs and assigns, forever; the representatives of a deceased child to stand in the place of the parent, and to take per stirpes, and not per capita. The allowance of a liberal income to be made by said executors hereby created trustees to the said Mary M. Barclay, under the directions of a court of equity, until she arrive at the age of eighteen years. After that time, the whole net income to be given to her. The excess of income in the preceding years to be invested in other property, to be held upon the same use and trusts as are in this will expressed. But, if the said Mary M. Barclay should depart this life leaving no such child or children, or representative of children, living at the time of her death, then and in that case I give and bequeath [here follows a bequest of certain property, upon the happening of the contingency mentioned, to the wardens and vestrymen of Christ Church, in Savannah, for a parsonage]. Item Fifth. The rest and residue of my property which may remain after the death of the said Mary M. Barclay without leaving issue living at the time of her death, as aforesaid, deducting the said lots on West Broad street, mentioned in the immediately preceding item of this, my will, I give, devise, and bequeath to the said the wardens and vestrymen of the Episcopal Church, in Savannah, called "Christ Church," for the purpose of erecting an orphan asylum and a house of industry for the indigent poor of the city of Savannah on such lots of land within the limits of the city of Savannah as to them may seem suitable for that purpose, and for the endowment of said institution. * * * Item Six. I desire and direct that the said Mary M. Barclay shall be liberally educated, and that a governess shall be employed for her, with an adequate salary, until she arrives at mature years; that said Mary M., with the said governess, shall reside in my house, on West Broad street; and that the governess shall be changed, should said Mary M. become displeased with her. [Here follows a recital that, in a codicil to the will above set out, James J. Waring and Mary M. Barclay had been appointed executor and executrix thereof, respectively, and that the following second codicil to the will had been published:] 'It is my will, and I do hereby direct, that the allowance from the income of my estate to be given to Mary M. Barclay, the daughter of my adopted daughter, Margaret Marshall, afterwards Margaret Barclay, until she shall attain the age of eighteen years, and also the entire net income of my said estate from that time until she attain the age of 21

the exclusive benefit of the said Mary M. Barclay; and it is my wish that under no circumstances shall A. A. E. W. Barclay, the father of the said Mary M. Barclay, have any of the said income, or claim a natural guardianship over her person.' And whereas, on the 8th day of April in the year 1874, a petition was filed in the court of ordinary of Chatham county by Albert R. Lamar, solicitor general, etc., under instructions from a grand jury of the superior court of the said county, praying that a guardian might be appointed of the person and property of said Mary M. Marshall, according with the provision of section 1855 of the Code of Georgia. And whereas, the said Mary M. Marshall is apprehensive that, although a decision was rendered by the said ordinary on the 30th day of said month of April refusing the appointment of a commission, on the ground that said application had not been made in proper form and with proper verification, yet that the same effort in some other form may be repeated, and although she is now in full possession of her mental faculties, and is fully able to take care of herself and her property, yet that the time may come when the advance of years may produce such effect upon her as to invite the renewal of the same effort to place her and her property under the control of some person not of her own selection. And whereas she, the said Mary M. Marshall, prefers to guard against the danger of such result by exercising now her right and power to select for herself the person to be intrusted with that care and management of her property, whenever disease or infirmity may incapacitate herself: Now, then, this indenture witnesseth that the said Mary M. Marshall, for and in consideration of the premises, and of the sum of five dollars to her in hand paid by the said James J. Waring at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold, * * * and by these presents doth give, grant, bargain, sell, * * * all the tracts or parcels of land premises hereinafter particularly described, situate, lying, and being in the city of Savannah, and in the county of Chatham, and in the state of Georgia; that is to say [here follows a description of the property conveyed]; and any other and all other property which may hereafter belong to the said Mary M. Marshall. To have and to hold, all and singular, the above-described lots, parcels, and tracts of land and premises, with the appurtenances, and any and all other the said property hereinbefore described and referred to, unto him, the said James J. Waring, in trust, nevertheless, to and for the only proper use, benefit, and behoof of the said Mary M. Marshall for and during the remainder of her natural life, the rents, profits, and income thereof to be disposed of by herself, or

said Mary M. Marshall, from disease or infirmity, or from any cause, shall be unable to collect, manage, and dispose of the said rents, profits, and income, and should be unable to give direction, management, and disposition of the same, then and in that event in trust to collect and receive the said rents, profits, and income, and to apply so much thereof as may be proper and necessary to the support of the said Mary M. Marshall, liberally supplying her with all the comforts of life; and further to apply as much thereof as may be required, indicated, and called for by the said Mary M. Barclay, in order to provide liberally for all of her wants as a young person in her station of life, investing whatsoever surplus may thereafter remain subject to the same use and trust; and after the death of the said Mary M. Marshall, and until the said Mary M. Barclay shall attain the age of 21 years, to apply the entire net income, or so much thereof as shall be required, indicated, and called for by the said Mary M. Barclay, for her support and use, investing whatsoever surplus may thereafter remain, subject to the same uses and trusts; and after the death of the said Mary M. Marshall, and after the said Mary M. Barclay shall have attained the age of 21 years, or shall have departed this life, with or without issue, then to hold the said property subject to the trusts which are explicitly set forth in recitals of the contents of the said last will and testament of the said Mary M. Marshall, and the codicils thereto, which said recitals are hereinbefore contained, and which, to that end, are made part and parcel of this deed of indenture." On the 7th day of March, 1893, the defendant, Taliaferro, was "duly appointed as substituted trustee" under the deed above referred to. It is further alleged in the petition that plaintiff is the natural son of Mary M. Barclay, born out of wedlock in the year 1878; that, after the birth of plaintiff, his mother intermarried with the defendant Taliaferro, and that there are now living three children, the offspring of this marriage; that Mary M. Barclay has departed this life; that, since her death, Taliaferro has furnished petitioner with what was necessary for his support and education, until about a year before the filing of the petition, but that since that time the defendant has totally failed and refused to furnish anything to petitioner; that petitioner, under the terms of the deed above referred to, is entitled to a one-fourth interest in the property described in that deed, which property is in the hands of the defendant as trustee. The prayer is that an accounting be had, and that petitioner recover his interest in the property. To the petition the defendant filed demurrers, both general and special, which were sustained by the court. To this ruling the plaintiff excepted.

The plaintiff contends that he is entitled to

and which declares that from and after the death of Mary M. Barclay the property shall be held "in trust for such child or children of the said Mary M. Barclay as she may leave living at the time of her death, share and share alike, if more than one, as tenants in common, their heirs and assigns, forever; the representatives of a deceased child to stand in the place of the parent, and to take per stirpes, and not per capita." It is also contended that the word "issue," appearing in a subsequent clause of the deed, which provides for a limitation over in the event that Mary M. Barclay should die "without issue," should be given a broader signification than the word "children," and that for that reason the words "child" or "children," wherever contained in the deed, are to be given the same meaning as would be given the word "issue." Construing this deed as a whole, it does not appear that the use of the word "issue" was intended by the grantor to in any way alter the meaning which would ordinarily be given the word "children," nor to enlarge the meaning of that word, even if, under some circumstances, the word "issue" should be construed to embrace illegitimate children. Treating the terms "children" and "issue" as having been used in identically the same sense in the trust deed under which the plaintiff claims, it becomes necessary to determine who were intended by Mrs. Marshall to be the recipients of her bounty, when she said that the property described in the deed should go to the "children" of Mary M. Barclay upon her death. It becomes necessary, in the first instance, to determine whether, under the law of this state, the words "child" or "children," when used in a deed or will, would embrace other than legitimate children.

Mr. Schouler, in his work on Domestic Relations, thus describes the status of a bastard at the common law: "The rights of a bastard are very few at the common law; children born out of a legal marriage having been from the earliest times stigmatized with shame, and made to suffer through life the reproach which was rightfully visited upon those who brought them into being. The dramatist depicts the bastard as a social Ishmaelite, ever bent upon schemes for the ruin of others, fully determined to prove a villain; thus fitly indicating the public estimate of such characters centuries ago in England. The law writers, too, pronounce the bastard to be one whose only rights are such as he can acquire; going so far as to demonstrate, by cruelly irresistible logic, that an illegitimate child cannot possibly inherit, because he is the son of nobody,—sometimes called 'filius nullius,' and sometimes 'filius populi.' Coke seemed to concede a favor in admitting that the bastard might gain a surname by reputation, though none by inheritance. The most important disability of an illegitimate

mother, or to any one else; that he can have no heirs but those of his own body." Schouler, Dom. Rel. §§ 276, 277. See, also, 1 Bl. Comm. 459; 2 Kent, Comm. (14th Ed.) 212; 4 Kent, Comm. (14th Ed.) 413; 3 Am. & Eng. Enc. Law, 891. The condition of a bastard under the law of this state is the same as it was at common law, except in so far as it has been ameliorated by statute. In 1816 the general assembly passed an act in relation to escheats, which declared that: "Where any woman shall die intestate, leaving children commonly called illegitimate or natural, born out of wedlock, and no children born in lawful wedlock, all such estate whereof she shall die seized or possessed of, whether real or personal, shall descend to, and be equally divided among such illegitimate or natural born children and their representatives, in the same manner as if they had been born in wedlock; and if such illegitimate or natural born child shall die intestate, without leaving any child or children, his or her estate, as well real as personal, shall descend to, and be equally divided among his or her brothers and sisters, born of the body of the same mother, and their representatives, in the same manner and under the same regulations and restrictions, as if they had been born in lawful wedlock." Acts 1816, p. 40. The reason for passing this act is stated in the preamble to be that the term "heirs" "has been so construed as to prevent children, born of the body of the same mother, from being capable of inheriting or transmitting inheritances." In 1829 an act was passed for the "relief of certain fortunate drawers" in a land lottery which had been authorized by law, and it was declared in that act that the fact that the drawer was an illegitimate child should not interfere with his rights to the land drawn, and that "whenever any illegitimate child, having drawn a lot of land in said lottery and who has or may die intestate without child or children, or the representatives of children, and without brothers or sisters on the maternal side, then and in that case, the said land shall descend to and vest in the mother." Acts 1829, pp. 121, 122. In 1850 the act of 1816, supra, relating to escheats, was amended so as to provide "that from and immediately after the passage of this act, all bastards or natural born children of widows, when said widows shall die intestate, shall inherit the real and personal estate of their deceased mothers, acquired and accumulated during widowhood, equally with the child or children of said widows born in lawful wedlock—any law, usage or custom to the contrary notwithstanding." Acts 1850, p. 172. In 1855 the general assembly passed an act "to prescribe the order of descent and succession of the estates of illegitimate persons who die intestate," which provides as follows: "When any person shall depart this life in-

illegitimate person shall descend to, and belong to, such persons as would inherit the same were such person legitimate. If such illegitimate person shall leave no widow, or child or children or the descendants of a child or children, then the property of such illegitimate person shall descend to and belong to such persons of the maternal blood, as would be entitled to the same, had such illegitimate person been legitimate, and died leaving no collateral kindred of the paternal blood." Acts 1855-56, pp. 227, 228. In 1859 a law was passed amending "the law of descent, in cases of persons who are illegitimate, or born out of lawful wedlock, dying intestate." It provided as follows: "When any person who is illegitimate or born out of wedlock and who has never been legitimized, shall die intestate, leaving no widow or child or children, or descendants of a child or children, and shall leave surviving a brother or sister, or brothers and sisters of like illegitimate birth, and born of the same mother of such intestate, or descendants of such brother or sister, or brothers and sisters, and their said descendants shall be entitled to, and inherit the estate, real or personal, of such intestate, under the same rules and regulations, as if said intestate and said brother or sister, or brothers or sisters, were born in lawful wedlock. If such intestate shall die leaving no widow, or child or children, or descendants of a child or children, or brother or sister so born as hereinbefore mentioned, no descendants of such brother or sister, but shall leave a brother or sister, or brothers or sisters, born of the mother of such intestate in lawful wedlock, or descendants of such last mentioned brother or sister or brothers and sisters, then and in that event, such last mentioned brother or sister, or brothers and sisters, and their descendants shall be entitled to and inherit the estate of such intestate, under the same rules and regulations as if they were in law the next of kin of such intestate." Acts 1859, p. 36.

The provisions of the different statutes above referred to relating to bastards were incorporated in the Code of 1863, in the following language:

"Sec. 1751. Bastards have no inheritable blood except that given to them by express law; they may inherit from their mother and from each other, children of the same mother in the same manner as if legitimate. If a mother have both legitimate and illegitimate children, they shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow, his mother, brothers and sisters shall inherit his estate equally. In distributions under this law the children of a deceased bastard shall represent the deceased parent.

"Sec. 1752. If a bastard dies intestate, leaving no widow or lineal descendant, or illegiti-

brother or sister, or descendant of such brother or sister, may inherit the estate of such intestate."

Section 1751 of the Code of 1863 appears in the Code of 1895 in identically the same language. Civ. Code, § 2510. Section 1752, as amended by the act of 1865, appears in the Code of 1895 in the following language: "If a bastard dies intestate, leaving no widow or lineal descendant, or illegitimate brother or sister, or mother, but shall leave a brother or sister of legitimate blood, such brother or sister, or descendant of such brother or sister, may inherit the estate of such intestate; but in default of any such person, the brothers and sisters of the mother of such bastard or their descendants, or the maternal grandparents of such bastard, may inherit the estate of such bastard, to be divided amongst said persons in accordance with the degrees of consanguinity prescribed in the laws for the distribution of other estates." Civ. Code, § 2511 (Acts 1864-65, p. 102).

Under the law of this state, a bastard has inheritable blood, to the extent provided in the statutes above referred to. He can take as heir by descent from his mother, and she from him; and, in like capacity, he may inherit from his mother generally with legitimate children. He may also inherit from an illegitimate brother or sister; and illegitimate brothers or sisters, or their descendants, may inherit from him. In certain instances, upon failure of heirs of the illegitimate line, the brother or sister of the legitimate blood, or their descendants, may inherit from him; and even the maternal grandparents of the bastard may inherit his estate. Such is the relation which, under the law of this state, the bastard bears to the mother and those persons related to him through her. The relation which the father bears to the bastard under the laws of this state is to be found in the declarations that the father of a bastard is bound to maintain him; that he may voluntarily discharge this duty, but that, if he fails or refuses to do so, the law will compel him. The father of an illegitimate child may render the same legitimate, by appropriate proceedings in the superior court. Civ. Code, §§ 2494, 2508. It will thus be seen that the bastard is recognized as an heir of the mother and of the issue of the mother, and that those who are in certain degrees of consanguinity to him may be his heirs; but, as to the father, the relation of a bastard who has never been legitimated is the same as it was at common law,—he cannot inherit from the father, nor are the descendants or relations of the father, under any circumstances, his heirs. The legal status of the bastard has changed from time to time in this state, as is seen by the statutes above referred to; and it may be well, in the present investigation, to examine the decisions of this court in reference to the

clared "that the name of Sarah Jane Wells be changed to the name of Sarah Jane Rakestraw, and that she be declared legitimate, and capable of inheriting, and like privileges in law as if she had been born in lawful wedlock," "that inasmuch as the illegitimate child was not, by the act, made legitimate to any particular person, the only effect of it was to change her name," and hence that she could not take under a will which bequeathed certain property to the "heir or heirs at law" of Gainham L. Rakestraw, her reputed father. In *Beall v. Beall*, 8 Ga. 210, the question was raised as to whether the general assembly of Georgia possessed the power by a special act to legitimate a bastard child; and it was there held that as, under the common law, the British parliament could pass such an act, and as there was nothing in the written constitution of this state to deprive the general assembly of the power, it still resided there. Since the Code of 1863, the power to legitimate bastards has been vested in the courts. Code 1863, § 1738; Civ. Code, § 2494. In *Allen v. Donaldson*, 12 Ga. 332, decided in 1852, it was held: "When there are two sets of children, born of the same mother, the one legitimate and the other illegitimate, and one of the latter dies intestate and without issue, the legitimate brothers and sisters on the maternal side are not, by the statutes of this state, co-distributors of the estate of the deceased, with the illegitimates." The radical changes which had been made in the law in reference to bastards up to the time of this decision are thus alluded to by Judge Lumpkin: "We acknowledge that there is an increasing liberality evinced in modern legislation in favor of illegitimates. And we rejoice that it is so. This is shown by the act of 1820, which provides that land drawn by illegitimates who have been returned as orphans should not be considered as fraudulent, but the same was declared to vest in them. But it does not occur to this court that we should be advancing this policy by holding that legitimates should come in and share the inheritance of an illegitimate with the co-illegitimates, while the privilege was not reciprocal. We do not understand, in the language of our Brother Peeples, how legitimates can be of kin to the illegitimates, but the illegitimates at the same time not of kin to them. It is counsel, and not the court, who erect the wall between these uterine brethren, and maintain that the legitimates may leap over this wall, and feed in common on the wild pasturage of the illegitimates, while they deny to the latter the privilege of returning with them and partaking of their green meadows. It would be a good law, perhaps, to enable each to inherit from the other, where there were no others occupying the same status, in preference to allowing the property to vest, under our statute of distribution, in distant collateral relations, or to es-

timated by an act of the legislature passed by the procurement of the putative father. he comes his lawful child; and such child and his lawful children, upon the death of either, inherit from each other." Judge McCay, in *Houston v. Davidson*, 45 Ga. 574, thus declares the law of Georgia in reference to the capacity of bastards to inherit: "The progress of civilization and the spread of correct ideas has now almost obliterated the old notion that illegitimates are outcasts. They do not inherit from the father, because the marriage tie—the proof that they are his children—does not exist between him and the mother. But no such proof being needed as to their connection by blood with the mother, or with the brothers and sisters of her womb, they inherit. It is in Georgia, now, only a question of legal proof of blood connection, since now legitimates and illegitimates inherit equally from the mother, and a legitimate brother or sister may in some cases inherit from an illegitimate. * * * So the marriage of the parents legitimates the children born before. * * * The whole spirit of our law is to put them on the same footing of legitimates, as to their mother and the children of her womb. We hold, therefore, that the act of 1850, extending the principle of representation among collaterals to the grandchildren of brothers and sisters, extends to the case where the estate for distribution is the estate of an illegitimate." The decision in *Langmade v. Tuggle*, 78 Ga. 770, 3 S. E. 666, was simply declaratory of the law that the mother was an heir of her bastard son. *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153, decides that an order of the superior court legitimating a bastard on the application of the father makes such bastard capable of taking by descent from his father only, and that he is not, by virtue of such order, enabled to take as the heir of the ancestors of the father. In *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451 it was held that "the term 'child,' as employed in section 2864 of the Code, does not include a bastard, so as to entitle him to the benefits of its provisions; and the conclusive presumption of a gift resulting from continuous possession, under the circumstances therein set forth, arises only in favor of legitimate children."

Florence Barclay Johnstone is therefore undoubtedly an heir of his mother, Mary M. Barclay, and as such is entitled to inherit with her other children any property which she may have owned at the time of her death and which would go to her heirs at law upon her demise. But the property in controversy was not vested in Mary M. Barclay in such way as to be transmissible to her heirs at law. Those who take this property after her death must take as purchasers under the trust deed, and therefore the question to be determined is whether the plaintiff is a "child" of Mary M.

clay, within the meaning of that term as was used by Mrs. Marshall. In other words, was it the intention of Mrs. Marshall, when she signed the paper purporting to be a will, and when she afterwards incorporated in the deed, that the provisions of that paper should be broad enough to embrace within the reach of the benefits therein provided the illegitimate offspring of Mary M. Barclay, brought into life more than three years before the date of the deed so made? Was it in contemplation of Mrs. Marshall when she made this deed that the child who was undoubtedly the object of her great affection should come to disgrace, and have born to her child out of lawful wedlock? A casual reading of the deed, with its provisions with reference to the care and attention which was to be given to Mary M. Barclay in her living and education, is all that is necessary sufficiently to demonstrate that this result was not only not contemplated by Mrs. Marshall, but would have been almost the last thing that would have occurred to her mind. Her mother could have been more tender and anxious about the future of her own child than Mrs. Marshall evidently was about the future of this girl. That the effect of holding that the plaintiff cannot take any interest in property in controversy under the terms of the deed would be adding sorrows to the lot of one already unfortunate and desolate does not weigh with us in determining what language of this deed means. [We are irresistibly forced to the conclusion that the plaintiff cannot take any interest whatever, under this deed, as the child of Mary M. Barclay, and that the meaning of the word "issue" cannot be enlarged so as to embrace illegitimate children notwithstanding the use of the word "issue" in another part of the deed. The words "children" and "issue," in deeds, wills, and conveyances, must be held to mean legitimate children or issue, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the import other than legitimates.] The conclusion reached by us in this case is, we think, not only essentially correct, but the conclusion is supported by the great weight of authority. Indeed, we have been unable to find a case which is entirely irreconcilable therewith. A number of cases are cited on the subject of counsel for both parties. Those which appear to be more nearly in point will now be considered, and we think we will be able to demonstrate that those which seem to be antagonistic to the view we have taken are not distinguishable from the present case. In the case of *Cartwright v. Vawdry*, 5 Ves. 401, Lord Chancellor Loughborough says: "It is impossible, in a court of justice, to hold that an illegitimate child can take equally with lawful children, upon a devise to children." And this was in a case where the illegitimate child thus excluded was one born before marriage of the parents, and at the time

of the making of the will was a member of the testator's household, with his children born after marriage. A similar ruling was made in the case of *Godfrey v. Davis*, 6 Ves. 43. See, also, *Durrant v. Friend*, 11 Eng. Law & Eq. 2. A testator bequeathed property to his son T., who was an illegitimate, and directed a division of his estate into seven parts, one of which was given to his widow for life, and after her death to "such of his children to whom the other six shares were given." As to those six shares, the direction was to pay them "among all my children living at my decease, except my son T." The testator left seven children, two of whom (T. and A.) were illegitimate; and it was held that A. was not entitled to a share as one of the testator's children; the vice chancellor saying: "There is no such designation personæ as to enable me to say that Ann, being illegitimate, is entitled to share with legitimate children of the testator in a gift to his children; nor does the exception of Thomas raise a necessary implication that Ann is to take as one of the testator's children." In *re Wells' Estate*, 6 L. R. Eq. 599. See, also, *In re Ayles' Trusts*, 1 Ch. Div. 282; *Ellis v. Houstoun*, 10 Ch. Div. 236; *Megson v. Hindle*, 15 Ch. Div. 198. The rule laid down in the cases just cited was recognized by the court of appeals of South Carolina in *Shearman v. Angel*, 1 Bailey, Eq. 351. In that case the will of the testator contained the following items: "I give, devise, and bequeath to my beloved mother, Mrs. Elizabeth Shearman, a part of my plantation on John's Island [describing it], which said parcel of land I give to my said mother during her life, and at her decease to her children forever. Also, I give, devise, and bequeath to my said mother * * * the following negro slaves [naming them], together with their issue; to her, my said mother, during her life, and at her decease to her children forever. Also, I give and bequeath to my said mother [certain personal property]; to her, my said mother, and her children, forever." The remainder of the testator's property, after bequeathing certain sums of money to several slaves whom he desired emancipated, was devised to his sister Martha Angel and her husband, Justus Angel. The testator and Martha Angel were the natural children of Mrs. Shearman, then Miss Tucker, and Isaac Waight, from whom the testator derived his estate. The complainants were the legitimate children of Mrs. Shearman by a subsequent marriage, and they claimed the whole of the real estate and personal property devised to Mrs. Shearman (she having died), by virtue of the express limitation to her children. The chancellor decreed that they were so entitled; holding that the illegitimate sister of the testator was not one of the children of their mother, in the sense in which that word was used in the will. Upon appeal this decision was affirmed. The ruling in the case just cited goes much further than it is necessary for us to go in the present case,

mate is being dealt with, and that it is incumbent upon any one who desires to give to this word any other than its well-known meaning to show that such was the intention of the person who used the language. In Massachusetts it was held that the word "children" did not embrace illegitimate children, in an act (Rev. St. c. 62, § 21) which provided that "when any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate; unless they shall have been provided for by the testator in his lifetime; or unless it shall appear that such omission was intentional, and not occasioned by any mistake or accident." And this, too, notwithstanding the fact that there was a statute which declared that an illegitimate child should be considered as an heir of its mother, and inherit from her estate. Thomas, J., in the opinion, thus states the conclusion reached: "As, at the common law, illegitimate children have no rights of inheritance or descent, whatever they take is by force of the statutes. The statutes have provided for cases of inheritance, for the descent of intestate estates. They have made no provision for cases where there is an omission by a testator to provide in his will for an illegitimate child. Whether the same reasons apply to the case of an omission of an illegitimate child, and the same results should follow such omission, it is a question for the legislature, and not for the court." Kent v. Barker, 2 Gray, 535. In Illinois it was held that, prima facie, the term "children" means lawful children, and that a statute of descents by which the property of an intestate is made to descend to and among children and their descendants has reference to lawful children only, and does not do away with the common-law rule which prevents illegitimate children from inheriting. Blacklaws v. Milne, 82 Ill. 505. In North Carolina it was held that the word "children," per se, imports, in law, legitimate children, and none but legitimate children can be understood as embraced in an instrument providing for "children," unless it manifestly appears that natural children were thereby intended, and that this meaning of the word "children" was not at all altered by an act of the legislature of that state which permits, where a woman dies intestate and without legitimate children, "those commonly called illegitimate or natural children" to succeed to the property of their mother. They are not thereby made, in law, the children of their reputed mother, but only enabled to take her property where there are none such under the description above quoted. The facts of the case in which this ruling was made were that John Charteris bequeathed all of his property to his two sisters, Jane McDonald and

survivor should take the property. Ann Charteris died without having been married, but leaving a daughter born out of lawful wedlock long before the execution of John Charteris' will. It was held that Jane McDonald took the entire estate of the testator. Thompson v. McDonald, 22 N. C. 463. In the same state it was held that the word "issue," in a will which contained a clause bequeathing certain property to a daughter, to which was added these words, "which I intend for the said Ann or her issue," did not embrace illegitimate issue, although the daughter had such illegitimate issue at the time the will was made, and died without having legitimate issue. Doggett v. Moseley, 52 N. C. 587. See, also, Kirkpatrick v. Rogers, 41 N. C. 130. In Pennsylvania it has been held that the effect of statutes regulating the right of bastards to inherit, similar to those which have been passed in this state, did not legitimate illegitimate children, but only gave the child and mother capacity to inherit from each other. Grubb's Appeal, 58 Pa. St. 55; Nell's Appeal, 92 Pa. St. 193. In New Jersey the rule is thus stated: "Under a devise or bequest to 'children' as a class, natural children are not included, unless the testator's intention to include them is manifest, either by express designation or necessary implication. All the cases cited in support of the claim of the illegitimate children will be found to fall within this principle. Illegitimate children may take under the general description of 'children,' but it must appear unequivocally from other parts of the will that such was the testator's intention. The natural and legal import of the term 'children' is legitimate children. To overcome this presumption, and to extend or alter the legal import of the term, the testator's intention must be manifest. The residuary clause of the will in question, under which the children of Mary Heater claim title, contains no express designation, by name or otherwise, of her illegitimate children. The testator's intention to include them in that devise, if it exist, must appear by necessary implication from other parts of the will." In this case the testator gave the residue of his estate to his stepdaughter, Mary Heater. At the time of the devise, and at the death of the testator, she had two children born before her marriage, and two legitimate children born after her marriage. After the death of the testator she had six other children born in wedlock, one of whom, Sarah Casterline, died in the lifetime of her mother, leaving issue, five children. Mary Heater at her death left nine children, two of whom were illegitimate, and five grandchildren, the children of a deceased daughter. Heater v. Van Auken, 14 N. J. Eq. 159. In New York the rule has been thus stated: "Where there are legitimate children in existence at the time of making the will, so as to satisfy the words of the devise or bequest

their primary sense, an illegitimate child not take under a general devise or bequest to children as a class, unless there is something else appearing in the will to show that the testator intended to include others besides legitimate children." *Collins v. Hoxie*, 9 Me. 81. In *Cromer v. Pinckney*, 3 Barb. 466, Chancellor Walworth uses this language: "As a general rule, in the construction of wills the testator must be presumed to have used words in their ordinary or primary sense meaning, unless, from the context of the will it appears that he must have intended to use them in some other or secondary sense, or to use them by reference to extrinsic circumstances which existed at the time of making of the will or which must necessarily exist in the future or at the time contemplated by him, the use of such words in their ordinary or primary sense would render the provision of the will inoperative to which such words were used in an absurd, or inoperative. Thus, the word 'children,' in its primary and ordinary sense, means the immediate legitimate descendants of the person named. And, where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include illegitimate offspring, stepchildren, children by marriage only, grandchildren, or more remote descendants." In Maine it has been held that a statute declaring under what circumstances an illegitimate might take property by inheritance or descent would not have the effect of requiring words in a will which ordinarily refer to legitimates, only, to be construed as to allow illegimates to take by purchase under the will. *Lyon v. Lyon* (Me.) 34 Atl. 180. In the case of *Flora Anderson*, 67 Fed. 182, it was held that a devise to issue meant, prima facie, legitimate issue, and that an intention to include illegitimate issue must be deduced from the language itself, without resort to extrinsic evidence. The same case being before the circuit court of the United States in the Southern district of Ohio the second time, a ruling was made that the Ohio statute of descents, which admitted bastards to inherit and transmit inheritances on the part of their mothers, did not enable an illegitimate child of a woman to take under a devise of a remainder to the issue of the body of such woman. *Flora v. Anderson*, 75 Fed. 217.

It will now proceed to a consideration of some of the cases relied on by the plaintiff in this case. The case of *Bennett v. Toler*, 15 Grat. 50, seems to have been confidently relied on by the plaintiff. In principle, the question under consideration in the present case. Upon an examination of the facts of that case, we cannot see that the decision is really in accord with the ruling made in the present case.

Joseph Toler gave to his daughter, Mary Bennett, the land on which she then lived; also, certain slaves,—the clause of the will concluding in these words: "My will is, that after the death of my daughter, Mary Bennett, the land and negroes given to her shall

be equally divided amongst her children." At the testator's death his daughter was married to Lewis Bennett, by whom she had several legitimate children. Previous to her marriage she gave birth to an illegitimate child by another man. This illegitimate was known and recognized by the testator as his daughter's son. When the testator died, the legitimate children and the bastard were all living. The question was whether the illegitimate child took an interest equally with the lawful children of Mary Bennett, under their grandfather's will. While the reasoning of Allen, P., seems to lead to the conclusion that, had it been necessary, the court would have gone to the extent of holding that an illegitimate child not in life at the time the will was made would have taken under the devise to children in the will under consideration in that case, the ruling made, when considered in connection with the fact that the bastard was born several years before the will was made, and was recognized by the testator as his daughter's child, is not authority for the construction sought to be given the word "children" in the deed under consideration in the present case. In the case of *Howell v. Tyler*, 91 N. C. 207, the court had under consideration a will which provided that "what is yet remaining, not above disposed of, shall be held and disposed of for the benefit of Martha J. Trevan's heirs, by my executor hereafter to be named, or in such manner as he may think just and proper." Martha Trevan had no legitimate children, and it was held that, under the word "heirs," her illegitimate children would take under this will; the court saying that "inasmuch as, in the absence of children born to the mother in wedlock, those of illegitimate birth can inherit from the mother, and thus become her heirs, these plaintiffs are sufficiently designated by the term which describes that relation." In that case it appeared that the testator knew that Martha J. Trevan had both legitimate and illegitimate children. In *Drummond v. Leigh*, 30 L. R. Ch. Div. 110, an illegitimate was allowed to take under a will which made provision for "all and every the children and child" of a designated person, because it was clear and manifest from the terms of the will that the testator so intended; the vice chancellor concluding his opinion in the following words: "Here I am satisfied the testator did intend that his nephew's daughter, whom he knew to be illegitimate, was to be treated, for the purposes of his will, as if she was legitimate." In *Dickinson's Appeal*, 42 Conn. 491, it was simply ruled that under the law of Connecticut a bastard has inheritable blood, for the purposes of collateral as well as lineal descent through him. Whether he could take as purchaser under a will or deed using the word "children" was not a question considered at all in that case. In *Hughes v. Knowlton*, 87 Conn. 429, the court had under consideration a will which contained a clause devising real estate to two daughters, "mean-

daughters had illegitimate children in life at the time the will was made. It was held that under the law of Connecticut this will gave to the daughters a fee-simple estate, and therefore the question as to whether the illegitimates would take under the language quoted was not passed upon by the court. The ruling made by the supreme court of California in *Re Wardell's Estate*, 57 Cal. 484, is entirely consistent, we think, with what is ruled in the present case. A California statute provided that "when any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate." Civ. Code, § 1307. Another statute declared that "every illegitimate child is, in all cases, an heir of his mother, and inherits her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock." Id. § 1387. Ada Wardell died testate, leaving a husband, two sons, and a daughter. No provision was made in the will for the daughter. Her name was not mentioned in it, but it does not appear from anything in the will itself that the omission was intentional. The daughter was born out of lawful wedlock, and had never been legitimated in any way authorized by the law of California. It was held that, under the statute first above quoted, she was entitled to a share in the estate in like manner as if she were legitimate. The statute last quoted made her an heir of her mother; and, being such heir, she was a child of her mother, within the meaning of the other statute, so as to allow her to claim that she had not been intentionally omitted from the will of her mother. Construing the two statutes together, the result reached by the court in that case was undoubtedly correct. In the case of a devise by a mother to children generally, her illegitimate issue, recognized by her as her children, would certainly take, unless the contrary intention on the part of the testatrix was clearly manifested in the will. Under the California law, the question under consideration was the same as if the mother had devised her property to her children generally. The statute in this state allowing a bastard to inherit from his mother, while throwing but little light on the question of the intention of a person who devised property to a woman, with remainder to her children, would certainly have great weight with the courts in construing a will made by the mother herself. On account of the natural affection which mothers bear to their offspring, it would take a strong case to authorize the exclusion of illegitimate children of a mother from participating in property devised by her to her children.

attention to such as we believe required special attention in dealing with the case. The conclusion reached by us is supported by an almost unbroken line of authorities. The case must at last be decided upon what was the intention of Mrs. Marshall when she made the deed of trust. What she might have done for this unfortunate plaintiff, if the deed or will had been made after he came into existence, we do not know; but that it was not her intention, by the language used in the deed, to provide for those of the class to which he belongs, hardly admits of doubt. Judgment affirmed. All the justices concurring, except LEWIS, J., disqualified.

MATTLAGE v. MULHERIN et al.

(Supreme Court of Georgia. March 17, 1899.)
TENANT — DISPOSSESSION — SALE OF LANDLORD'S INTEREST — DEED — RECORD AS NOTICE.

1. A lessee from the grantor in a security deed, which has been duly filed and recorded, can be dispossessed in a summary way by the sheriff for the purpose of placing in possession a purchaser of the property at a sale had under a judgment setting up a special lien upon the same, rendered in a suit by the creditor on the debt secured by such deed, notwithstanding the lease may be older than the judgment under which the sale was had.

2. A duly filed and recorded deed, which plainly shows that it was given to secure a debt, but does not show when the same matures, is notice to one dealing with the grantor therein of all the rights which the grantee has under the contract, performance of which is thereby secured. Especially is this true where the deed in terms refers to the bond for titles held by the grantor as containing the "terms and conditions" of the contract of indebtedness.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

Suit by Wm. Mulherin's Sons & Co. against C. F. Mattlage. Judgment for plaintiffs. Defendant brings error. Reversed.

J. S. & W. T. Davidson and J. R. Lamar, for plaintiff in error. F. W. Capers, for defendants in error.

COBB, J. On June 5, 1895, Kahrs executed and delivered to Mattlage a deed, which was duly filed and recorded on the day following the date of its execution, and which contained the following clause: "This deed is made under the provisions of the Code of Georgia of 1882 (section 1969 et seq.) to secure a debt of \$25,000 and interest, upon the terms and conditions set forth in the bond for titles given by Charles F. Mattlage to Nicholas Kahrs contemporaneously with the making of this deed." The deed contained no statement with reference to the date of the maturity of the debt. The debt was represented by a promissory note, which contained the following clause: "This note is subject to earlier ma-

should any semiannual installment of it remain unpaid for sixty days after maturity." The bond for titles referred to in the deed was recorded in the office of the clerk of the superior court of Richmond county on June 29, 1896. In addition to the "earn-out" clause of the note, above quoted, the bond for titles contained the following:

"The first loan shall be subject to earn-out, and the second likewise, if an installment should be made for the whole or part of said amount, should any installment of interest remain unpaid for sixty days after its maturity; or should any insurance, or other assessment which said Mattlage have paid off remain unrefunded for sixty days, with five per cent. interest from date of payment, then in either of said cases the entire debt may, at the option of said Mattlage, become due, payable, and collectible, at any time in the note to the contrary notwithstanding." On June 8, 1896, Kahrs leased a portion of the property described in the deed to Mulherin's Sons & Co. for three years at a rental of \$100 monthly rental, for which they gave their notes, falling due each month. Mulherin discounted certain of these notes on June 15, 1898 and 1899. An installment of \$100 on the debt due Mattlage by Kahrs on July 1, 1897, having remained unpaid for 60 days, thereafter, on June 14, 1898, Mattlage filed suit on the notes, and on June 16, 1898, obtained a common-law judgment for the amount due on the debt, and a special judgment against the property described in the deed. Execution issued accordingly. After levy and due advertisement, the property was sold at sheriff's sale on October 4, 1898, and purchased by Mattlage to whom the sheriff delivered a deed to the same. The sheriff being about to put Mulherin's Sons & Co. in possession of the property, which they had leased from Kahrs, Mulherin applied for and obtained an injunction to prevent the sheriff from dispossessing them. The granting of this injunction Mattlage contested.

It is contended that, because the lease of Mulherin's Sons & Co. was older than the judgment under which the sale was made, there is no authority for the sheriff to dispossess them, and place the purchaser in possession. In order to determine whether or not this contention is correct, we must read in connection with each other the following provisions of the Code, which relate to the subject of the right of the sheriff to put purchasers at sheriff's sales in possession: Whenever a present interest in land is sold by any judicial officer, it shall be his duty to place the purchaser or his agent in possession of the land, and to this end he may dispossess the defendant in the process, his heirs and his assigns, or his lessees or vendees of younger date than the judgment upon which the process issues; but he may not dispossess others claiming under an independent title." Code, § 5451. "When any sheriff, or other

officer, shall sell any real estate by virtue of and under any execution, it shall be the duty of such sheriff, or other levying officer, upon application, to put the purchaser, his agent or attorney in possession of the real estate sold: provided, that the provisions of this Code shall not authorize the officer to turn out any other person than the defendant, his heirs, or their tenants, or assignees since the judgment." Id. § 5468. "If the purchaser of real estate, at sheriff's and other sales under execution, shall fail to make application for possession thereof until the next term of the superior court after such sale takes place, or until the officer making such sale goes out of office, such possession can only be obtained under an order of said superior court." Id. § 5469. "The widow of the defendant, claiming dower, cannot be dispossessed of the mansion; nor can a lessee, whose lease is older than the judgment under which the sale was made, be dispossessed under the provisions of the two preceding sections." Id. § 5470. Construing these sections together, it can be clearly seen that it was the intention of the general assembly to provide that the general rule should be that in all cases where a present interest in real estate was sold by a judicial officer under any execution the purchaser at such sale should be entitled to be placed in possession by the officer making the sale in a summary way, and thereby be saved the delay and annoyance incident to acquiring possession by an ordinary suit at law founded upon the title acquired by him at the sale. This is undoubtedly the general rule that was intended to be established. To this rule certain exceptions were made. It is incumbent upon any one who is attacking the right of the sheriff to dispossess him to show that he comes within one of the exceptions. Those who are within the exceptions are declared to be "tenants claiming under an independent title," and persons other than "the defendant, his heirs, or their tenants, or assignees since the judgment," and "the widow of the defendant claiming dower," and "a lessee whose lease is older than the judgment under which the sale was made." Taking these exceptions, which are found in three different sections of the Code dealing with this matter, what was the intention of the general assembly with reference to who should be excepted from the operation of this general rule? In order for one to bring himself within the exceptions, he must show either that he claims under an independent title, or that he claims under a title derived from the defendant anterior to the judgment, and of such a character that under no circumstances could the judgment relate back, and become a lien upon the property thus acquired. The identical question raised in the present case has never been decided by this court. In the case of *Seymour v. Morgan*, 45 Ga. 201, Judge McCoy uses this language: "It would be giving very extraordinary power to a sheriff's sale to say that the sheriff might put

the possession of a dispute about the title. The statute is the rule. The sheriff may turn out the defendant, his tenants and his assignees since the judgment. Further than this he cannot go. The fact that the lien of this judgment dates back does not help the case. One buying land after a judgment against the owner, which has been vacated by an appeal, buys it with notice and subject to the final judgment; but he is no more a purchaser after the judgment than one who buys with notice of the vendor's lien, or with notice of any other fact which will make the land subject to a judgment against his vendor." Some of this language would indicate that the learned judge who delivered that opinion did not think that the power to dispossess in a summary way existed in cases like the one now under consideration; but in a subsequent case (*Rival v. Gallagher*, 52 Ga. 630) the same judge uses this language: "This case does not, therefore, bring up the point insisted on in the argument, though we incline to think that, as a purchaser from the mortgagor with notice buys only the equity of redemption, and has a right to redeem, he stands in the mortgagor's shoes, and cannot resist the right of the purchaser to be put in possession any more than could the mortgagor. The case in 45 Ga. 203, stands on a different footing. The right of plaintiff who has got a judgment on an appeal to go upon property sold by the defendant after the first judgment is peculiar. The statute, in terms, declares that the property shall not be bound by the first judgment, except that the defendant cannot alienate it. The sale is under the second judgment. That, for certain purposes, it will operate so as to treat land sold by the defendant since the first judgment as still his, even in the hands of a purchaser for value without notice, does not alter the fact that it is sold under the second judgment. Besides, the judgment of foreclosure is not a judgment against the defendant. It is a quasi proceeding in rem to assert against the mortgagor, and all claiming under him subsequent to the record, or having actual notice, the lien of the mortgage on the land." The reason for the conclusion reached in the case in 45 Ga. was due to the peculiar language of the law in reference to appeals which is now embodied in the Civil Code (section 5352), and is as follows: "In all cases where a judgment shall be rendered and an appeal shall be entered from such judgment, the property of the defendant shall not be bound by the first judgment, except so far as to prevent the alienation by the defendant of his property between the signing of the first judgment and the signing of the judgment on the appeal, but shall be bound from the signing of such judgment on the appeal." What is said by Judge McCay in 52 Ga. is obiter, that case being one in which there had been a verdict rendered in a claim case find-

ing claimant. The reasons given, however, why there would be a right to dispossess even if there had been no verdict in the claim case are so satisfactory that we are willing to follow them in the present case, although what is there said is not binding as authority. It would be unreasonable to hold that it was the intention of the general assembly, in the language which is used in these various statutes, that a person who bought or leased from a mortgagor after the mortgage was duly filed and recorded, or from a grantor in a security deed after such deed had been likewise filed and recorded, should be entitled to hold possession of the property against the purchaser at a sale had in pursuance of the foreclosure suit in the one instance, or a suit resulting in a special judgment setting up a lien on the land in the other, and drive such a purchaser to the delay and expense incident to an action of ejectment.

It is contended, however, that, even if this be true, there was nothing to put Mulherin's Sons & Co. upon notice that the debt due by Kahrs, which was secured by a deed, would mature earlier than five years. To this it may be answered that there is nothing in the deed to show when the debt would mature, but Mulherin's Sons & Co. were put on notice by the record of the deed that there was an outstanding debt for the payment of which the title to the property therein described was pledged, and this imposed upon them the duty of inquiring when that debt would mature, and thus ascertain for what length of time they would be safe in dealing with Kahrs as the owner of the property. While the record of the bond for titles was not constructive notice to Mulherin's Sons & Co. of what was therein contained, the deed referred to the bond as to the maturity of the debt, and any one dealing with Kahrs as the owner of the property was bound to inquire as to all matters in connection with this debt. Inquiry either of Matlage, the creditor, or of Kahrs, the debtor, would have brought full information; and, such being the case, Mulherin's Sons & Co. must be dealt with as if they knew all that this inquiry would have elicited. The court erred in granting the injunction. Judgment reversed. All the justices concurring.

PRICE BAKING-POWDER CO. v. MACON TELEGRAPH PUB. CO.

(Supreme Court of Georgia. March 17, 1899.)
RIGHT OF ACTION—CONTRACT WITH THIRD PARTY.

1. This being an action by the plaintiff against the defendant for money alleged to be due for the publication of an advertisement in a newspaper conducted by the former, and the evidence disclosing that the defendant made with a third person, acting independently and in his own behalf, a contract to have the advertisement in question inserted in this newspaper for a speci-

for the defendant, the agent of the publishing company, there could be no lawful recovery by the plaintiff.

2. The evidence demanded the verdict for the defendant; and therefore, irrespective of the errors alleged, the court ought not to have granted a new trial.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by the Macon Telegraph Publishing Company against the Price Baking-Powder Company. Judgment for defendant. From an order granting a new trial, defendant brings error. Reversed.

Steed & Wimberly and W. D. Nottingham, for plaintiff in error. Smith & Jones, for defendant in error.

PER CURIAM. Judgment reversed.

MACON & B. R. CO. v. PROCTOR.

(Supreme Court of Georgia. March 18, 1899.)

APPEAL—REVIEW.

The requests to charge which were refused, so far as legal and pertinent, were covered by the general charge. The charges excepted to, when taken in connection with the general charge, were not erroneous. There was evidence upon which the jury might base a finding in favor of the plaintiff, and, the trial judge being satisfied with the verdict, his judgment overruling the motion for a new trial will not be disturbed. (Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Judge.

Action by O. J. Proctor against the Macon & Birmingham Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

L. F. Garrard and Hardeman, Davis & Turner, for plaintiff in error. Guerry & Hall, for defendant in error.

PER CURIAM. Judgment affirmed.

NEWMAN et al. v. H. B. CLAFLIN CO. et al.

(Supreme Court of Georgia. March 18, 1899.)

SALE—FRAUDULENT REPRESENTATIONS OF PURCHASER—RESCISSION OF CONTRACT—APPEAL—NEW TRIAL.

1. When a vendee of personal property makes a material representation which is false, and upon which the vendor is induced to act, to his injury, by parting with possession of his goods, such a misrepresentation amounts to a fraud in law, which voids the sale; and equity may rescind the contract, and restore the parties to their original rights, although the party making such misrepresentations was not aware that his statement was false.

2. The charge of the court fully and fairly covered the issues involved; there was sufficient evidence to authorize those portions of the charge complained of on the ground that they

for new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by the H. B. Claflin Company and others against H. Newman and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

Hardeman, Davis & Turner and Bacon, Miller & Brunson, for plaintiffs in error. Steed & Wimberly and Dasher, Park & Gerdina, for defendants in error.

LEWIS, J. The law of this case as to right of defendants in error to obtain the relief they prayed for, provided the allegations in their petition are sustained by proof, was settled in their favor by a decision of this court in the same case, viz.: *Exchange Bank of Macon v. H. B. Claflin Co.*, 100 Ga. 640, 28 S. E. 439. Among the prayers for relief in the petition of defendants in error was the prayer that "the goods which might be identified and reclaimed by them might be decreed to be, in equity and good conscience, the property of petitioners, respectively, and that said goods, or the proceeds thereof, might be decreed to belong to petitioners, and that the said Mrs. H. Newman be decreed to account for the value and the proceeds of so much and such portions of petitioners' goods as may have been sold by her, and that petitioners have judgment against her for such sums of money as in law and equity they may be entitled to." A verdict was rendered by the jury in favor of the plaintiffs, which, in effect, found in them title to the identified goods and wares, with the proceeds of the sale thereof, and also found in their favor against the defendant Mrs. Newman certain specific amounts, which evidently covered the goods that had been sold by her. The defendants below, who were Mrs. Newman, the plaintiffs' debtor, and her mortgage creditors, filed their motion for a new trial, on various grounds, and except to the judgment overruling the same. One of the grounds relied upon by the defendants in error for the rescission of their contract of sale of the goods to Mrs. Newman was on account of representations alleged to have been made by Mrs. Newman, or her authorized agent, touching her financial standing, her solvency, and the amount of her estate, liabilities, etc.

1. In the motion for new trial, error is assigned on the following charge of the court: "The law declares that fraud may exist from misrepresentation by either party, made with design to deceive, or which does actually deceive, the other party; and in the latter case such misrepresentation voids the sale if the party making it was not aware that his statement was false. Such misrepresentation may be perpetrated by acts as well as words, and by artifices designed to mislead. A misrepres-

loss, without knowledge, and acted on by the opposite party, or if made by mistake and acted on by the opposite party, constitutes legal fraud." It was earnestly contended by counsel for plaintiffs in error that a misrepresentation when made innocently, and not with an intention to deceive, constitutes no ground for a rescission of a contract; that the fraud which operates to void a sale must be an actual fraud, embracing an element of corruption, or an intention to deceive; and that, therefore, that portion of the charge quoted above which declares that such misrepresentation voids a sale although the party making it was not aware that his statement was false, and although it was made by mistake and innocently, and was acted upon by the opposite party, was error.

The confusion, and a degree of uncertainty, which exists to some extent in the legal minds of this state on this subject, doubtless grow out of a failure to draw the proper distinction between the misrepresentations contemplated by section 3533 of the Civil Code, and the effect of a warranty mentioned in section 3556; and also to a misconstruction of some decisions of this court, in which, while treating of the effects of an express or implied warranty, it has been declared that it requires actual, and not merely legal or constructive, fraud, to render void a sale. There is quite a distinction between the rule of law touching a misrepresentation upon which one has acted to his injury, either in the purchase or sale of property, and a warranty, either express or implied, touching the character or quality of goods sold. Such a warranty enters into, and forms a part of, the contract between the purchaser and the seller. It is an obligation either imposed by law on the vendee, or assumed by him, and its breach gives a right of action by the vendee. In case the vendee is sued for the purchase money of the goods sold, he can recoup or offset any damages he may have sustained in consequence of such breach. Liability on an implied warranty may exist when the vendor has acted in the utmost good faith, and has made no representation of anything as a fact, touching the quality of the article sold, and he may have no knowledge even of any defect therein. Liability on an express warranty may exist under similar circumstances. It may cover even patent defects in the property, known just as well to the vendee as to the vendor. It is not a representation of the condition or quality of the property, upon which the vendee is induced to act to his injury; but is simply a guaranty against any loss or damage that may result from any subsequent defect in the property, and implies a promise to pay such damages, should any result. We do not mean to say that where there are misrepresentations, or other deceptive means are used to induce the purchase, the contract may

be based, not upon the naked warranty or guaranty against loss, but upon the fraudulent conduct practiced. In other words, under a contract of warranty the liability of the warrantor is in no wise dependent upon the degree of faith or belief that the warrantee may have in the words used in the contract of warranty, and the title does not pass simply on condition that no breach of such warranty shall occur. The term "warranty," therefore, has a technical meaning, and simply contemplates a liability for damages in case of its breach. On the other hand, when a party represents a fact touching the original sale or purchase, with a view of inducing, and does thereby induce, another to part with his title, the truth of the statement, and not the belief of the party who made it, is made by law a condition precedent to the validity of the sale. This is no arbitrary distinction that we are drawing. It is really fixed by the statute itself. Section 3556 of the Civil Code expressly declares that a breach of warranty, express or implied, does not annul the sale, if executed, but gives the purchaser a right to damages. Section 3533 declares, in effect, that fraud may exist from misrepresentation by either party, and, in case it actually deceives the other party, it voids the sale, if the party making it was not aware that his statement was false. Section 4026 declares that a misrepresentation, if made by mistake, and innocently acted on by the opposite party, constitutes legal fraud. Construing these sections together, so as to give effect to all of them, there was evidently in the legislative mind a distinction between a warranty and a misrepresentation, which should be observed whenever the one or the other is considered either as a defense or a cause of action. Bearing in mind this distinction, it will be readily seen that the decisions of this court relied upon by counsel for plaintiff in error are not in point. For instance, in the case of *Dawson v. Pennaman*, 65 Ga. 698, it is decided that where there is a breach of warranty, unmixed with fraud, the remedy is by a suit on the warranty, but where there has been actual fraud, mixed with deceit and corruption, in the exchange of personalty, the party deceived has his election to sue on the warranty, or to bring trover for the property sold by him. The principle, therefore, decided in that case, was nothing more nor less than what is declared in section 3556 of the Code, above cited,—that a mere breach of warranty, express or implied, does not void the sale. The expression by Chief Justice Jackson in the case above cited, on page 700, that fraud which voids the sale, and which does not permit title to pass, must be actual fraud, mixed with deceit and corruption, and not merely legal or constructive fraud, was mere obiter; for in that case it is decided there was actual fraud, and the ques-

sides, the opinion as well as the decision should be construed in the light of its facts; and the truth is that neither actual nor legal fraud which would void a sale can be predicated upon a bare naked warranty, uncoupled with any representations as to the existence of certain facts. Again, in the case of *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168, it was decided that the right to rescind for fraud in a horse swap exists only when actual fraud has been committed, and that rescission, where a right to rescind was not expressly reserved, cannot be had for constructive fraud, nor on account of warranty merely, express or implied. It will be seen from the opinion of Justice Simmons delivered in that case that it was an action of trover for the recovery of a horse. The ground upon which the judgment of the court below was reversed was error in charging the jury the law on the subject of implied warranty. Construing the decision, then, in the light of the facts, to the effect that "rescission cannot be had for constructive fraud, or merely on account of warranty, express or implied," it simply means that such relief cannot be had on constructive fraud which has for its basis only a warranty. But the case we are now considering is quite different. It involves no effort by the vendee to rescind a contract of purchase on account of a breach of warranty by the vendor, but it is an effort by the vendors themselves to rescind a contract of sale on account of the fraudulent conduct of the vendee, which induced the owners of the goods to part with their possession. The vendee warranted nothing, and had parted with nothing that might have been the subject-matter of either express or implied warranty. She simply promised to pay, after representing facts to exist which induced the sale. The case of *Nicol v. Crittenden*, 55 Ga. 497, to the effect that it is impossible that a sale can defraud creditors, unless it was made with a fraudulent intent, is, of course, not in point; for it had no relation whatever to the rights of the parties to the particular contract of sale, but to the rights of creditors, founded upon a specific statute that voids a sale by the debtor made with intent to delay or defraud creditors, if such intention be known to the party taking. Code, § 2695, subd. 2.

We are aware of a conflict of authority among text-books and decisions in other states on this subject, but no useful purpose could be subserved by a discussion of these authorities. Suffice it to say that, in the early history of this court, it has aligned itself definitely with that class of authorities which hold that it does not necessarily require actual fraud to void a contract. In the case of *Smith v. Mitchell*, 6 Ga. 458 (headnotes 7, 8), it is decided: "Whether a party thus misrepresenting a fact knows it to be false or not is wholly immaterial; for the affirmation of what one does not know to be true or believe

known to be absolutely false. It is a fraud on account of which equity will rescind the contract, and reinstates the parties in their original rights. If a party thus affirming a fact believes it to be true when it is false, it is a fraud, in law, and equity will rescind the contract, and restore the parties to their original rights." This same rule is followed in the case of *Bailey v. Jones*, 14 Ga. 384, where it is decided: "If a party innocently, by mistake, misrepresents a fact which is material, and which the other party confided in, it is cause for rescinding the contract, on the ground that it operated as a surprise and imposition on the parties seeking relief." It seems to us, too, there is decidedly a better reason for this rule than the contrary; for the party acting upon a misrepresentation, believing it to be true, is none the less injured because the one who made it also thought it was true. The belief or good faith of one who injures another should not affect the latter's rights of, or title to, property. But this question is settled in Georgia by the express provisions of the law itself; for the legislature, when it adopted the Code of 1863, and again when it adopted the present Civil Code, enacted into positive law the principles announced in the above early decisions of this court. Section 3533 declares that: "Fraud may exist from misrepresentation by either party, made with design to deceive, or which does actually deceive the other party; and in the latter case such misrepresentation voids the sale, though the party making it was not aware that his statement was false." This provision in the law is nothing more than an adoption of the doctrine laid down in the cases above cited in 6 and 14 Ga. There is no decision of this court, properly construed and interpreted in the light of its facts, that has ever in any way changed or modified this principle. To decide otherwise would be to simply write off, by judicial sanction and power, the plain meaning of the letter, reason, and spirit of the written law of this state.

2. There are various grounds in the motion for new trial, but the above disposes of the only important legal question in the case. The other grounds relate to alleged error in the court in overruling the motion for nonsuit, and to various rulings of the court and exceptions to the charge in this case. The only ground of such exceptions which seems to have any merit at all was the contention on the part of movant's counsel that the parts of the charge complained of were inapplicable to the facts in this particular case. The main representations relied upon by plaintiffs in the sale of their goods was a report of Dun's Agency, made September 25, 1895. It appeared from this statement that the defendant Mrs. Newman, or her authorized agent, represented that her total assets amounted to \$35,571, and her total liabilities to \$17,200, leaving a net surplus of \$18,371. This, it seems,

which they claim to have acted. There was a later report made to the agent of the company the latter part of the year, but this was not published, for the reason that there was no material change made by the defendant in her financial statement. The goods sued for in the case were purchased during the following months,—January, February, and March. It is insisted that, on account of the difference between the time of the purchase and the time of the representation, it was not contemplated by the parties that the above financial statement would be acted upon by the creditors when the goods were bought. No arbitrary rule can be fixed, defining what lapse of time shall expire after the representation is made before it can be said the party did not act upon it to his injury. Of course, the longer the interval, the weaker may be the case that makes such representation the foundation for a rescission, and the more difficult it may be to prove or establish the fraud based upon such misrepresentation; but all these are matters for consideration by the jury. This court cannot say, under the facts and circumstances of this case, that when this statement was published to the world in September, 1895, and subsequently repeated during the month of November of that year, it was not intended as a basis for credit for goods to be bought during the following months of January, February, and March. While the evidence in behalf of the defendants below impresses us as being strong and positive in favor of their contention that the statement given was fairly accurate at the time it was made, yet we cannot say, from other circumstances developed in the testimony, that the jury might not have discredited the truth of the statement. We will here allude to only a few prominent facts in this connection: It appears by the statement referred to that Mrs. Newman's liabilities were represented to be \$17,200; her total assets, \$35,571; the net value of her estate, \$18,371. Her return for taxes for the year 1895 was introduced in evidence, showing an amount largely and remarkably less than the value of her estate as estimated in her published statement to the commercial world. It appears further that a few months thereafter, at the time of her failure, her total indebtedness amounted to \$32,689.65,—almost double what it had been a few months before,—and that the value of her estate was largely less than that returned in her statement. It further appears that none of these debts in behalf of the defendants in error, contracted during the months of January, February, and March, were ever paid, but that in May she gave several mortgages on her stock, to secure an amount of money in excess of its value, which were directly afterwards foreclosed by the mortgage creditors. We cannot say, in the light of these facts, not only that the jury might not have inferred

she bought the goods she knew at the time she was insolvent, and that she did not intend to pay for them. We therefore think that there was sufficient evidence in this case, though it may not have been very clear, positive, or direct, to have authorized the court to give the jury in charge the principle embodied in section 3531 of the Civil Code, to the effect that where one who is insolvent purchases goods, and, not intending to pay therefor, conceals his insolvency and such intention, the vendor may disaffirm the contract and recover the goods, if no innocent third person has acquired any interest in them; and also the law embodied in section 3533 of the Code, on the subject of fraud arising from misrepresentation. Especially is this true in view of the well-recognized principle of law that, while fraud will not be presumed, yet, being subtle in its nature, slight circumstances may be sufficient to carry conviction of its existence. It was not pretended in this case that the mortgage creditors, parties defendant in the suit below, occupied the position of innocent purchasers for value; for it is not denied that the mortgages were given them, as alleged, to secure antecedent debts. Judgment affirmed. All the justices concurring.

SUPREME CONCLAVE KNIGHTS OF DAMON v. O'CONNELL.

O'CONNELL v. SUPREME CONCLAVE KNIGHTS OF DAMON.

(Supreme Court of Georgia. March 18, 1899.)

LIFE INSURANCE—ACTION ON BENEFIT CERTIFICATE—FRAUD—EVIDENCE—DIRECTING VERDICT.

1. Where the main issue in the trial of an action upon a benefit certificate of life insurance was whether or not the deceased had, for the purpose of procuring the certificate, practiced upon the association issuing it such a fraud as would render the same void, and there was evidence warranting a finding in the defendant's favor upon this issue, it was erroneous to direct a verdict for the plaintiff.

2. An entry upon the minutes of another association, to which the deceased had applied for a benefit certificate, was not, in such a trial, admissible against the plaintiff, it not being shown that the deceased had anything to do with the making of this entry.

3. Admissions or declarations by the holder of a benefit life insurance certificate, made before it was issued, and affecting its validity, are admissible against the person therein named as beneficiary, when the latter has no vested interest in the contract evidenced by such certificate, and it is, under the terms thereof, within the power of the holder, at any time before his death, to designate another person as the beneficiary.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Judge.

Action by Mary O'Connell against the Supreme Conclave Knights of Damon. Ver-

Hardeman, Davis & Turner, for plaintiff.
 Steed & Wimberly, A. W. Lane, and Hall &
 Wimberly, for defendant.

LUMPKIN, P. J. This was an action by Mrs. Mary O'Connell against the Supreme Conclave Knights of Damon. At the April term, 1896, of the superior court of Bibb county, there was a verdict against her, and this court, at the March term, 1897, granted her a new trial. See 102 Ga. 143, 28 S. E. 282. At the trial now under review the judge directed a verdict in her favor, and the defendant excepted. The plaintiff, by a cross bill of exceptions, alleges that the court erred in admitting certain evidence, the nature of which will be presently disclosed. It appears from the record that the defendant, on the 23d of January, 1893, issued to Cornelius O'Connell, since deceased, who was the husband of the plaintiff, a benefit certificate of life insurance, promising therein to pay to his wife, Mary O'Connell, on certain conditions, \$3,000, upon satisfactory proofs of his death. This certificate distinctly provided, however, that O'Connell might surrender the same, and have another issued in its stead; that is, it gave him the right to name another beneficiary if he saw proper to do so. At the trial the defendant introduced in evidence an application of O'Connell for membership in the American Legion of Honor, dated May 22, 1883; also an application by him for membership in the Royal Arcanum, dated January 14, 1889; also the following extract from the minutes of the association last named: "Cornelius O'Connell, born September 15th, 1834, between 54 and 55 years of age; Mary O'Connell, wife; Mary, Kate, Edward, Timothy, Cornelius, and Daniel, children;" also an affidavit made by O'Connell before W. A. Poe, a justice of the peace, on the 5th day of February, 1889, which was in the following words: "Personally came before me the undersigned, Cornelius O'Connell, who, on oath, saith that he was born in the county of Limerick, Ireland, on the 15th day of September, 1834." A comparison of these various documents discloses that the deceased made widely conflicting statements as to the date of his birth, and as to other matters affecting the risk upon his life. Besides this documentary evidence, the defendant introduced a considerable amount of oral testimony tending to show that O'Connell had made, on various occasions, conflicting statements as to his age. The main issue in the case was whether or not, in the application for the certificate upon which the present action was based, the representation that the applicant had, to the best of his knowledge and belief, correctly stated his age, was false and fraudulent.

1. As will have been seen from the foregoing brief summary of the evidence intro-

ducing this issue in the defendant's favor. Manifestly, therefore, the court erred in directing a verdict for the plaintiff. This disposes of the main bill of exceptions, and we will now deal with the points made by the cross bill.

2. The court erred in admitting in evidence the entry upon the minutes of the Royal Arcanum. It does not appear by whom the same was made, or that the deceased had anything to do with the making thereof. Certainly, then, it could not, in any sense, be binding upon him, or affect any right of his wife arising under the benefit certificate issued by the defendant association.

3. There was, however, no error in admitting in evidence the applications of O'Connell for membership in the Legion of Honor and the Royal Arcanum, or in admitting his affidavit made before Poe. These documents were objected to on the ground that the admissions or declarations of O'Connell relating to his age, though made before the issuance of the certificate now sued upon, could not be received against his wife for the purpose of invalidating this certificate. Had this been an action upon an ordinary life insurance policy evidencing a contract between the insurance company and the beneficiary, it would, according to some authorities, have been erroneous to admit the evidence in question. See, as illustrations, *Insurance Co. v. Willer*, 100 Ind. 92; *Schwarzbach v. Protective Union*, 25 W. Va. 622. But the principle laid down in these cases, and perhaps others, which might be cited to the same effect, is not, in our opinion, applicable to a case like the present. In this connection we extract the following from *Nibb. Ben. Soc. & Acc. Ins.* (2d Ed.) 325, which apparently goes to the extent of declaring that admissions by the holder of a benefit certificate, though made after its issuance, are admissible against the beneficiary, if the holder had the power to name at will another as the person who should claim under the certificate: "In ordinary life insurance, where the contract is between the company and the beneficiary, where a vested interest passes to the beneficiary, and the assured ceases to be a party in interest, it is held that the admissions of the assured after the issuing of the policy are not admissible to defeat the contract. The reason upon which the rule is founded is that, after the contract of insurance is effected, the assured has no such relation to the beneficiary as gives him the power to affect or destroy it by his statements. But in contracts of mutual benefit insurance, where the contract is between the society and the member, where the beneficiary has only an expectant interest, and the member insured has full power and dominion over the contract until the moment of his death, it has been held that the reason for the rule in ordinary insurance does not exist, and that there is no escape from the conclusion that, since the beneficiary has no vested interest in the

be against the beneficiary just as they would be against his legal representatives." The author cites *Smith v. Society*, 123 N. Y. 85, 25 N. E. 197, affirming a decision rendered by the supreme court of New York reported in 51 Hun, 575, 4 N. Y. Supp. 521. Even if we should accept as sound, to the full extent indicated in the language above quoted, the rule relating to admissions by the insured which has been applied to cases of ordinary life insurance, we think it is perfectly clear that this rule, certainly so far as relates to admissions or declarations made before the insurance was obtained, should have no application to contracts like the one with which we are now dealing. It will have been observed that Mrs. O'Connell had no absolute and vested interest in the benefit certificate issued to her husband, but that he retained full power and control over it up to the time of his death. Our attention has been called to the case of *Supreme Lodge v. Schmidt*, 98 Ind. 374. The opinion therein was delivered by the Honorable William E. Niblack, and it appears that his conclusion was entirely different from that reached by Mr. William C. Niblack, of the Chicago bar, the author of the text-book from which we have above quoted. It appeared in that case, however, that the admissions of the insured sought to be shown were made subsequently to the issuing of a certificate made payable to a named beneficiary, or "to such other person or persons as the insured might subsequently direct." Accordingly, it was not decided what effect should be given to statements by the insured made prior to his application for membership in the society. On principle, it would seem that the beneficiary would be bound by the knowledge of the insured, at the time of applying for a certificate, that the representations he made as to his age, or as to other matters affecting the risk, were false, as such fraudulent representations would have the effect of rendering the contract void ab initio, even considering it as a contract between the association and the beneficiary, effected through the latter's agent. Upon the theory that the insured acts as the agent of the beneficiary in procuring insurance for his benefit, knowledge of the falsity of such representations on the part of the agent would be imputable to his principal; and though, after the contract had been effected, and the agency had terminated, the insured might, with much reason, be said to have no power to bind the beneficiary by any admissions against the latter's interest, contradictory statements made by the insured prior to making the contract would certainly be competent evidence, not upon the idea that an agent has authority to make in behalf of his principal admissions against the latter's interest, but as tending to show knowledge on the part of the agent that the representations made by him in behalf of his principal to induce the association to en-

ter into which his agent has fraudulently induced a third party to enter, for the principal cannot in part ratify and in part repudiate the act of his agent in effecting the contract, and thus relieve himself from responsibility for the wrongful conduct of his agent. It is true that, ordinarily, no agency primarily exists between the insured and the beneficiary in a policy of life insurance, for generally the insured acts on his own motion, and without direct authority from the person in whose favor the company is instructed to issue the policy. But such person cannot claim the benefits arising from the contract unless he subsequently ratifies the act of the insured in taking out the policy, in which case the beneficiary becomes bound by any misrepresentations made by the insured to the same degree as would have been the case had the latter been the accredited agent of the beneficiary at the time the policy was actually issued. In dealing with policies so issued, they are commonly regarded as evidencing a contract between the insurance company and the person named as beneficiary, for the reason that the law will presume the acceptance of a gift or benefit sought to be bestowed by one person on another. Of course, where the beneficiary sues upon such a policy, the courts rightly treat the contract as one, not between the insured and the company, but between it and the plaintiff; for, by seeking an enforcement of the contract, the beneficiary necessarily adopts as his own the act of the insured in taking out the policy. In this connection, see *Bish. Cont.* §§ 1222-1226. In any view of the matter, therefore, we are not prepared to hold that the trial judge committed error in admitting the evidence last above referred to. Judgments on both main and on cross bills of exceptions reversed. All the justices concurring.

PHOENIX INS. CO. OF HARTFORD, CONN., v. GRAY.

(Supreme Court of Georgia. March 18, 1899.)

APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY—IMPEACHMENT—NEW TRIAL—SPECIAL AGENT—INSURANCE—BREACH OF CONDITIONS.

1. A bill of exceptions, which complains of the overruling of a certiorari sued out to review, in a superior court, a judgment of a city court denying a motion for a new trial, is, as to the matter of assigning error, sufficiently clear and explicit when it alleges that the superior court erred in overruling the certiorari, it appearing that a copy of the motion for a new trial was attached to the petition for certiorari, and that in this petition exception was taken to the action of the city court in refusing to grant the motion.

2. There was no error in rejecting a letter which had been written by a witness, and which was tendered in evidence for the purpose of impeaching him, when it contained nothing in conflict with his testimony on the stand.

3. Admitting illegal evidence offered to establish a particular contention is not cause for

given with reference thereto, this evidence was not calculated to injure the party objecting to the same.

4. A principal is not bound or affected by the unauthorized acts of a special agent with limited powers, unless he ratifies the same.

5. An instruction which puts upon a party the burden of establishing an admitted fact is calculated to mislead a jury, and should not be given.

6. A policy of fire insurance, covering a house and furniture, and containing a stipulation rendering it void if the insured shall, without the consent of the company, procure additional insurance on the property covered, in whole or in part, by such policy, becomes void if the insured, without such consent, obtains from another company a policy insuring the furniture only.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by E. T. Gray against the Phoenix Insurance Company of Hartford, Conn. Judgment for plaintiff. Defendant brings error. Reversed.

Anderson, Anderson & Grace, for plaintiff in error. Estes & Jones, for defendant in error.

LUMPKIN, P. J. The Phoenix Insurance Company issued to E. T. Gray a policy of fire insurance for \$1,525, covering a building and the furniture therein. In the policy was a stipulation that, unless otherwise provided by agreement indorsed thereon or added thereto, it should "be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy." The property insured was consumed by fire, and Gray brought his action against the insurance company. The defense was that, after taking out the policy above mentioned, Gray had procured from the Orient Insurance Company a policy in the sum of \$300, covering the same furniture as that insured by the Phoenix Company. There was no contention that this company had, by agreement, consented to the additional insurance. It appeared at the trial that the second policy was taken out by one Rodgers, who at the time was assuming to act for Gray in so doing. The defendant contended (1) that Rodgers was the general agent of Gray, and, as such, was authorized to take out this policy; (2) that Rodgers was especially authorized by Gray to obtain the additional insurance from the Orient Company; and (3) that, after this policy had been procured by Rodgers in behalf of Gray, the latter, with a full knowledge of the facts, ratified what Rodgers had done, and claimed that the Orient Company was liable upon this policy. On the other hand, Gray contended (1) that Rodgers was not his general agent; (2) that he had never instructed Rodgers to take out this policy in the Orient Company, but had specifically directed him to get the additional insurance from the Phoenix Company; and (3) that he had never in any

intended to do so. The defendant, however, ponderated upon the side of the defendant, but there was enough testimony, if entitled to credit, to sustain the verdict returned in the plaintiff's favor. In view, however, of what has just been stated, it is quite clear that a new trial should be ordered if any material error of law was committed by the trial judge. We have reached the conclusion that there was at least one such error, which will be pointed out at its proper place in the discussion which follows. The bill of exceptions alleges error in overruling a motion for a new trial filed by the defendant. Before undertaking to deal with the questions thereby presented, we will first dispose of a question of practice raised in this court by a motion to dismiss the writ of error.

1. The case was tried in the city court of Macon. A motion for a new trial was made by the company, and overruled by the judge of that court. The defendant then sued out a certiorari, alleging in its petition that the city court erred in overruling the above-mentioned motion, and attaching to the petition a copy thereof. The superior court overruled the certiorari, and the bill of exceptions alleged that this was error. The motion made here to dismiss the writ of error was based on the ground that the bill of exceptions did not "specify plainly the alleged error complained of, the specification of error consisting of a reference to the errors specified in the certiorari, which certiorari specifies the error by reference to the motion for a new trial reviewed by the certiorari." We have no difficulty in reaching the conclusion that the case was properly brought to this court. By attaching to the petition for certiorari a copy of the motion for a new trial, and alleging that the judge of the city court erred in denying this motion, the questions upon which the superior court was asked to pass were distinctly made; and the bill of exceptions, in alleging that the superior court erred in overruling the certiorari, is sufficiently clear and explicit in the matter of assigning error. There was certainly no necessity for incorporating into the bill of exceptions the grounds of the motion for a new trial. A copy of the same, as has been seen, was attached to the petition for certiorari, which was specified as a material part of the record, and is therefore regularly before this court.

2. On the trial in the city court, Rodgers was introduced as a witness for the plaintiff, and testified at considerable length. The defendant offered in evidence, for the purpose of impeaching this witness, a letter written by him after the fire to an agent of the company. This letter was objected to as irrelevant, and the objection sustained. A careful examination thereof discloses that it really contains nothing contradictory of, or in conflict with, the statements made by Rodgers

3. The plaintiff offered certain evidence with the object of showing that the defendant company had waived its right to contend that its policy was void on the ground of "double insurance." This evidence tended to prove that the company, after having received proofs of loss, expressed dissatisfaction with the same, and called for additional proofs. The court admitted this evidence over the defendant's objection, but, as appears from the record, subsequently charged the jury that it did not establish the alleged waiver; that it should accordingly be disregarded; and that the only issue for determination by them was whether or not Gray in fact procured concurrent insurance, in violation of the stipulation contained in the defendant's policy. It therefore plainly appears that the alleged error in admitting the evidence objected to was effectually cured, and consequently affords to the company no cause of complaint. What the court did was, in effect, a complete ruling out of this evidence, and it could have had no bearing whatever upon the jury's determination of the case; for we must assume that they followed the plain instructions of the court with respect to this matter.

4. The fourth headnote deals with one of the main questions involved at the trial. The court correctly instructed the jury, in effect, that if Rodgers was only the special agent of Gray, and, as such, was in terms directed to procure the additional insurance in the Phoenix Company, but in violation of his instructions took out a policy in the Orient Company, then Gray would not be bound by what Rodgers did in the premises, unless, with a full knowledge of the facts, Gray subsequently ratified Rodgers' unauthorized act. It seems to us a proposition too plain for discussion that a special agent, with limited powers, cannot, by any act outside the scope of his authority, bind his principal. While the latter may, of course, by adopting as his own the unauthorized act of the agent, render the same binding upon himself, the agent's violation of duty can count for nothing, in the absence of such ratification on the part of his principal. The charge of the court was in exact accord with the familiar rule here stated. In the same connection, the trial judge further charged, as it was proper to do in view of the defendant's contentions, that, if Rodgers was the general agent of Gray for the transaction of all his business, then what Rodgers did in taking out the policy in the Orient Company was binding upon Gray, irrespective of the question of ratification.

5. Complaint is made of the following charge: "In order for the defendant to avail itself of the defense that the plaintiff secured, authorized, or ratified the taking of a second policy of insurance which would avoid the first policy, the burden is on the insurance company to show, by a preponderance of the

property was covered by both policies, and there being no controversy whatever as to this point, it is obvious that the charge above quoted should not have been given, as it introduced an issue upon which the jury were not called upon to pass. In other words, the instruction complained of placed upon the defendant the burden of establishing, by a preponderance of testimony, an admitted fact, and therefore may have had some tendency to mislead and confuse the jury.

6. The court further charged the jury in this connection: "If you believe from the evidence in the case that the policy sued on covers other and different property from that covered by the Orient policy introduced in evidence, then I charge you that the policy sued on would not be avoided by the taking out of the Orient policy, although such Orient policy may have been taken out on the authority of the plaintiff or ratified by him." The error of this instruction is manifest, and, in our judgment, entitled the defendant to a new trial. It practically amounted, in view of the undisputed facts shown by the evidence, to directing a verdict in favor of the plaintiff. There was no dispute that his house, as well as his furniture, was insured under the policy issued by the Phoenix Company, whereas the policy taken out in the Orient Company covered only his furniture. Consequently the jury, in following this instruction, were constrained to find for the plaintiff, regardless of the merits of the defense relied on by the defendant company. We order a new trial because of the error thus committed, and for the further reason that, in view of the entire record and the general complexion of the case, the ends of justice require that it should undergo another investigation. Judgment reversed. All the justices concurring.

POLLOCK v. NATIONAL BUILDING & LOAN ASS'N et al.

(Supreme Court of Georgia. March 18, 1899.)

APPEAL—REVIEW—INTERLOCUTORY INJUNCTION.

This being an equitable petition to enjoin the further progress of a dispossessionary warrant sued out to evict the plaintiff below from the premises in dispute, and there being some evidence warranting a finding that he contracted, as a tenant of the main defendant, to pay rent to the latter, and that there was a sufficient consideration to support the contract, this court, while not regarding the evidence just referred to as very strong or satisfactory on either of those points, will not, it being undisputed that the rent, if due at all, was unpaid, interfere with the discretion of the trial judge in denying the interlocutory injunction, but will leave the case to be fully heard and determined upon its merits by a jury at the final hearing.

(Syllabus by the Court.)

tional Building & Loan Association and others. From an order denying an interlocutory injunction, plaintiff brings error. Affirmed.

H. F. Strohecker, for plaintiff in error. S. A. Reid, for defendants in error.

PER CURIAM. Judgment affirmed.

JOSEY et al. v. GORDON et al.
(Supreme Court of Georgia. March 18, 1899.)

ALLOWANCE TO WIDOW.

When, by a year's support, duly set apart to a widow for herself and her minor children, she is allowed a sum of money, the collection of which must necessarily, and in any event, exhaust the entire assets of the estate, neither she nor the children can, as heirs or distributees, recover anything from the administrator. This is so for the obvious reason that the estate in his hands is subject to the judgment for the year's support, the enforcement of which would completely exhaust the assets, and leave nothing for distribution to heirs.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Judge.

Petition by W. M. Gordon, administrator, to marshal the assets of an estate. Clara E. Josey, as widow, for herself and her minor children, and others, intervene. Judgment for the administrator, and interveners bring error. Affirmed.

Alex. Proudft and Chambers & Jordan, for plaintiffs in error. Smith & Jones, Bacon, Miller & Brunson, Dossan, Bartlett & Elms, Hardeman, Davis & Turner, Steed & Wimberly, Dasher, Park & Gerdine, Ryals & Stone, Anderson, Anderson & Grace, A. W. Lane, J. L. Hardeman, and I. L. Harris, for defendant in error.

SIMMONS, C. J. Josey died in October, 1879, leaving some household and kitchen furniture, and an interest in a partnership, which interest was worth \$1,729.57. Johnson was appointed administrator of his estate. Mrs. Josey applied for a year's support for herself and minor children, and commissioners were appointed, who assigned to her the household and kitchen furniture and \$2,000 in money. Their report was approved by the ordinary, and made a judgment of the court of ordinary, in the year 1884. Johnson died in the year 1893, and Gordon was appointed his administrator. He filed an equitable petition to marshal the assets of Johnson's estate. During the pendency of the litigation brought on by this petition, Mrs. Josey, and some of her children who were of age, and she as next friend of those who were minors, filed an intervention, claiming that Johnson, the administrator of Josey's estate, had never settled or accounted with them as heirs and distributees of that estate. There was an agreed statement of

The agreed statement of facts shows that Johnson received in money only about \$1,200, and that he had a set-off of a large amount against Mrs. Josey, which included supplies for the family, tuition for the children, etc. It was contended by the administrator of Johnson that the demand was stale, and, further, that he ought to be allowed to set off the demand against Mrs. Josey, and have a judgment against the interveners for the surplus. In the view we take of the case, it is unnecessary to decide either of these questions. This is especially so as to the latter, for the trial judge did not allow the set-off, and the administrator did not except to that judgment. We think that when Mrs. Josey applied to the ordinary, and had set apart as a year's support an amount larger than the whole estate, this gave her the highest lien on the entire estate for the benefit of herself and children. It was a judgment of the court, which virtually took the whole estate out of the hands of the administrator, and placed it in her. She had the right to enforce the judgment by execution, if she saw proper to do so. It deprived her and her children of any distributive share in the estate of Josey. It changed the general law of administration by, in effect, taking the whole estate from the administrator, and placing it in the hands of the widow. When that was done, there could be no distributive share, because there was nothing for the administrator to distribute. Hence, when the interveners claimed as distributees only, the judge was right in disallowing the claim. Whatever rights they may have had as creditors of Johnson under the judgment of the court of ordinary, it is clear that they have no right as heirs and distributees, and only as heirs and distributees did they seek by their intervention to recover. Judgment affirmed. All the justices concurring.

WARWICK v. SUPREME CONCLAVE KNIGHTS OF DAMON.

(Supreme Court of Georgia. March 18, 1899.)

BENEFIT CERTIFICATE—FORFEITURE—NONPAYMENT
OF ASSESSMENTS—AFFIRMATIVE ACTION.

Where a certificate in the nature of a policy of life insurance has been issued by a benefit association to one of its members, promising to pay out of its beneficiary fund to the wife of the member a specified amount upon his death, and where it is stipulated in the certificate that it is issued upon condition "that the said member complies in the future with the laws, rules, and regulations now governing said conclave and fund or that may hereafter be enacted by the supreme conclave to govern said conclave and fund," the nonpayment of an assessment made upon the member for the common benefit fund which had become due and payable under the laws of the association will not ipso facto amount to a forfeiture of the benefit of life insurance provided for in the certificate; it appearing that

is a ground of suspension, a forfeiture of his benefits under the certificate will not result from such nonpayment, unless there has been some judicatory or affirmative action by the association declaring the member suspended. (b) The mere fact that the collector of such association has entered upon the account of the defaulting member the word "suspended," and has recored the same on the books of the association, would not amount to such affirmative action; the collector not being empowered to declare a member suspended for any reason, and no action whatever having been taken by the association approving or authorizing such entry on his books.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by T. F. Warwick, guardian, against the Supreme Conclave Knights of Damon. Judgment for defendant, and plaintiff brings error. Reversed.

Hardeman, Davis & Turner, for plaintiff in error. Hall & Wimberly, A. W. Lane, and Steed, Ryals & Stone, for defendant in error.

LEWIS, J. It appears from the record in this case that the following facts were developed on the trial below: On the 13th of October, 1891, the Supreme Conclave Knights of Damon issued to James A. Kennedy what is known as a "benefit certificate," upon evidence received from the subordinate conclave in Macon that he was a third-degree member of that conclave, and was a contributor to the benefit fund of the order issuing the certificate. The conditions named in the certificate were, in substance, that the statements made by Kennedy in his petition for membership and certified by him to the medical examiner were made a part of the contract, and the further condition that he would comply "in the future with the laws, rules, and regulations now governing the said conclave and fund or that may hereafter be enacted by the supreme conclave to govern said conclave and fund." These conditions being complied with, the supreme conclave promises and binds itself in the certificate to pay out of its beneficiary fund to Fannie W. Kennedy, the wife of the applicant, \$3,000, in accordance with the provisions of the laws governing the fund, upon satisfactory evidence of the death of the member, or a sum not exceeding \$1,500 upon satisfactory evidence of the permanent total disability of the member, and upon surrender of the certificate; provided, that the member is in good standing in the order at the time of the death or disability. Besides paying a stated sum to its members upon death or disability, it seems that another object of the association was to look to the social and moral culture and enjoyment of its members. Two kinds of payments were required of members of the association. One was known as "dues," which were payable quarterly in advance and

paid by the member to the collector of the subordinate conclave, and by the latter forwarded to the supreme conclave. This assessment from the various members of the association, it seems, constituted the fund relied on for meeting its obligations under the benefit certificates. In the case of Kennedy, the assessment amounted to \$2.28 per month. On the 30th day of August, 1895, Kennedy, while away from home, was killed in a wreck on a railroad. He had paid all dues since his membership required of him up to October 1st following his death, and at the time of his death he was not in arrears for any assessment, save for the month of August, 1895. Prior to his death, his wife had died; and when he died he left as his only heir at law a minor son, who, under the rules of the association, became the only beneficiary under the benefit certificate. Warwick, the guardian of this minor, brought suit on the certificate in the city court of Macon against the Supreme Conclave Knights of Damon. On the trial of the case, after the testimony for both parties had closed, the court directed a verdict for the defendant; whereupon plaintiff moved for a new trial, and in his bill of exceptions complains of error in the judgment overruling his motion. The defense relied upon was that the nonpayment of the assessment for August, 1895, operated as a forfeiture of the insurance and of all benefits under the certificate. The laws of the supreme conclave and of the subordinate conclave of which deceased was a member were introduced in evidence, and we refer in this connection to such portions of them as seem to bear upon the issues involved in this case. It is provided in the first section of the laws of the supreme conclave that "every applicant, before becoming a member, shall pay to the collector, in accordance with his age and the amount of protection applied for, a monthly assessment as provided in the following table, and shall continue to pay the same amount on the first day of each month thereafter whilst remaining a member of this order in good standing." Section 6 of these laws declares that, "on the death of a member who, at the time of his death, shall not be under suspension for the nonpayment of benefit assessment, the conclave shall appoint a committee to ascertain the cause of death and the circumstances attending the same." The section then provides for forwarding the report of the committee and proof of death to the supreme secretary. Section 9 provides that "monthly assessments shall be due and payable to the collector, without notice, on the first day of each and every month, and it shall be the duty of every subordinate conclave to immediately forward to the supreme treasurer the assessments due from every member." Section 10, among other things, declares that, "if

a copy of it to the proper officer of the supreme conclave. This official, on the 31st day of August, after the death of Kennedy, mailed him a notice informing him of the suspension. This August account with Kennedy marked "suspended" thereon was by the collector of the subordinate conclave entered on the books of that conclave, the collector being the custodian of the books. It appears from his testimony that no vote of the order was taken declaring the suspension. It does not appear that the minutes were ever approved, or that even any announcement was had in a meeting of the conclave that Kennedy had been suspended on account of the nonpayment of an assessment. The secretary of the supreme conclave testified, in effect, that his conclave had nothing to do with suspending members for nonpayment of assessments, but that that was the duty of subordinate conclaves. He also said in his testimony that, "when a member failed to pay an assessment when due, he suspended himself."

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in the law; and, in order to work a forfeiture of the rights of membership in a mutual association, it must clearly appear that such was the meaning of the contract, and the facts upon which a forfeiture is claimed must be proved by the most satisfactory evidence." There is also a well-recognized rule of construction, applicable to insurance companies generally, to the effect that contracts of insurance prepared by the insurer will be rigidly construed against him and liberally construed in favor of the insured. In the case of *Association v. Robinson* (Ga.) 30 S. E. 918, this principle is declared in the following words: "If a policy of insurance is capable of being construed in two ways, that interpretation must be placed upon it which is most favorable to the insured." See the opinion of Justice Cobb on this point and the authorities cited therein. This doctrine is directly applied to benefit associations in 3 Am. & Eng. Enc. Law (2d Ed.) 1067, in the following language: "When the rights of members or their beneficiaries are involved, by-laws declaring a forfeiture are to be construed strictly if their validity is called in question, and liberally if it is sought to bring such claimants within their provisions, so as to prevent a forfeiture in either case, and in order to do complete justice." The following cases are examples of the rigidity with which this principle has been enforced by the courts: In *Masi v. Congrega San Donato* (Sup.) 40 N. Y. Supp. 667, it was decided that, under a provision of the constitution of a mutual benefit society, any member failing to pay his "monthly dues or other dues" for a certain time should forfeit his membership, a forfeiture would not result, unless the default was as to both monthly dues and other dues. In the case of *Osterman v. Grand Lodge* (Cal.) 43 Pac. 412, it was held that "where the laws of a mutual endowment association make suspension for nonpayment of dues a forfeiture of membership benefits, and provide a formal method for suspension in such case, nonpayment of dues will not ipso facto work a forfeiture, though the assured was secretary of the society, and formal proceedings have not been had because he failed, as required, to report his own delinquency." Following as a necessary corollary to this doctrine, and clearly sustained both by reason and authority, is the further rule, made especially applicable to mutual benefit associations, that a failure by a member who has acquired such a benefit certificate as appears in this record to comply with any particular law, rule, or regulation in the constitution and by-laws of the society does not ipso facto work a forfeiture of his membership benefits. Before such noncompliance can of itself amount to a forfeiture, it must be clearly shown that some rule of the association, which enters into and forms a part of the contract between

declaring the suspension or adjudging the forfeiture. In 3 Am. & Eng. Enc. Law (2d Ed.) 1066, this principle is recognized in the following language: "It should be clear that a condition that the obligation of the association to pay benefits or insurance depends upon the compliance by the member with all the laws of the association is not a condition the failure of which works an absolute forfeiture but one which calls for an affirmative exercise of jurisdiction by the association to produce that effect." In 2 Bac. Ben. Soc. § 383, the rule is made directly applicable to the nonpayment of assessments, and is stated in the following way: "Unless the constitution and laws of the society make nonpayment of an assessment operate as a forfeiture, the failure of a member to pay such assessment only makes him liable to expulsion from the society or suspension from its benefits, for which some affirmative action of the lodge or society is necessary; and the mere act of the secretary in marking the member's account as 'suspended' is not sufficient." See, also, 2 May, Ins. § 560b; *Thompson v. Insurance Co.*, 104 U. S. 252.

After a very careful review of authorities both text-books and decisions of courts of other states, we have reached the conclusion that there is really no conflict of authority touching the soundness of the views heretofore expressed as principles of law. The apparent conflict arises out of the applications of these principles to the facts of particular cases. Some courts have been more rigid in their construction of these contracts against the insurer than others; but upon a careful review of the authorities cited by counsel for defendant in error, as well as many others we have examined, there is none which would authorize such a construction of the contract under consideration in this case as would work a forfeiture of benefits thereunder. For instance, in the case of *Pitts v. Insurance Co.* (Conn.) 34 Atl. 95, it was simply ruled that "where a mutual benefit certificate and the application for it provide that, if the monthly dues, assessments, etc., required to be paid are not paid to the company on the day due, the certificate shall be void, the payment of such dues and assessments is a condition precedent to any subsequent liability of the company, and it need not take any action declaring a forfeiture in order to relieve it of liability." The distinction between that case and this one will be readily seen, for there it appears from the decision itself that the contract expressly provided that such nonpayment would operate to render the certificate void. In *Scheele v. Home Lodge*, 68 Mo. App. 277, it appeared that the by-laws of the benefit society required members to pay assessments within 30 days after notice. It was held by the court that a violation of this requirement worked a

facts of that case on page 282 it will be seen that it was provided in the by-laws, which formed a part of the contract, in "plain and unambiguous" terms, that "no certificate shall be binding, nor shall any assessment be made to meet the requirements of any certificate, whose holder is in arrears for more than thirty days on any legitimate assessment thereunder." Evidently the court meant to rule that such language expressly provided for a forfeiture on account of nonpayment ipso facto. In *Lyon v. Supreme Assembly* (Mass.) 26 N. E. 236, payment of the policy was conditioned on the member's being in good standing, and, under the terms of the constitution of the society, in point of fact he was not in good standing at the time of his death. There is nothing in that case in conflict with the ruling made in the present case, or with the decision of the same court in *Chamberlain v. Lincoln*, 129 Mass. 70. It was decided in the latter case that, although a subordinate lodge has done acts which render it liable to have its charter declared forfeited by the grand lodge, yet, until such forfeiture has been declared, it has lost none of its rights to the property of the lodge. In the case of *Borgraefe v. Supreme Lodge*, 22 Mo. App. 127, while it was decided that nonpayment of an assessment worked a forfeiture, it appears that the decision was based upon the idea that the member stood suspended by operation of the laws of the order. In the report of the facts of that case it further appeared that the plaintiff's wife, who was a beneficiary member of the lodge of the defendant, paid for the husband the price of what was known as a "withdrawal card," and presented his resignation as an officer of the lodge. The facts, therefore, upon which that decision was based, are quite different from those presented by this record. There is not a single provision contained either in the benefit certificate sued upon or in the laws of the conclave, which were introduced in evidence by the defendant and claimed by it to constitute a part of its contract, expressly making the nonpayment of an assessment operate per se as a forfeiture of any benefit which the deceased had acquired under the certificate. There is quite a difference between suspension itself and a ground of suspension. The conclave in this case no doubt had the right to suspend this member, and such suspension would have worked a forfeiture of his benefits; but it also had the privilege to waive this right, and exercised it by failing to take any affirmative action in the matter. The first law of the conclave quoted above in the statement of the facts of the case simply declared that every applicant, before becoming a member, should pay a certain monthly assessment, and should continue to pay the same thereafter, on the 1st day of each month. There is no provision in that clause expressly working a forfeiture solely

death shall not be in suspension for the nonpayment of benefit assessments, the conclave shall appoint a committee to ascertain the cause of his death, etc. The rule might have been quite different if, instead of the words "in suspension," the words "in arrears" on his benefit assessments had been used. The next section quoted (9) simply declares that the assessments shall be due and payable to the collector without notice on the 1st day of each month. We have carefully examined not only these clauses and others to which our attention has been directed, but also the entire by-laws and constitution of the order in this record, and we have failed to find a single provision therein expressly declaring or even indicating to our minds that it was the intention of the parties that nonpayment of assessments should ipso facto work a forfeiture. Section 1 of article 8 of the constitution of the subordinate conclave provides, among other things, that any member who may become sick or otherwise disabled while in arrears to the conclave for dues and fines can by paying the same become entitled to receive benefits during such sickness or disability. This provision has no application in this case, for, in the first place, a member must be in arrears for both dues and fines, and the term "assessment" is not used; and, as above indicated, the term "assessment" applies to payments to be made the supreme conclave, and "dues" to money owing the subordinate conclave. Besides this, the article has no reference whatever to benefits arising from the death of a member, but simply to such benefits as he may be entitled to during illness or disability. Section 1 of article 5 of the constitution provides, among other things, that the commander (referring to the commander of the subordinate conclave) shall declare in open conclave such members suspended as are in arrears for assessments or indebtedness to the conclave for more than three months' dues. It appears from the record that no action was ever taken by the subordinate conclave or the supreme conclave, or by any authorized official of either, even declaring that Kennedy stood suspended on account of the nonpayment of his assessment. All the action taken was by the collector marking on the account of the deceased the word "suspended," and entering the account upon the books of the conclave in his custody, and transmitting the account or a copy thereof to the supreme conclave. No duty or power is conferred by the laws of the order upon the collector to declare any member suspended for any reason. As to his entry upon the books, it appears from his own testimony that no vote was taken by the conclave on the matter, and that it was simply his own act, for which he alone was responsible. The supreme conclave took no action, save that one of its officers mailed a notice to the address of the insured, after his

a member for nonpayment of dues or assessments, but that that was a matter concerning only the subordinate concave.

In addition to what has been said, we think the citation of a few of the authorities bearing upon this question will clearly show that the general, if not the uniform, drift of judicial opinion upon this subject, would constrain us to hold that the facts of this record wholly fail to show that the deceased had forfeited his rights under this benefit certificate. In the case of *Scheu v. Grand Lodge*, 17 Fed. 214, it was held that the mere nonpayment of an assessment did not of itself operate as a suspension, and that the act of the secretary in marking the account of the insured as "suspended" was not sufficient, as such suspension must be made by some affirmative action of the lodge. It further appeared in that case that, while the member was in default in not paying the assessment of the subordinate lodge, the latter had advanced the amount to the grand lodge, and this amounted to a waiver of suspension by the grand lodge. We cite the case to show that the action of the secretary, which was the same as the act of the collector in this case, amounted to nothing. There were two principles decided in the case. One was that the mere nonpayment did not of itself operate as a suspension, and the other was that the act of the secretary in marking the account would not work such suspension. In the case of *Insurance Co. v. Buckley*, 83 Pa. St. 293, it appeared that that company was a mutual fire insurance company, and that the contract provided that, if the amount assessed upon the premium note given on the policy was not paid within 30 days after assessment, the policy should be void. Due notice of assessment was given and demand of payment made. It was held that, although a condition be attached to a policy declaring it void on failure to pay an assessment upon a premium note within a specified time, default in payment would not ipso facto avoid the policy. As an illustration of the rigid construction given contracts of the character involved in the present case, we quote the following from the opinion on page 296: "To secure a more prompt payment of the assessments, most companies have inserted a clause in their policies declaring the same shall be void unless the assessment be paid within a specified time after notice. The word 'void,' in a contract, has often been held to mean voidable only, and at the election of the party wronged." In the case of *High Court, I. O. F., v. Edelstein*, 70 Ill. App. 95, it was decided that "a provision in the constitution of a benefit society that members 'shall be dropped from membership in the order' for failure to pay assess-

ments and become delinquent" is binding directly upon the issue involved, see, also, the following cases: *Petherick v. Order of Amaranth* (Mich.) 72 N. W. 262; *Lamarsh v. L'Union St. Jean Baptiste* (N. H.) 38 Atl. 1045; *Knights of Honor v. Wickser* (Tex. Sup.) 12 S. W. 175; *Sanford v. Insurance Ass'n*, 63 Cal. 547.

From the above principles, and their application by, to say the least, the decided weight of authority, we have reached the following conclusions: (1) In determining the meaning of benefit certificates of the character involved in this case, the law adopts a rigid construction against the association preparing the contract. (2) The law does not favor a forfeiture, and consequently courts will seek to give a construction to a contract, if permitted by its terms, that will avoid such result. They therefore will not declare a forfeiture, unless expressly required to do so by the terms of the contract. (3) A benefit certificate of the character involved in this action will not be construed as intending a forfeiture of benefits thereunder for failure to comply with any rule in the constitution and laws of the association. (4) Before such noncompliance can ipso facto amount to a forfeiture, some rule of the association that enters into and forms a part of the contract must expressly so provide. If there is no such provision, affirmative action must be taken by the lodge having jurisdiction of the matter, formally declaring the suspension or adjudging the forfeiture. (5) Such requisite action is not had by the collector simply marking on the delinquent's account "suspended," and entering it on the books of the association; it not appearing that such official had authority to declare the suspension, and it further not appearing that his entry upon the minutes of the association was ever authorized by it or by any official who had authority to act in the premises. Applying these principles to the facts of this case, we are of opinion that the court below erred in directing a verdict in favor of the defendant. It is a harsh rule to declare that one who, like the deceased, has for years been paying his dues and assessments to his company, and by accident has met with his death after being in default for a few days by failing to pay a monthly assessment of less than three dollars, thereby forfeits all benefit from his investment. When he has expressly made such a contract, the courts will enforce it; but, on account of the harshness of the rule, the law will construe the contract liberally in his favor, and will never imply such an agreement from such facts and circumstances as are presented by the record before us.

Judgment reversed. All the justices concurring.

(Supreme Court of North Carolina. May 2, 1899.)

**WITNESSES FOR DEFENDANT IN CRIMINAL CASE—
COMPENSATION—PAYMENT BY COUNTY.**

Under Code, § 747, providing that, whenever a person accused of crime shall be acquitted, it shall be the duty of the court, unless the prosecutor be adjudged to pay the costs, to direct the witnesses for accused to be paid by the county, in the same manner and to the same extent as is authorized for the payment of the state's witnesses, and section 733, authorizing the court, in its discretion, to direct that witnesses for the state in a criminal case shall receive none, or only a portion, of the compensation allowed by law, it is discretionary with the court to refuse to direct a county to pay the witnesses for defendant on his acquittal.

Douglas, J., dissenting.

Appeal from superior court, Rutherford county; Starbuck, Judge.

Frank Hicks, being charged with crime, was acquitted, and from an order refusing to direct the county to pay his witnesses he and the witnesses appeal. Affirmed.

M. H. Justice, Matt McBrayer, and E. J. Justice, for appellants. The Attorney General, for the State.

CLARK, J. The court below found that the three witnesses named were necessary and material witnesses for the defendant, duly subpoenaed and examined, but that "for reasons satisfactory to the court, and in the exercise of the discretion in such cases vested in the presiding judge," he refused to order the witnesses paid by the county. From this order the defendant and the three witnesses named appealed. The appellants contend that the Code (section 747) prescribes that the judge "shall" direct that the county shall pay the witnesses of an acquitted defendant (unless taxed against the prosecutor), but this must be taken in connection with the last two lines of said section (747), "in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases;" and, as to state's witnesses, the sections (733, 744) place it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of the state's witnesses, in whole or in part, to be paid by the county. In *State v. Massey*, 104 N. C. 877, 10 S. E. 608, the history of the taxation of witness fees is fully discussed, with statement of the reasons why it is left so largely to the discretion of the presiding judge. It is therein said: "As to the necessary witnesses [of defendants who are acquitted] the constitutional provision (article 1, § 11) does not require that they shall be paid by the public, but merely deprives them of their common-law right to look to the defendant for payment, and places them, except when there is some legislative enactment, upon the footing all state's witnesses formerly held, and some still hold, of serving without compensation." It is necessary that some one be charged with

what is just and reasonable. The judge who tries the case can discharge that duty better than any one else, and, the statute having expressly vested it in his discretion upon satisfactory reasons appearing to him (Code, §§ 733, 744, 748), no appeal can be taken. *State v. Massey*, supra, which has been cited and approved in many cases,—among others, *In re Smith*, 105 N. C., at page 170, 10 S. E. 982; *Merrimon v. Commissioners*, 106 N. C., at page 372, 11 S. E. 268; *State v. Horne*, 119 N. C. 853, 26 S. E. 36; *Guliford v. Board*, 120 N. C. 23, 27 S. E. 94; *Clerk's Office v. Board*, 121 N. C., at page 30, 27 S. E. 1003; and by *Faircloth, C. J.*, in *State v. Ray*, 122 N. C. 1095, 29 S. E. 948, in which last case the findings of fact are almost identical with those in the present case. There are many other instances in which the action of the judge below is a matter of discretion, and not reviewable,—as setting aside or refusing to set aside a verdict because excessive or against the weight of the evidence, granting or refusing amendments, continuances, and in other matters fully as important as questions of allowing witness fees. Affirmed.

DOUGLAS, J., dissents.

STATE v. DAVIDSON.

(Supreme Court of North Carolina. May 2, 1899.)

LARCENY—PRIOR CONVICTION—INDICTMENT—SUFFICIENCY—CRIMINAL LAW—APPEAL BY STATE.

1. Where defendant was accused of theft of property worth less than \$20, an admission of a conviction of a prior larceny will not justify a sentence exceeding a year's imprisonment, under Code, § 1187, unless a former conviction was charged in the indictment, or the evidence showed that the larceny was from the person, or that defendant broke into a dwelling house in the daytime.

2. Code, § 1237, authorizing appeals by the state in certain cases, does not include a ruling of the superior court remanding a case for the imposition of a lesser sentence.

Appeal from superior court, Buncombe county; Starbuck, Judge.

Abe Davidson was prosecuted for larceny. From a conviction, defendant appealed to the superior court, which remanded the case, and the state appeals. Dismissed.

The Attorney General, for the State. Mark W. Brown, for appellee.

CLARK, J. Acts 1895, c. 285, § 1, provides, "In all cases of larceny where the value of the property stolen does not exceed \$20 the punishment shall for the first offence not exceed imprisonment in the penitentiary or common jail, for a longer term than one year." Section 2 excepts from the operation of this act larceny from the person or from a dwelling by breaking and entering in the daytime. Section 3 provides that in all cases of doubt

criminal circuit court of Buncombe upon an indictment charging the value of the property at \$1. The indictment did not charge that the defendant had been theretofore convicted of any larceny. The court, however, sentenced the defendant to imprisonment for four years, upon his admission of a former conviction for larceny. On appeal to the superior court, that court adjudged the sentence of the criminal court illegal, and remanded the case, that a proper sentence might be entered, from which judgment the solicitor appealed to this court.

The Code (section 1187) prescribes that, when a second conviction is punished with other or greater punishment than for a first conviction, the first conviction shall be charged in the manner therein set out, and what proof shall be sufficient evidence thereof. When the property stolen is charged of less value than \$20, or when charged at more than that value, if it is found by the jury to be of less value than \$20, no punishment greater than one year's imprisonment can be inflicted, unless it is charged in the indictment that the defendant has been formerly convicted of larceny, except that, should the proof show that the larceny was from the person, or by breaking and entering a dwelling house in the daytime the defendant cannot claim the protection of this statute; and hence it is not necessary to charge in the indictment the manner of the larceny. *State v. Bynum*, 117 N. C. 749, 23 S. E. 218. If the larceny was committed in the manner specified in the second section of the act (by taking from the person, or breaking into a dwelling in the daytime), the case falls under the general statute, and, though the goods stolen are of less value than \$20, allegation and proof as to former conviction become immaterial. *State v. Harris*, 119 N. C. 811, 26 S. E. 148. In the case before us the larceny was not committed in either of the modes mentioned in section 2, and the value of the goods being charged at less than \$20, and no previous conviction for larceny being alleged in the bill, it was erroneous to pass sentence of imprisonment for more than one year. Whether there was a former conviction or not was for the jury, not for the court. Had the bill charged that this was not the first offense, then the defendant's admission that he had been formerly convicted of larceny would have been competent to prove the charge; but in the absence of such charge, as provided by section 1187 of the Code, the admission, if believed, was probata without allegata, and of no effect. This case differs materially from *State v. Willson*, 121 N. C. 654, 28 S. E. 416, where the judge, imposing a sentence plainly within his discretion, recited in his judgment the former convictions of the defendant as a reason for the severity of his sentence.

The defendant further insisted that no ap-

upon questions of law (*State v. Hinson*, 123 N. C. 755, 31 S. E. 854), it would seem that the state should be entitled to an appeal to this court from the judgment of the superior court; but the legislature, by inadvertence, has so far failed to so provide in Code, § 1237, and while, from its public importance, we pass upon the point presented, we feel constrained to dismiss the appeal,—the same course which was taken in *Hinson's Case*, supra. Appeal dismissed.

HARRIS v. RUSSELL.

(Supreme Court of North Carolina. May 2, 1899.)

ANTENUPTIAL CONTRACT—CONSTRUCTION.

An antenuptial contract provided that, if the wife survived, she should have a life estate in certain land, and "at her death" it should descend to the husband's heirs. *Held*, that the heirs took a vested remainder on the death of the husband.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Controversy between S. A. Harris and Kate Russell. There was a judgment for Harris, and Russell appeals. Affirmed.

Burwell, Walker & Cansler, for appellant. Osborne, Maxwell & Keerans, for appellee.

FAIRCLOTH, C. J. Controversy without action, under Code, § 567. Plaintiff's father, in 1868, entered into a marriage contract (Exhibit A) with his intended wife, in which he stipulated that, if she survived him, "then in that case she should be entitled to the use, possession, and enjoyment of the lot owned by him [lot No. 54 in square 8 of the city of Charlotte], with all the improvements thereon, for and during the term of her natural life, and at her death said real estate to descend to the heirs at law of said party of the first part," the plaintiff's father, who died in 1870. The widow is still living, and the plaintiff, at his father's death, was, and still is, his only heir at law. The widow conveyed her interest, in 1893, to the plaintiff, who, in 1896, conveyed in trust for the defendant, and took her notes for the purchase price. She paid a part, and now refuses to pay the balance, on the ground that the plaintiff cannot make her a good title during the lifetime of the widow. The only question is whether the estate vested in the plaintiff at his father's death. In *Rives v. Frizzle*, 43 N. C. 237, there was a bequest to the widow for life, and "after her death to be equally divided among his lawful heirs." Held a vested legacy at the time of his death. In *Brinson v. Wharton*, Id. 80, a testator bequeathed all the residue to his wife "during her widowhood, and, when she marries, then that all the remaining property, both real and personal, shall be equally divided between his

facts, the decision was the same. In each of the above cases it was a conveyance by devise, and it was held that, if one of the heirs died before the death of the widow, or the happening of the future event, his or her share went to his or her representative, and that "after" or "upon" the death of the wife, or the like expression, does not make a contingency, but merely denotes the commencement of the remainder in point of enjoyment. The case before us is not a conveyance, but a covenant,—marriage contract,—evidently for the benefit and protection of the wife if she should become a widow. Upon the death of an intestate ancestor the title to his estate descends and vests at once in his heirs. It cannot stand in abeyance, and vest in futuro, like an executory devise. Consider an estate with a conditional limitation. The title passes at once, and may be divested by the happening or nonhappening of some future event; but this can only take place when so expressed or clearly intended. There is nothing in this agreement (Exhibit A) indicating any intention that the estate, which vested in the plaintiff by his father's death, should be defeated by the death of the widow. We are satisfied that S. A. Harria, Sr., meant that his heir, the plaintiff, or heirs, if he should have other children, should possess and enjoy the property after the widow's death, and that he did not mean to divert the law of descent from its natural course. The plaintiff's estate therefore vested at his father's death, and we see no reason why he cannot give the defendant a good title. **Affirmed.**

PRICE & LUCAS CIDER & VINEGAR CO.
v. **CARROLL.**
Supreme Court of North Carolina. May 2, 1899.)

NOTARIES—FEES—PROTESTS.

Code, § 3308, providing that notaries' fees for each certificate and seal shall be 50 cents, does not apply to protests, section 3749, as amended by Acts 1895, c. 296, providing that notary shall be allowed 25 cents "for all services on a protest."

Appeal from superior court, Wake county; Brown, Judge.

Action by the Price & Lucas Cider & Vinegar Company against J. D. Carroll. There was a judgment for plaintiff for less than the relief demanded, and it appeals. **Affirmed.**

Perrin Busbee, for appellant. A. J. Felld, for appellee.

FURCHES, J. The defendant, in October, 1898, drew and forwarded to plaintiff his check on the Citizens' National Bank of Raleigh for \$15. On the 21st of October this check was duly presented, and protested for nonpayment. The notary public charged as

public for said protest. The defendant admits the balance claimed to be due on the check, but denies that he is liable for \$2.29, the amount claimed for the protest. On the trial in the justice's court the plaintiff recovered judgment for the full amount due on the check, and \$2.29, the amount claimed for the protest. The defendant appealed from this judgment to the superior court, where the case was heard upon a case agreed, the facts being substantially the same as stated above. The superior court held that plaintiff was only entitled to recover 25 cents as a fee for the protest, and 25 cents for an internal revenue stamp, which it was necessary for the notary to use in making the protest, and rendered judgment accordingly for the plaintiff, from which the plaintiff appealed to this court.

The fees of notaries public are created and regulated by statute. Section 3749 of the Code fixed the fees of a notary public for all services of a protest at one dollar. But Acts 1895, c. 296, amended section 3749 by striking out "one dollar" and inserting "twenty-five cents" instead thereof. It is claimed in the brief of the plaintiff that the notary is allowed 50 cents under section 3308 of the Code; that the act of 1895 does not refer to nor repeal this section; and that plaintiff is at least entitled to 75 cents for the protest, 25 cents for the internal revenue stamp, and 8 cents postage, making \$1.08. We agree with the plaintiff that the act of 1895 does not refer to nor repeal section 3308 of the Code, but we do not agree with the plaintiff that a notary public has the right to charge 50 cents, or any other sum, under section 3308 of the Code, for protest services. His pay for this service is fixed by section 3749 of the Code as amended by the act of 1895. Section 3308 of the Code applies to other services rendered by a notary public than those for protesting a paper for nonpayment or nonacceptance,—such as taking the acknowledgment or probate of a deed or other legal instrument. The judgment of the court below is affirmed. **Affirmed.**

STEVENS et al. v. SMATHERS.
(Supreme Court of North Carolina. May 2, 1899.)

TORTS—REMOVAL OF MORTGAGED BUILDING—THIRD PERSON'S LIABILITY.

One who acquiesces in the erection of a building on his land, knowing that the material had been removed from a building on mortgaged premises, is liable to the mortgagee for its value.

Appeal from superior court, Haywood county; Hoke, Judge.

Action by Henry B. Stevens and others against C. L. Smathers and another. From a judgment for plaintiffs, defendant Smathers appeals. **Affirmed.**

CLARK, J. The plaintiff had a mortgage on a house and lot to secure a debt due by J. Willey Shook. The latter tore down the house, removed it, and re-erected it upon the land of the defendant Smathers. The jury found that the house, when torn down, was worth \$150, and that the mortgaged property was impaired that much in value by its removal. The court charged the jury (there being evidence to sustain the charge) that if the removal of the house to the land of defendant Smathers was with his knowledge and assent, and he knew, before it was rebuilt on his land, that it had been taken from the land covered by plaintiff's mortgage, his acquiescence therein made Smathers responsible for the value of the building. In this there was no error. *Horton v. Hensley*, 23 N. C. 163. We were treated to an argument whether the lien of plaintiff's mortgage was not destroyed by tearing down the house and rebuilding it upon Smather's land. But this is not a case in which the lien is sought to be enforced against the removed building, as in *Turner v. Mebane*, 110 N. C. 413, 14 S. E. 974, where the house was bodily rolled across the road upon another tract. Here no lien is sought to be enforced against the building, but the mortgagee asks a personal judgment against Smathers, who acquiesced in the removed building being rebuilt upon his own land with knowledge that it had been taken from premises covered by plaintiff's mortgage. The court, upon the verdict, properly rendered judgment against Shook for the balance due on the mortgage debt, and against Smathers for \$150, the value of the removed house, and by whose removal the plaintiff's security had been impaired to that amount; payment of said \$150 to be credited on the mortgage debt. No error.

MEANS v. CAROLINA CENT. R. CO.

(Supreme Court of North Carolina. May 5, 1899.)

RAILROADS—INJURIES TO PASSENGERS—FREIGHT TRAINS—NECESSITY OF CONDUCTORS—EVIDENCE—RES GESTÆ—MATERIALITY.

1. It was negligence for a railroad company to have no conductor on a freight train having a passenger coach attached, where it carried a good many passengers at ordinary times, and went to a city at a scheduled time, and returned after giving the passengers a few hours' time to remain in the city, thereby enabling them to reach their homes on the same day; the object of the passenger coach not being simply to accommodate the public, but to establish a passenger business.

2. In an action against a railroad company for the death of a passenger occasioned by the absence of a conductor, a declaration of the passenger, "Get out of my way; I want to get

3. In an action for the death of a passenger killed on a freight train while returning from the engineer, to whom he had given his tickets to a passenger coach, evidence that the engineer would have stopped the train if he had been requested to do so is immaterial.

Appeal from superior court, Mecklenburg county; Greene, Judge.

Action by Maggie Means, administratrix, against the Carolina Central Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

Osborne, Maxwell & Keerans, for appellant. Burwell, Walker & Cansler, for appellee.

MONTGOMERY, J. When this case was here at February term, 1898 (29 S. E. 939), a new trial was ordered because of an error committed by his honor on the trial below in instructing the jury that "it is the duty of a railroad company to have a conductor when there are passengers, and it is negligence not to have one." In reference to that instruction we said: "The rule would apply where the trains are passenger trains, or where a considerable part of the train was for the accommodation of passengers, and the passenger fare would be a considerable part of the inducement to run the train. But where the train is a freight train, with a passenger car attached, it is a fair presumption that the passenger coach is purely for the accommodation of the public; and we cannot say, as a matter of law, that it would be negligence (nothing else appearing) in a railroad company not to furnish a conductor on such trains." In the case as it was made up for this court at the first hearing, nothing appeared as to the nature or destination of the train, except that it was one which consisted of an engine and eleven cars, including one passenger coach and a shanty car, and that it left Charlotte at 4 p. m. Nothing was said of the extent of the passenger traffic. We thought the charge of his honor too broad to fit the facts of that case. The case as presented now has some new features, and important ones. The train, a local one, was operated between Charlotte, by Lincolnton and Shelby. Its schedule time for departure from Shelby was 6 a. m., and for arrival at Charlotte 10 a. m. It left Charlotte at 4 p. m. The engineer testified that "at ordinary times we carried a good many passengers." It is apparent, from the facts above stated, that in the running of that train the passenger traffic was a matter of business consideration to the company; that the inducement to attach the passenger coach was not simply to oblige a passenger now and then who might wish to make an emergency trip or to visit some obscure station, but to establish a passenger business by a schedule so arranged as to enable and encourage the people along the route, and especially those in Shelby and Lincolnton, to visit the city of

Charlotte for several hours, and return to her homes at a reasonable hour on the night of the same day; and that the result was as was anticipated,—a considerable passenger-business. His honor, after the conclusion of the testimony, was of opinion that the plaintiff could not recover, and, upon intimating so much to the plaintiff's counsel, the plaintiff submitted to a nonsuit, and appealed. His honor thought the case as developed did differ materially from the case as brought on the first trial. We think, however, that there was a substantial difference between the two cases in the respects pointed out by us. It was the duty of defendant company to have had a conductor for such a train as that of the defendant's was shown to have been by the undisputed evidence, and defendant was negligent in not having provided one. What might be a sufficient way to manage a train would ordinarily be a question for the jury; but whether or not it was negligence in a railroad company not to furnish a conductor in a case like the one before the court, the evidence being undisputed, is to be a question of law. The conductor did not have been purely and entirely a passenger conductor. A freight conductor might have been sufficient, under the circumstances, to have discharged the duties of a passenger conductor and his own at the same time. Whether or not the intestate's death was caused, without his fault, by the failure of defendant company to furnish a conductor, is a question for the jury, under proper instructions as to the law from the court. There were only two exceptions on points of evidence. The plaintiff was permitted, over the objection of the defendant, to introduce a declaration or statement made by the state while he was hurriedly going from the coach at the rear end of the train to the line in front. The declaration was, "Get out of my way; I want to get to Mr. Hall [engineer], to give him these tickets, before the train gets too fast." The evidence is competent as a part of the *res gestæ*. It is contemporaneous with the main subject, the alleged killing of the intestate through negligence of the defendant. It was made out forethought or design, and it helped to explain the main fact in the case. *Carter v. Buchanan*, 3 Ga. 513; 21 Am. & Eng. Enc. 7, p. 99; *Best*, Ev. 446. The declaration of the intestate was the natural and inartificial concomitant of a probable act which itself was a part of the *res gestæ*. *Hunter v. State*, 41 J. Law, 540.

The defendant offered to show by the evidence that he would have stopped the train in order that the intestate might have returned to the coach, if he had been so requested to do so.

We do not see how the evidence was material, as the case was then constituted. It should not have been admitted, for it threw no light upon the matter. There was no error in the ruling of his honor, and there is to be a new trial.

STATE v. DIXON et al., Commissioners.
(Supreme Court of North Carolina. May 10, 1899.)

TOWNS—COMMISSIONERS—DUTY TO REPAIR STREETS
—DISCRETION—INDICTMENT.

1. Failure of the town commissioners to keep streets in repair, as required by Code, § 3803, is an indictable offense, though the Code allows a wide discretion as to the manner and extent of the repairs.

2. An indictment charging town commissioners with failing, refusing, and neglecting to have a certain street worked out and kept in proper repair, is sufficient, under Code, § 3803, requiring them to provide for keeping the streets in proper repair.

Appeal from superior court, Burke county; Starbuck, Judge.

One Dixon and others, commissioners of the town of Morganton, were indicted for neglect of official duty, and from an order quashing the indictment the state appeals. Reversed.

The Attorney General, for the State. S. J. Ervin, for appellees.

DOUGLAS, J. This is a criminal action, founded upon a bill of indictment charging that the defendants, "commissioners of the town of Morganton," on the 1st day of May, 1897, "unlawfully and willfully did fail, refuse, and neglect to have the road leading from the depot to Hunting creek worked out and kept in proper repair; the same being a public road or street, and within the corporate limits of the town of Morganton." The defendants moved to quash the bill, which motion was granted, and the state appealed.

The ground of the motion does not appear in the record, but is thus stated in the brief of defendants' counsel: "The indictment does not charge any criminal offense. It was not the duty of the defendants to work the streets of the town of which they were commissioners, nor does any statute provide that they shall have the same worked. Their duty is discharged when they provide for keeping in proper repair the streets of the town." We are aware that there are many cases holding, in substance, that it is not the duty of the town commissioners personally to work the streets, and that an indictment, to be valid, must distinctly state the neglect or violation of some public duty; but we do not understand these cases to hold that there is no duty whatever imposed upon such officers of keeping the public streets in such reasonable repair as is demanded by the public safety and convenience. Section 3803 of the Code provides that "they shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best." Surely, this section imposes some duty in relation to the repair of streets; and, while it allows a wide discretion, we do not think that such discretion extends to the entire neglect of the duty imposed. We know that one of the principal duties of a municipal corporation is the proper maintenance of its streets, and for a neglect of this duty the corporation

Large sums of money are annually collected in taxes, and appropriated to the maintenance and improvement of the public streets. Can it be possible that men holding responsible municipal offices, and disbursing large sums of public money, have no legal duties whatsoever imposed upon them by virtue of their office; or, if having such duties, that they are in no way responsible for their faithful performance? It is a general rule that all public officers, with some few well-recognized exceptions, are liable to indictment for neglect of duty. Bish. Cr. Law, § 459, says: "Any act or omission in disobedience of official duty by one who has accepted public office is, when of public concern, in general, punishable as a crime." Mechem, Pub. Off. §§ 1022, 1025; Throop, Pub. Off. §§ 855, 856; 19 Am. & Eng. Enc. Law, 502; State v. Hatch, 116 N. C. 1003, 21 S. E. 430. As we are of the opinion that it is the duty of municipal officers to cause the public streets to be kept in proper repair, we see no reason why they should not be held criminally liable for its neglect, as for the neglect of any other public duty.

We think the indictment sufficiently describes the offense as neglecting to keep a public street in proper repair. What is proper repair would depend largely upon circumstances,—such as the size of the town, and its available funds, the character and location of the street, and the amount of travel thereon; but that question is not now before us. As we see no reason why town commissioners should be exempt from the general responsibility of public officers, the judgment of the court below quashing the indictment must be reversed. Reversed.

STATE v. LUCAS.

(Supreme Court of North Carolina. May 2, 1899.)

HOMICIDE—DEGREE—TRIAL—WITNESSES—VERDICT—INSTRUCTIONS.

1. On a trial for murder the state cannot be compelled to put all of the witnesses it has sworn upon the stand.

2. The foreman of the jury, in answer to a question by the clerk, returned a verdict of "guilty of murder." On being asked by the judge whether the jury found the prisoner guilty of murder in the first or second degree, he responded, "In the first degree." The clerk then asked, "So say you all?" and the jurors responded in the affirmative, and the verdict was so recorded. The prisoner and his counsel were present, and made no objection. *Held*, that the verdict would be upheld.

3. Accused went towards an office, where deceased was standing in the door, talking, stopped and talked, went past, turned, and came towards the door, and pulled out his pistol. Deceased ran, and he pursued him. He shot once before deceased got out of the office, which was more than 100 feet long, and twice after he got out of the office and was still running. Before the shooting he had said he should kill deceased, and after the shooting he

slaughter would not be justified.

4. On a trial for murder, where the killing with a deadly weapon is proved and admitted, and accused fails to prove facts in extenuation or excuse by his own or the state's evidence, the only question for the jury is whether he is guilty of murder in the first or second degree.

Appeal from superior court, Guilford county; Timberlake, Judge.

Samuel Lucas was convicted of murder in the first degree, and he appeals. *Affirmed*.

The Attorney General, for the State.

FURCHES, J. This is an indictment for murder, and the verdict of the jury is, "Guilty of murder in the first degree." From the evidence in the case, it was a shocking affair, a deliberate and cruel murder. The evidence tends to prove that the prisoner, a short time before he shot the deceased at the Piedmont House, said, "I'll kill the son of a bitch;" that he and one Dunnell came towards the express office, where the deceased was standing in the door, talking to Collins, the express agent, stopped and talked, went past the door where the deceased was standing, stopped and talked, went towards the center of the street, then turned, and came towards the door where the deceased was standing, with his hand in his hip pocket, and, just before reaching the door, he pulled his hand out of his pocket, with his pistol in it; that deceased ran; the prisoner ran after him, and shot once before the deceased got out of the office, which is more than 100 feet in length; that he shot twice more after the deceased got out of the house, and while deceased was still running. The second fire was probably the fatal shot, as the deceased was seen to throw up his hands to his back, and hold it at the place of the wound. The deceased died that night, and Dr. Battle testified that he died of that wound. The prisoner said he intended to kill the deceased, but was afraid he had not done so: that he went to get his own pistol, a Smith & Wesson, and, had he got it, there would have been no running. But we will not pursue this line of thought further, as it was admitted on the trial and the argument of the case that the prisoner shot and killed the deceased. While there are several exceptions, there are none to the evidence, and none to his honor's charge applying to the first and second degrees of murder, under the statute of 1893.

The prisoner introduced no evidence, and the state closed without putting all the witnesses it had sworn upon the stand. The prisoner insisted that the state should put them on the stand, and asked his honor so to rule. The court declined to do this, saying that the solicitor would be allowed to manage the case in his own way, so that he observed the law and rules of practice. To this the prisoner excepted. This exception cannot be sustained. State v. Martin, 24 N. C. 101;

e v. Smallwood, 75 N. C. 104; *State v. ter*, 82 N. C. 602.

When the jury came into court to return a verdict, the foreman, being asked by the judge, responded, "Guilt of murder." The judge asked whether they found the prisoner guilty of murder in the first or second degree, when the foreman responded, "In the first degree." The clerk then asked, "So say all?" and they responded in the affirmative, and the verdict was so recorded. This was done in open court, in the presence of the prisoner and his counsel, and no objection was made at the time. If there was any doubt as to the matter in the minds of the prisoner and his counsel, they might have had the jury asked; but this was not asked for. It seems that the action of the court was entirely proper. It was its duty to see that the proper verdict should be made of the finding of the jury. This exception cannot be sustained.

Another ground of error assigned by the prisoner is that the court did not charge and explain the law with regard to manslaughter. The court charged that there was no evidence in the case making the killing manslaughter. The judge was correct in this, it would have been only useless, but, as it seems to us, out of place, to have charged the jury upon a question of law that there was no evidence to sustain. And we entirely approve of the action of the court that there was no evidence in the case to authorize the jury in finding a verdict of manslaughter. This exception cannot be sustained.

Another ground assigned as error is that the court instructed the jury that, the killing being with a deadly weapon being shown and admitted, and the prisoner having failed to show anything in extenuation or excuse by his own testimony, and the state's evidence, the only question for the jury was whether it was murder in the first or second degree. This instruction was correct, and in accordance with the decisions of the court. *State v. Khyne* (at this term) 33 S. C. 28.

As this is an issue of life and death, we have carefully examined all the exceptions and assignments of error in the case, and find no error. The judgment of the court must be affirmed. Affirmed.

WILLIAMSON v. COCKE.

Supreme Court of North Carolina. May 5, 1899.)

JUDGMENT BY DEFAULT—VACATION—SERVICE OF PROCESS—PROVINCE OF COURT.

Where an officer, meeting a defendant, tells him he has a summons for him, and defendant gives the name of plaintiff on the paper, and says he knows all about it, he waives his right to have the summons read to him as provided by Code, §

One sued as administrator and individually, when the summons is shown to him, says he knows all about it, walks away from the officer before it is read to him, and, supposing he

is sued only as administrator, makes no defense, cannot have a default judgment set aside.

3. What constitutes service of process, and whether, upon a given state of facts, service has been duly made, is a question for the court.

Appeal from superior court, Buncombe county; Starbuck, Judge.

Action by B. Williamson, as trustee, against W. J. Cocke, as administrator of W. M. Cocke, Jr., and individually. A judgment by default was set aside, and plaintiff appeals. Reversed.

Davidson & Jones, J. W. Summers, and Geo. A. Shuford, for appellant. Merrimon & Merrimon and Carter & Weaver, for appellee.

FAIRCLOTH, C. J. The summons in this case was issued against W. J. Cocke, administrator of W. M. Cocke, Jr., and W. J. Cocke individually. The deputy sheriff returned the summons with this indorsement: "Served February 18, 1898, by reading the within summons to W. J. Cocke, adm'r of W. M. Cocke, Jr., and W. J. Cocke individually." The defendant did not answer or appear in court, and for want of an answer a judgment was entered. On notice and motion of defendant the said judgment was set aside, and the plaintiff appealed.

His honor, after hearing affidavits, found as facts: "That at some time the defendant was accosted by said Greenwood [deputy sheriff] on West Court-House Square, in the city of Asheville, and near the entrance to the office of Dr. C. V. Reynolds, and told by said Greenwood that he had a summons for him. The defendant was ascending the stairway which leads to the office of Dr. Reynolds, and looked back, and upon a paper in the hands of said Greenwood saw the name of W. B. Williamson, trustee [the plaintiff], and said, 'Well, I know all about that,' and turned immediately and walked up the stairway, and saw no more of said Greenwood." That he believed at the time that the summons was against him as administrator of W. M. Cocke, Jr., and had no idea that he had been sued individually, and that the deputy did not so inform him, by reading the summons, or otherwise. Do these facts, found by his honor, constitute cause for setting aside the judgment by default? The judgment was regularly entered on a duly-verified complaint. The Code (section 214) requires the summons to be served by reading the same to the party named as defendant. The return of the sheriff is prima facie service, subject to be overcome by proof of the facts. *Miller v. Powers*, 117 N. C. 218, 23 S. E. 182; *Strayhorn v. Blalock*, 92 N. C. 292. When the sheriff informed defendant that he had a summons for him, and defendant looked at it enough to see the name of the plaintiff, trustee, and said, "Well, I know all about that," and immediately departed from the sheriff, it is clear that he elected to waive his right to have the summons read to him by the officer, as he had a right to do. It was then defendant's duty to attend court, and

nished all proper information, and this case, on the matter now presented, would not be here. The failure to attend to that duty was negligence. Such negligence frequently occurs by inattention by suitors in court. This negligence cannot be held a sufficient ground for setting aside a regular judgment entered up in consequence of inattention on the part of defendant to an important duty. The courts must proceed with business in a reasonable way, or forfeit their usefulness to the public. The fact that defendant supposed and believed that the action was against him as administrator, and not individually, is not such excusable neglect as entitles him to relief. He would have known otherwise by simply discharging his own duty. *White v. Snow*, 71 N. C. 232.

What constitutes service of process, and whether, upon a given state of facts, service has been duly made, is a question for the court. We hold, upon the case before us, that the court's conclusion was a misapprehension of the law. Reversed.

HARBISON et al. v. HALL.

(Supreme Court of North Carolina. May 5, 1899.)

EVIDENCE—ACCOUNT BOOKS—PAYMENT.

In an action for goods sold, where the defense is payment, plaintiff may show by his bookkeeper, in corroboration of his own testimony, that the amount has not been paid, his usage in regard to his system of entries in his books, when checks and money have been received, and that the books fail to show any evidence of payment.

Appeal from superior court, Granville county; Timberlake, Judge.

Action by Harbison & Gathright against J. S. Hall. From judgment in favor of defendant, plaintiffs appeal. Reversed.

H. M. Shaw, for appellants. Edwards & Royster and J. B. Batchelor, for appellee.

FAIRCLOTH, C. J. Action for goods sold and delivered. Plea, payment. The defendant testified that he had paid the entire account. One of the plaintiffs testified that the account had not been paid. The plaintiffs then offered to show by their cashier and bookkeeper, in corroboration of their testimony, the custom of the firm in regard to their system of entries in their books when checks and moneys, etc., were received, and that an investigation of the books failed to show any evidence of payment by the defendant. This evidence was excluded by the court, and the plaintiffs excepted and appealed.

There is error. The evidence was competent in support of the positive testimony of the plaintiffs. These were circumstances showing the business methods and usages of

83 N. C. 377; *Vaughan v. Railroad Co.*, 63 N. C. 11; 1 Greenl. Ev. (1896) §§ 116, 118. Error.

SIBLEY et al. v. GILMER.

(Supreme Court of North Carolina. May 5, 1899.)

SALES—CHARGES ON BOOKS—HUSBAND AND WIFE—IMPLIED AGENCY OF WIFE—EVIDENCE—REVOCATION—SEPARATION—NOTICE.

1. A husband, without objection, paying from time to time for merchandise purchased from a certain person by his wife, impliedly authorizes her to purchase other goods as his agent, and such agency continues until such person is notified of its termination.

2. That a seller entered charges on his books against a wife for goods purchased by her as her husband's agent did not thereby make the contract to pay for the goods that of the wife, and void, where the whole transaction showed the credit given to the husband.

3. A wife's authority to purchase goods of a certain person as her husband's agent is not revoked by their separation, in the absence of notice to such person of the separation.

4. Notice thereof is not given merely by the fact that the separation is generally known in the city where the husband resides, where the seller resides in a different city.

Douglas, J., dissenting.

Appeal from superior court, Guilford county; Robinson, Judge.

Action by Sibley, Lindsay & Carr against E. L. Gilmer. Judgment for defendant, and plaintiffs appeal. Reversed.

A. M. Scales, for appellants. Bynum & Taylor, for appellee.

MONTGOMERY, J. The only question presented in this case is: Is the husband liable for the price of goods (ladies' apparel), not necessities, sold to his wife, after separation, by one who had, previous to the separation, sold to her, on credit, at various times, goods which were afterwards paid for by the husband; the seller having been ignorant of the separation at the time of the last sale? What constitutes "necessaries," and what are the nature and extent of the husband's liability for "necessaries" furnished to his wife, either while they are living together or living apart, though discussed at length on the argument here, are not matters necessary to be considered by the court. In the case on appeal it appears that the plaintiffs on the trial below abandoned the count for necessities, and relied upon the agency of the wife. His honor instructed the jury that, if they believed the evidence, to answer the issue, "Is the defendant indebted to the plaintiffs, and, if so, in what sum?" "Nothing." The defendant's wife had, before their separation, bought goods from the plaintiffs in New York City, and they had sent out monthly statements of account therefor to the defendant at his home

Greensboro, N. C. He never made objection to the course of his wife, and the husband paid some of the bills by his personal checks. After the separation, the plaintiffs transferred other goods to the defendant's wife, the effect of which this action was brought to reverse, the plaintiffs having no notice of the separation, although it was known generally in North Carolina, and at Greensboro, where the defendant resided. A husband can make his wife his agent, and he will be bound for acts by the same rules of law as would apply in the case of any other agency, and an agency may be express or implied, as in various cases. *Schouler*, Dom. Rel. § 72; *Story*, § 7; *Mechem*, Ag. § 62; *Webster v. Laws*, 111 N. C. 224. That being the true statement of the law, we are of the opinion that upon the facts in this case the instruction of the jury was erroneous. The matter is one of agency in general, and the agency arising out of the relation of husband and wife by operation of law is not the question involved. The defendant, by his course of acquiescence in the dealings between the plaintiff and his wife, and by his payment of the accounts, held his wife out to the plaintiffs as empowered and authorized by him to make purchases of goods from them, and such an agency by implication is as binding as if he expressly authorized her to buy the goods on his account. The implied agency having been established, the plaintiffs had a right to presume that the authority would be continued until they had reason to know that it had been discontinued. *Cowell v. Phillips* (100 Atl. 933; *Story*, Ag. § 470; 1 Am. & Enc. Law, p. 1230, and cases there cited). The main contentions of the defendant are: First, that the purchase of the goods on credit was the contract of the wife herself and therefore void, and, as a corollary, the defendant husband could not ratify a contract void and against public policy; second, that the wife's implied authority from the husband to purchase the goods from the plaintiffs if it ever existed, was revoked by the separation, by force of law, as in case of the agent of a principal; and, third, that if there had existed an implied agency between the defendant and his wife, the plaintiffs had no right to its revocation by reason of the fact that the separation was generally known in Greensboro, where the defendant resided. We think that, although the goods were charged in the books of the plaintiffs to the wife, the transaction showed that the credit was extended to the defendant; and the manner in which they were charged could not affect the validity, especially as monthly statements of the account were sent to the defendant, some of which he paid by his personal checks, without a word of objection or protest to the charges by his wife. In support of the sec-

ond mentioned contention of the defendant his counsel cited the case of *Pool v. Everton*, 50 N. C. 241. In that case the husband and the wife were living apart, and the plaintiff, a physician, attended her in a case of sickness. A public notice by advertisement had been given by the husband of the separation, and that he would not be liable for her debts, and the plaintiff was aware of such notice having been given at the time he rendered the service. The court held there that the plaintiff could not recover on the ground that he had not shown that the wife had good cause of separation. The question there was not one of general agency, but one of operation of law; i. e. the liability of the husband for necessities, the husband and the wife living apart. The court said, among other things, that a married woman could make a contract for her husband that would bind him, and that the agency might be constituted either by express authority or by implication. The defendant's reliance is upon the following language used by the court in that case: "But this implication of agency can only be made while the parties continue to live together. If they separate, and live apart, the idea of an implied agency is out of the question. The effect of the notice [such as was given in this case] is merely to inform the public of the fact of the separation, which operates as a revocation of any implied agency that existed while they lived together." The language of the eminent judge who wrote the opinion in that case may not convey as clear a meaning as usually characterized his opinions, but we think the reasonable construction of his words must be that, in cases where husband and wife had separated, no notice of separation need be given to prevent his liability for debts contracted by the wife during the separation,—even for necessities; the law being that, if the separation was without good cause on the part of the wife, her debt contracted, even for necessities, was not only not binding on the husband, but such creditors made themselves liable to the husband in an action for damages for extending such credit. And we think that, while there may be some confusion about the language in the last sentence of the extract from that opinion, the meaning was that the notice given in that case could only affect such creditors as had been, before the separation, dealing with the wife as agent by implication of the husband in respect to matters not strictly to be classed as necessities for the support of the family. We think the court had in mind just such agencies as the one we are treating in this case as the ones to be affected by the notice. There was error in the instruction given by his honor, and there must be a new trial. New trial.

DOUGLAS, J., dissents.

REFERENCE—CONSENT TO NONSUIT—DISCRETION—REVIEW.

1. Under Code, § 423, providing that either party to a reference may move to review the referee's report, and set aside, modify, or confirm the same in whole or in part, and no judgment shall be entered on any reference except by the judge's order, it is discretionary with the court whether or not to set aside a nonsuit consented to before a referee.

2. A ruling of the court under its discretionary authority under Code, § 423, to set aside a nonsuit consented to before a referee, will not be reviewed, unless the discretion was abused.

Appeal from superior court, Buncombe county; Starbuck, Judge.

Action by Virginia K. Swepson, executrix, against P. A. Cummings, executor. The cause was referred, and, being required to proceed to trial, plaintiff consented to a nonsuit. On the referee's report, plaintiff was relieved from her consent, and defendant appeals. Affirmed.

Moore & Moore, Shepherd & Busbee, and Burwell, Walker & Cansler, for appellant. J. W. Summers and T. H. Cobb, for appellee.

FAIROLOTH, C. J. This action was referred by consent, and on the trial day the plaintiff made affidavit that he could not try, stating his reasons. The referee required him to proceed to trial, and the plaintiff's counsel stated that in justice to his client he was driven to consent to a nonsuit. The referee filed his report, and the defendant made a motion that judgment of nonsuit be entered by his honor, which was refused. His honor, upon the facts found, in the exercise of his discretion ordered that the plaintiff be relieved from his consent to nonsuit before the referee, and that the cause be remanded to the referee to proceed according to the original order. Defendant's exception is that the court had no power to set aside the nonsuit entered before the referee, and relies upon *Boyd v. Williams*, 80 N. C. 95, and *Twitty v. Logan*, 86 N. C. 712. Each of those cases involved a question of excusable neglect in allowing judgments to be entered at a term of the court. The law of those cases has no application to the facts in the present case. It is a first principle that the law must fit the facts.

The powers and duties of a referee are found in Code, § 422, and *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248. Code, § 423, provides that the referee shall make his report to the court in which the action is pending, and "either party may move the judge to review such report and set aside, modify or confirm the same in whole or in part, and no judgment shall be entered on any reference except by order of the judge." In *Busbee v. Surles*, 79 N. C. 51, it was held not to be error when the judge in his discretion set aside the reference after the report was filed,

authorities, we can have no doubt of the power of the judge to make the orders set out in the record and above stated. The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee, and a discretion to modify or set aside the report; and his ruling in the latter respect is not reviewable, unless it appears that such discretion has been abused.

Affirmed.

STATE v. HEIGHT.

(Supreme Court of North Carolina. May 5, 1899.)

CRIMINAL LAW—VERDICT.

Where one is indicted for two crimes involving different penalties, a general verdict of "guilty" is improper. The jury should state for which crime he is guilty, that the proper punishment may be imposed.

Appeal from superior court, Durham county; Bryan, Judge.

Samuel Height was convicted of a crime, and he appeals. Reversed.

Boone & Bryant and Manning & Foushee, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant stands indicted—First, for an assault with intent to commit rape; and, second, for a simple assault. At the close of the evidence, his honor properly instructed the jury that there was no evidence of an assault with intent to commit rape. The jury rendered a verdict of "guilty." The defendant was sentenced to work on the roads for 12 months. There must be a new trial. The general verdict "guilty" applies to the first count as well as to the second. The jury should have said on which count he was guilty, in order that the proper punishment might follow. His honor seems to have understood the verdict to be on the first count, as he imposed a longer term of imprisonment than is allowed for a simple assault, i. e. 30 days. Code, §§ 987, 992; *State v. Nash*, 109 N. C. 837, 13 S. E. 824; *State v. Johnson*, 94 N. C. 863; *State v. Albertson*, 113 N. C. 633, 18 S. E. 821.

New trial.

WILKINSON et al. v. BRINN et ux.

(Supreme Court of North Carolina. May 9, 1899.)

DEEDS—MORTGAGES—DECREE—ESTOPPEL—JUDICIAL SALES.

1. Where the grantors sue to foreclose a mortgage given as part of the price, they are estopped by the decree to question the validity of the deed.

2. Where the purchaser at judicial sale gets a

ty; Bowman, Judge.

Foreclosure by Minerva V. Wilkinson and others against William R. Brinn and wife. From an order overruling a motion for summary judgment against T. J. Topping, purchaser at the sale, plaintiffs appeal. Reversed.

John H. Small, for appellants. Chas. F. Warren, for appellee Topping.

FAIRCLOTH, C. J. At the death of J. B. Wilkinson, in 1887, his land, the same now in controversy, descended to his four children, subject to the dower of his widow, Minerva Wilkinson. Said children, their husbands and the widow, sold and conveyed by deed said land to defendant Brinn, who, with his wife, executed a mortgage deed to the grantors to secure the purchase price, both deeds being duly probated and registered. Among said grantors was Mattie V. Campbell, and her husband signed the deed to Brinn, but his name does not appear in the body of the deed. Subsequently Mattie V. died intestate, leaving infant children and her husband surviving. An action was brought to foreclose said mortgage. The minor children of Mattie V., having no general guardian, were represented by A. H. Wilkinson, as their next friend. A decree of sale was ordered. The sale was made, and T. J. Topping was the best bidder, and was declared and reported as the purchaser. In this action all interested are parties plaintiff, including the widow, Minerva, and Charles A. Campbell (husband of Mattie V. Campbell) individually; and, on motion, he has been made a party, as administrator of his wife, in this court, under Code, § 963. On notice to Topping, the purchaser, to show cause why a summary judgment should not be entered against him for the amount of the purchase money now due, he responds that he cannot get a good title to the land under a decree of the court confirming said sale, and a deed made by its commissioner under its direction: (1) Because, by reason of Campbell's name not appearing in the body of the deed, his wife's interest did not pass to Brinn; that it was not their deed. (2) Because Campbell, on the death of his wife, acquired an interest in her estate, and will be entitled to share in the distribution of the proceeds of the sale if confirmed. There is no question raised as to the interest of any other of the parties interested. There is no force in the respondents' contention. Without in any manner considering the regularity or irregularity of the deed to Brinn, the plaintiffs, including the widow, the children of Mattie V., her husband, individually and as her administrator, are concluded, and will be estopped effectually, by a foreclosure decree in this action and deed thereunder, as to all material questions presented in this record. Topping has no inter-

terial to him where the money goes. The court, after collecting the proceeds of sale, will see that they are properly distributed.

By consent, the facts above stated were found by the court. We see no reason why the plaintiffs should not have judgment in their favor. Reversed.

MOREHEAD BANKING CO. v. MOREHEAD.

(Supreme Court of North Carolina. May 5, 1899.)

REFORMATION OF INSTRUMENTS—MISTAKE OF LAW.

An executrix took up an outstanding note of the testator by giving her individual note for it. The scrivener had drawn it as directed, and she signed it knowing its contents. Nothing was said at the time whether she should be liable personally or in her representative capacity only, but she and the representative of the payee who conducted the transaction testified that when it was signed they did not think she was personally liable thereon. *Held*, that the note would not be reformed so as to make her liable in her representative capacity only, since the mistake was one of law.

Douglas, J., dissenting.

On petition for rehearing. Dismissed.
For prior report, see 30 S. E. 331.

FURCHES, J. This case was here at spring term, 1898, and is reported in 122 N. C. 318, 30 S. E. 331. It is here now on a petition to rehear. The facts now are necessarily what they were then, and it is for us to say whether the construction then put upon this transaction was correct or erroneous. If upon examination it is found to be erroneous, the error should be corrected; if correct, it should be affirmed. We do not deem it necessary that we should state the facts, as they are stated in the reported case *supra*. It will there be seen that the defendant's testator, with the other defendants, Green and Duke, as his sureties, made a note to a New York bank for \$6,000, which was unpaid at the death of the testator; that this note was sent to the plaintiff for collection, and the defendant Morehead arranged with the plaintiff for the satisfaction and payment of the New York note by giving the note sued on with Green and Duke, as sureties, and paying the plaintiff the difference between the New York note and the \$5,000 note sued on, and the plaintiff paid off and satisfied the New York note. There has been judgment heretofore entered against the sureties, and this action is now being prosecuted for the purpose of recovering a personal judgment against the defendant Morehead.

It was admitted on the argument by counsel for defendant Morehead that his client was liable to a personal judgment upon the note as it stands; that is, as we understand the counsel, that she is personally liable for

as it stands, gave her case away. We do not mean to say that defendant's counsel made a slip or mistake by which his client was damaged, but that it was the admission of a legal proposition which, if true, was equivalent to admitting the plaintiff's contention. Equity, for many reasons, will reform and correct facts, but as a general rule it does not correct errors of law. It is said there are exceptions to this general rule; but what are called exceptions by some writers are in fact not exceptions. When they are examined, it will be found that there is some fact, some inducement, some fraud, connected with the transaction that raises the equity. 2 Pom. Eq. Jur. § 843; Thomas v. Linea, 83 N. C. 191; Korne-gay v. Everett, 99 N. C. 30, 5 S. E. 418.

In this case it appears that the transaction took place between the defendant Morehead and Morgan, the cashier of the plaintiff bank. Morgan says he drew the note as he was directed to draw it, and the defendant Morehead says that she signed it as it was drawn, knowing how it was drawn. There was not a word said then or before by either Morehead or Morgan as to whether she would be personally liable or not, and no such question was raised until long after this action was commenced. Finally, the question was raised as to whether the defendant Morehead was personally liable or not; and then she said she did not think when she signed the note that she was making herself personally liable, and Morgan said he did not think when she signed the note that she was personally liable. Upon this evidence, the defendant Morehead asks a court of equity to come to her relief and say she is not liable for this debt, although she admits that in law she is liable. Suppose the jurisdictions of law and equity were in separate courts, as they were before the constitution of 1868, and the plaintiff had recovered judgment against the defendant Morehead in a court of law, and she had gone into a court of equity to restrain and enjoin its collection; upon what ground would she put her relief? There is not a suggestion of fraud, deceit, or mistake of the draftsman in drawing the note, nor a suggestion but what it was drawn just as the parties wanted it and intended it should be drawn. Indeed, this is admitted. We must confess that we are at a loss to see any ground for an equitable interference. And though equity is now administered in the same court, and may be in the same action, the rules that governed before 1868 are the same now that they were before that time. To entitle the defendant Morehead to equitable interference and equitable relief, she must have such equities as would have availed her before 1868.

After giving this case all the investigation and reflection we are able to do, under the light of the very able argument of defendant's counsel, we do not see the error alleged in

cal error, but do not affect the opinion as to the merits of the controversy. There being no disputed facts,—they having been agreed upon,—there was nothing to submit to the jury. The province of the jury is to pass upon disputed facts, and to find how they are. Where there are no disputed facts, it becomes a question of law for the court, and the jury has nothing to do with it. There being no disputed facts in this case, it became a question of law for the court; and, upon the undisputed facts, the court should have directed a personal judgment to be entered against the defendant Morehead. As that judgment should have been entered at the trial, it will be so entered upon this opinion being certified to the superior court of Durham county. Petition dismissed.

CLARK, J., did not sit on the hearing of this case. DOUGLAS, J., dissents.

GRAMPTON v. IVIE et al.

(Supreme Court of North Carolina. May 5, 1899.)

HIGHWAYS—NEGLECT—PROXIMATE CAUSE—TRIAL—INSTRUCTIONS.

1. Where the answer admits that a driver was defendant's driver, and evidence to that effect is introduced on both sides, and defendant asks instructions based on that assumption, he cannot complain that the court's charge assumed that the driver was defendant's servant, and acting in the usual course of his employment.

2. A party cannot complain of an omission from an instruction which is appropriately given in another charge.

3. Where one driving on a highway was put in sudden peril by the negligence of the driver of an approaching vehicle, and his buggy was driven onto a bank at the side of the road under a reasonable apprehension that a collision would occur if he remained in the road, and he acted as a reasonably prudent man would under the circumstances, in the effort to escape the peril, and was thereby thrown from his buggy and injured, his injury was the direct consequence of the other's negligence, though he might not have been injured, had he remained in the road.

4. A charge not fitting the facts is properly refused.

5. One sued for injury resulting from his driving rapidly along a highway at night cannot confine his liability for negligence to his conduct after he discovered, or could reasonably have discovered, the danger.

6. A requested charge that if defendant's driver, as soon as he saw plaintiff's team approaching him in the road, drove out of the way as well as he could to allow space to pass, and thought there was sufficient space, and could give no more because of obstructions on his side of the road, he was not negligent, was properly modified by adding, "after discovering the other team."

7. In an action for injury caused by being thrown from a buggy in attempting to avoid a collision, plaintiff's driver was asked if he did not tell H. that plaintiff said he would not have fallen out, if he had not got his feet tangled in

robe. Witness denied it, and H. im-
d him. *Held*, that this evidence did not
a charge based on the theory of the lap
causing the injury.

Here one hires a team and driver to take
a certain place, and he does not direct
anner of driving, the negligence of the
concurring with that of the driver of
r team in causing him to be thrown from
hicle and injured, does not prevent his re-
from the owner of the latter team. The
ence of the two is the proximate cause,
is driver not being his servant, he is not
sible for him, but has his remedy against
both.

cloth, C. J., and Clark, J., dissenting.

deal from superior court, Mecklenburg
r; Starbuck, Judge.

ion by A. J. Crampton against Ivie Bros.

was a judgment for plaintiff, and de-
nts appeal. *Affirmed*.

well, Walker & Cansler and Scott &
for appellants. Jones & Tillett, for ap-

NTGOMERY, J. The plaintiff, a trav-
salesman, on the 23d of December, 1897,
a team (a buggy and two horses), with a
furnished, from a liveryman in Reids-
to take him from Reidsville to Spray and
1. On the way back from Spray to
ville, about 8 o'clock p. m., the plaintiff's
met in the road, in the darkness, a team
e defendants (a surrey and two horses),
1 by the driver of the defendants. The
where the teams met was a level sur-
about 50 yards long and 12 or 13 feet
in the clear. The evidence of the plain-
ended to prove that the two teams met
is the one of the plaintiff had ascended a
hill, and reached the level road at the
he defendants' team traveling at the rate
or 10 miles an hour; that it was so dark,
here being also a bend in the road, they
not see the defendants' team until with-
yards; that, upon seeing the defendants'
they began to shout to the driver to
and that no attention was paid to the
that the plaintiff's driver, to prevent a
ion and injury, turned suddenly out of
oad, and upon a bank, and, in doing so,
the buggy, by which the plaintiff was
vn out and injured. The defendants' evi-
e tended to show that their team was go-
t a slow rate of speed,—about 3 miles an
; that there was plenty of room for both
s to pass without collision or injury to
r; and that, at the time of meeting, the
dants' driver pulled his team as far out
e road as it was possible to do.

the plaintiff made three special prayers for
action, in substance as follows: First,
from the undisputed evidence, the driv-
the defendants' team, at the time of the
ed injury of the plaintiff, was the serv-
of the defendants, and in the regular
se of his employment; and, if the driver
guilty of negligence on that occasion,
the defendants were as much responsible
hat negligence as if the defendants them-

selves had been driving the team. Second.
That a recovery by the plaintiff would not be
dependent upon an actual collision of the
teams, if by the negligence of the defendants'
driver the plaintiff was suddenly put in dan-
ger, and the driver of the plaintiff, in order
to extricate himself and the plaintiff from
peril, suddenly pulled the team upon a bank
at the side of the road, and that was done
under a reasonable apprehension that it was
necessary for their safety, and the plaintiff
thereby was thrown from the buggy and in-
jured. Third. That, notwithstanding the plain-
tiff might not have been injured if the buggy
had not been driven out of the road and up-
on the bank, yet, if the plaintiff was put in
sudden peril by the negligence of the defend-
ants' driver, and the buggy was driven on the
bank under a reasonable apprehension that a
collision would have occurred if it had re-
mained in the road, and the plaintiff's driver
acted as a reasonably prudent man would
have acted under the circumstances in the ef-
fort to extricate himself from sudden peril,
and the plaintiff was thereby thrown from the
buggy and injured, then the plaintiff's in-
jury would be the direct consequence of the
defendants' negligence. Fourth. That it was
the duty of the defendants' driver to drive his
team in such a manner that he would not un-
necessarily imperil the rights of persons on
the road, and that if it was dark, and travelers
from an opposite direction might not be seen
or heard, it was all the more necessary that
he should drive carefully, to prevent sudden
peril, accidents, and injury to those he might
meet, and that, even if the road was wide
enough for the teams to have passed in safe-
ty, yet, if the defendants' driver negligently
delayed to turn out of the road until his
horses' heads got nearly to the heads of the
plaintiff's horses, and the plaintiff and his
driver were thereby put in reasonable appre-
hension that there was about to be a colli-
sion, and to avoid the impending danger the
buggy of the plaintiff was pulled up on the
bank, and the plaintiff thereby thrown from
his buggy and injured, then the injury was
the result of the defendants' negligence. The
instructions were given, and the defendants
excepted.

The error complained of as to the giving of
the first prayer was that the court assumed
that the person who was driving the defend-
ants' team was the servant of the defendants,
and acting in the usual course of his employ-
ment. The exception was without merit. It
was admitted in the answer that the team
and driver were the team and driver of the
defendants. Evidence to that effect on both
sides was introduced, and special instructions
were requested by the defendants, based on
that assumption.

Exception to the second prayer for instruc-
tions was that his honor left out any instruc-
tion concerning the conduct of the plaintiff in
jumping from the buggy, and applying the
rule of the prudent man to the facts. Without

gy, it appears that an instruction—all the defendants were entitled to—was given in the following words: "Even if the plaintiff, Crampton, was placed in a position of danger or peril, the law requires that he should exercise ordinary firmness in avoiding the peril of his position; and if he became frightened, and jumped from the buggy when a man of ordinary firmness would not have jumped under the same circumstances, any injury received by him in consequence of, or as the result of, this act, cannot be imputed to the negligence of the defendants, but would be considered as the result of his own negligence." As to the rule of the prudent man, his honor told the jury that the apprehension for their safety by the driver must have been reasonable; and, to further illustrate that doctrine, he said, in his charge in chief: "To answer the first issue 'Yes,' you must find by a preponderance of the evidence, in the first place, that defendants' driver was driving in such a negligent manner as to cause the driver Hunt [plaintiff's driver] to believe his buggy would be struck, if he remained in the road, and that, to avoid a collision, Hunt drove upon the bank, and the plaintiff was thereby thrown out and injured. In the next place, you must find by a preponderance of the evidence that a driver of ordinary prudence, under the circumstances, and when Hunt drove on the bank, would have had reason to believe that there was danger of collision, and would probably have driven upon the bank to avoid the danger." The third instruction was correct in every particular. *Vallo v. Express Co.* (Pa. Sup.) 23 Atl. 594; *Lincoln Rapid Transit Co. v. Nichols* (Neb.) 55 N. W. 872. The ground of exception to the fourth instruction was the same as that made to the second, and we have disposed of that.

The defendants submitted the following prayers for instructions:

"(1) It was not negligence in the defendants' servant in charge of their team to drive rapidly on an open country highway, if the danger of collision was slight; and, even if the jury find that he was driving rapidly at the time he first saw, or could by reasonable care have seen, the team of Ogburn & Crafton, in which the plaintiff was riding, and that defendants' servant, as soon as he saw the team, did what he could under the circumstances to avoid any collision with the team of said Ogburn & Crafton, there was no negligence on the part of the defendants' servant, and the jury will answer the first issue 'No.'" The court declined to give the instruction, and the defendants duly excepted.

"(2) That the servant of defendants who was driving their team was required to exercise only that degree of care or prudence in driving over the public highway which careful drivers are accustomed to use, or that degree of care usual with careful drivers under the

the other team, they will answer the first issue 'No,' and the defendants' servant in such case was not guilty of negligence." This instruction was given by the court.

"(3) That if the defendants' driver, as soon as he discovered the other team, either standing still or approaching him in the road, drove his team out of the way, as well as he could under the circumstances, in order to give the other team sufficient space in the road to pass, and he thought at the time that the driver of Ogburn & Crafton had sufficient space to pass his team in safety, and the driver of the defendants could not give more space than he did, by reason of the fact that there were obstructions on his side of the road which prevented the driving of his team further away from the other team, the jury will find that there was no negligence on the part of the defendants." This instruction was refused as asked for, but the court gave the same with this addition at the end thereof, to wit, "after discovering the other team." To the refusal to give the instruction, and to the modification thereof, defendants duly excepted.

"(4) If the driver of the team of Ogburn & Crafton had sufficient space in the roadway, or traveled part of the road, to pass the team of the defendants in safety, and the driver of Ogburn & Crafton's team drove said team further to the right than he was required to do, under the circumstances, in order to pass, and by reason thereof the plaintiff was thrown from the buggy or vehicle in which he was riding, the jury will answer the first issue 'No,' as the injury in such case was not caused by the negligence of the defendants' servant, but by that of the driver of the team of Ogburn & Crafton." The court refused this instruction, and defendants excepted. The court gave it in a modified form, as follows: "If it was a fact, and would have so appeared to a man of ordinary prudence and firmness, under the circumstances, that the driver of the team of Ogburn & Crafton had sufficient space in the roadway, or traveled part of the road, to pass the team of the defendants in safety, then, inasmuch as the evidence shows that the driver of Ogburn & Crafton's team drove said team so as to throw the wheels on the embankment, the jury will answer the first issue 'No,' as the injury in such case was not caused by the negligence of the defendants' servant, as the proximate cause, but by that of the driver of Ogburn & Crafton." The defendants excepted to the modification of the court.

"(5) That all that was required of the servant of the defendants, Ivie Bros., under the circumstances, was to use such a degree of care as was proportioned to the danger of the situation and surroundings, and to do what a reasonable and prudent man would have done under the circumstances; and, if he exercised that degree of care, the jury will

wer the first issue 'No.'" This instruction was given by the court.

(6) That if the accident to the plaintiff resulted by reason of the fact that his legs were so wrapped in the lap robe which he was using that he could not prevent his fall from the buggy, and if the jury find that his fall from the buggy was caused by the manner in which his legs were wrapped in the robe, they will answer the first issue 'Yes.'" The court declined to give the instruction, and the defendants duly excepted.

(7) If the jury find that the plaintiff either fell or was thrown from the buggy by reason of the fact that the bit in the mouth of one of the horses drawing said buggy broke, and the horse became unmanageable, the jury will answer the first issue 'No.'" This instruction was given by the court.

(8) If the jury finds the facts to be as set out in either of the prayers for instructions 4, 6, and 7, they will answer the second issue 'Yes.'" The court declined to give this instruction, and the defendants duly excepted.

(9) If the jury believe from the evidence that when the conveyances passed each other on the road the plaintiff's buggy was on an incline of only twelve or eighteen inches, and this was insufficient to capsize the buggy, throw plaintiff out, so that there was no reasonable ground for apprehension on his part that he would be thrown out, and under the circumstances he jumped out, the result of his fall cannot be charged against the defendants." This instruction was given by the court.

(10) If the jury believe from the evidence that the incline or tilt of the plaintiff's buggy was not great enough to throw from it a man who exercised ordinary care under the circumstances when the plaintiff was thrown from the buggy, the fact is to be attributed to want of care on his part, and the defendants cannot be held responsible for the effects of his fall." This instruction was given by the court.

(11) If the jury believe from the evidence that the driver of Ivie Bros., the defendants, soon as he knew there was a conveyance coming him in the road, turned his team to right, and moved to the right as far as could with safety to himself and team, and between his conveyance [and] the opposite side of the road there remained sufficient space for the plaintiff's conveyance either to pass safely, or to stand safely till he passed with conveyance, then the defendants' driver exercised all the care which the law required of him, and the defendants cannot be held responsible for the injury complained of by plaintiff, and this would be so even though the defendants' driver had been driving at a rapid pace just before that time." The court refused to give this instruction, and defendants excepted. The court gave the instruction with addition thereto as follows: "Provided, the driver of defendants, before he knew he was meeting a conveyance, was not driving

so recklessly and carelessly as to reasonably cause plaintiff's driver to believe at the time he turned out of the road that his buggy would be struck if he remained in it." The defendants excepted to the modification of this instruction.

"(12) If the jury believe from the evidence that the plaintiff had passed over the road often, and was familiar with its condition, and thought it was too narrow for two conveyances to pass safely, and if he apprehended, when he saw the defendants' conveyance approaching, that danger was imminent, and had time and opportunity to do so, it was his duty to get out of his conveyance until they did pass; and, failing to do so, he is guilty of contributory negligence, and cannot recover." This instruction was given by the court.

"(13) If the jury believe from the evidence that the plaintiff's conveyance was passed safely by the defendants' conveyance, and it was not necessary for the plaintiff's conveyance to have moved any further with its outside wheels elevated on the embankment, and if, because of the bridle bit of one of his horses breaking, or for any other reason, the plaintiff's buggy did move further on the incline before coming back into the road, and thereby the plaintiff was thrown from his buggy, this was no fault of the defendants' driver, and the defendants cannot be held responsible for the plaintiff's injury." The court declined to give this instruction, and defendants excepted. The court modified the instruction as follows: "If the jury believe from the evidence that the plaintiff's conveyance was passed safely by the defendants' conveyance, and it was not necessary for the plaintiff's conveyance to have moved any further with its outside wheels elevated on the embankment, and it would have so appeared to a man of ordinary prudence, under the circumstances, and, if because of the bridle bit of one of his horses breaking, or for any other reason, the plaintiff's buggy did move further on the incline before coming back into the road, and thereby the plaintiff was thrown from his buggy, this was no fault of the defendants' driver; and the defendants cannot be held responsible for the plaintiff's injury." To the modified instruction the defendants excepted.

"(14) If the plaintiff's buggy was driven further to the right, and up the embankment on that side, than was necessary, under the circumstances, for the safe passage of the buggy by the team of the defendants, and the injury to the plaintiff was caused thereby, the jury cannot impute negligence to the defendants as the cause of the injury to the plaintiff; and the first issue should be answered 'No.'" The court declined to give the instruction, and the defendants duly excepted.

"(15) If the plaintiff hired the team of Ogburn & Crafton for the purpose of being carried from Reidsville to Leaksville and Spray, and back to Reidsville, any negligence of his

ered by the jury as the negligence of the plaintiff himself." The court declined to give the instruction, and the defendants duly excepted.

"(16) If the negligence of the driver, Whit Hunt, proximately caused the plaintiff's injury, the jury will answer the first issue 'No;' and if there was any negligence of the defendants in causing the injury, and the negligence of Whit Hunt contributed thereto, the jury will answer the second issue 'Yes.'" The court declined to give the instruction, and the defendants duly excepted.

"(17) Even if the plaintiff, Crampton, was placed in a position of danger or peril, the law requires that he should exercise ordinary firmness in avoiding the peril of his position; and if he became frightened, and jumped from the buggy when a man of ordinary firmness would not have jumped under the same circumstances, any injury received by him in consequence of, or as the result of, his act, cannot be imputed to the negligence of the defendants, but would be considered as the result of his own negligence." This instruction was given by the court.

The first sentence of the first prayer could not have been given. It did not fit the facts in the case. The remaining portion of that prayer was properly refused, as were the third and eleventh prayers, for they left out of consideration entirely the view of the alleged negligence of the defendants' driver prior to the meeting of the teams. His honor's addition to the third prayer was proper. The fourth prayer left out of consideration the idea of reasonable apprehension of danger on the part of the plaintiff's driver, and was properly refused. Its modification by his honor was correct. There was no error in the refusal to give the sixth instruction, for there was no testimony upon which it could be based. Hunt, the plaintiff's driver, was asked on his cross-examination if he did not tell Hampton that the plaintiff had told him that, if he had not gotten his feet tangled up in the lap robe, he would not have fallen out of the buggy, to which the witness said he had made no such statement to Hampton. To affect Hunt's credibility, the defendants introduced Hampton as a witness, who said that Hunt told him that Crampton, in jumping out, had hung his feet in the lap robe, and that caused him to fall. That evidence was not sufficient to justify the giving of the sixth instruction. The eighth prayer was properly refused. There was no error in his honor's refusal to give without qualification the thirteenth prayer, but, with the modification added by his honor, it became a proper instruction.

The fourteenth, fifteenth, and sixteenth prayers were founded on the defendants' views of the law, that, if the plaintiff's driver contributed to the injury of the plaintiff, the law would impute that negligence to the plaintiff

even if their driver had been negligent. The sixteenth prayer contained both propositions of law, and the view of the court was that one was a correct proposition, and the other was not, and his honor declined to give it as it was framed. But he did give the first section of the sixteenth prayer, substantially in the following words: "Even if Smallwood [defendants' driver] was driving negligently, an Hunt thought it necessary to drive upon the bank to avoid a collision, yet if an ordinarily prudent driver, under the circumstances, would not have had reason to believe there was danger of collision, or probably would not have driven on the bank, you will answer the first issue 'No;' for in such case the defendant's negligence was not the natural cause of Hunt driving on the bank. Hunt's negligence (not contribute with, and, together with defendants' negligence, constitute the proximate cause. It was of itself the direct, the proximate, cause of the injury." The other sections of the sixteenth prayer his honor refused to give. On the contrary, he instructed the jury: "Now, even if Hunt was negligent in the manner of his driving while passing defendants' conveyance,—as, for example, turning out more suddenly, or higher upon the bank, than an ordinarily prudent man would have done,—his negligence, under these circumstances, would be considered as concurring and contributing with defendants' negligence, in together being the proximate cause of any injury sustained by plaintiff, if plaintiff was thrown out by the driving upon the bank while passing. Defendants would be relieved from liability by this concurrent negligence of Hunt, which co-operated with their own driver's, producing the injury." This instruction was, in our opinion, proper. The view of the law is ably stated in the opinion of the court in *Little v. Hackett*, 116 Pa. 366, 6 Sup. Ct. 391. There the plaintiff was injured by the collision of a railroad train with the carriage in which he was riding. The plaintiff had gone on an excursion from Germantown to Long Branch. At that latter place, having some spare time, he was taking the cars on his return home, he was in a carriage, and directed the driver to go to a public park near the railroad station. The driver, upon receiving the order, turned the horses to go to the park; and in crossing the railroad track, near the station, for that purpose, the vehicle was struck by the engine of a passing train, and the plaintiff was injured. The carriage belonged to a liveable keeper, and was driven by a person in his employment. It was an open carriage with the seat of the driver about ten feet above that of the person driven. (The circumstance, however, did not in any way affect the reasoning of the court in the decision of the case. The evidence went to show that the collision was the result of the concurrent

age of the trainmen and of the driver of carriage. The railroad company set up defense of contributory negligence, contending that the driver's negligence was to be attributed to the plaintiff. On the trial his honor instructed the jury as follows: "I charge that when a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver; and, if he sustains an injury by means of a collision between his carriage and another, he may recover damages from the party by whose fault or negligence the injury occurred, whether of that of the driver of the carriage in which he is riding, or of the driver of the other. He may sue either the negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time. A passenger in the carriage may direct the driver where to go,—to such a park, or such a place that he wishes to see. So far the driver is under his directions; but my charge to you is that, as to the manner of driving, the driver of the carriage, or the owner of the hack,—in other words, he who has charge of it, and has charge of the team,—is the person responsible for the manner of driving, and a passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements." That instruction was sustained. In the opinion of the court, the contrary doctrine announced in the case of *Thorogood v. Bryan* (decided in the court of common pleas in 1849) 8 C. B. is referred to and disapproved. Justice L., who wrote the opinion of the court, said: "The doctrine resting upon the principle that no one is to be denied a remedy for injuries sustained without fault by him, or by a party under his control and direction, is affirmed by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, that he can only recover against a wrongdoer when they who are in charge can recover. In other words, that their contributory negligence is imputable to him, so as to prevent his recovery for an injury when they are negligent of such negligence, could not recover. The leading case to this effect is *Thorogood v. Bryan*." The court further cited *Little v. Hackett*, supra: "The truth of the decision in *Thorogood v. Bryan* rests upon an indefensible ground. The identification of the passenger with the negligent driver or driver, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are in the same position. The owner of a public conveyance is a carrier, and the driver or

the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." In that opinion it is stated that in this country *Thorogood v. Bryan* has not escaped criticism in the English courts, and in this country has not been generally followed, and the cases in which it has not been followed are cited. There is no error, and the judgment is affirmed.

CLARK, J. (dissenting). "*Proxima, sed non remota, causa spectatur.*" The court charged the jury: "Now, even if Hunt was negligent in the manner of his driving while passing defendants' conveyance,—as, for example, by turning out more suddenly, or higher upon the bank, than an ordinarily prudent man would have done,—his negligence under these circumstances would be considered as concurring and contributing with defendants' negligence, in together being the proximate cause of any injury sustained by plaintiff, if plaintiff was thrown out by the driving upon the bank while passing. Defendants would not be relieved from liability by this concurring negligence of Hunt, which co-operated with their own driver's, producing the injury." This is clearly error. In such case the negligence of his own driver, which threw the plaintiff out and injured him, was subsequent to, and independent of, the negligence of the defendants. It was not the necessary consequence of defendants' negligence, and was not concurrent with it, and was the proximate, direct cause of plaintiff's injury. The defendants' negligence was the remote cause. The court, in substance, told the jury that if defendants' negligence made the plaintiff's driver turn out of the road, and the negligent manner of plaintiff's driver in so doing injured the plaintiff, the defendants were liable. This cannot be sustained by precedent or in reason, and, if followed up, would have no limit. For instance, if the barkeeper had not sold defendants' driver whisky, he would not have been negligent, and, if not negligent, he would not have frightened the plaintiff's driver into turning out, and the latter would not by his negligent manner of driving so have injured the plaintiff. And it could be carried still further back, one cause depending on another, in the manner of the "house that Jack built." But the charge presupposes that the injury was caused by the negligence of plaintiff's driver in running the buggy upon the bank and throwing the plaintiff out, and, if so, the law can go no further back than this direct cause. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, has no application. There the conveyance in which the plaintiff was driving was struck by defendants' train, and he was injured. The driver of the conveyance and the engineer were both negligent, and it was held that, the negligence being concurrent, the plaintiff could sue both the owner of the conveyance and the railroad company. Clearly,

case here, if the two conveyances had run together, both drivers being negligent, causing injury to plaintiff. But here the negligence of defendants caused plaintiff's driver to do something, which something he did in a negligent manner, whereby the plaintiff was injured; and the court told the jury that, if so, the negligence was concurring. Clearly not so, for plaintiff's driver need not have done so in a negligent manner, and, if he had not, the plaintiff would not have been injured. Here is the proximate cause, which alone the law can consider. Anything beyond that opens the door to a wide and illimitable field of speculation. The negligence of plaintiff's driver was not concurrent with that of defendants, but subsequent thereto, and due to his own want of nerve or skill. This instruction went to the marrow, and, being erroneous, a new trial should be granted.

FAIRCLOTH, C. J. I concur in the dissenting opinion.

HUSS v. CRAIG et al.

(Supreme Court of North Carolina. May 9, 1899.)

TAXATION—CERTIFICATE—COUNTY COMMISSIONERS—FORECLOSURE.

The assignee of a tax certificate issued to county commissioners can only acquire the title by foreclosure, as provided by Laws 1895, c. 119, § 90.

Clark, J., dissenting.

Appeal from superior court, Gaston county; Coble, Judge.

Action by C. J. Huss against T. L. Craig and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

R. L. Durham, for appellants. Todd & Pell and Argo & Snow, for appellee.

MONTGOMERY, J. This is a controversy submitted without action under section 567 of the Code. The following is the statement of facts agreed: Prior to the year 1895, the defendants T. L. Craig and T. W. Wilson were tenants in common in fee of the tract of land described in the complaint, and on the 3d day of December, 1895, they contracted to convey the same to George Glenn, and put him in possession. The land was listed for taxes for the year 1896 in the name of Glenn, and the taxes assessed thereon amounted to \$2.40. Default having been made in the payment of the taxes, the land was sold for the same by the sheriff of Gaston county, and bid in by the commissioners of the county. The sheriff issued a certificate of sale to the commissioners, in which it was recited "that, unless redemption was made of said estate in the manner provided by law, the said county commissioners of Gaston county, heirs or as-

the certificate was assigned to the plaintiff. After the expiration of the period of redemption, and the owner not having paid the taxes, the plaintiff presented and surrendered the certificate to the sheriff, and demanded and obtained a deed to the land from him, according to the provisions of the statute. Under this deed the plaintiff claims the land in controversy. The plaintiff contends that his tax deed conveys a good title to the land in fee. The defendants contend that the plaintiff's deed is void. His honor was of opinion, upon the facts, that the sheriff's deed conveyed the title to the land, and that the plaintiff was entitled to possession thereof, and gave judgment accordingly. For the reasons set out in *Wilcox v. Leach*, 123 N. C. 74, 31 S. E. 374, we are of opinion that his honor was in error, and that the plaintiff was not entitled to recover. But we are of the opinion, however, that, as it does not appear from the facts agreed that the defendants have offered to pay to the plaintiff the amount of the tax, interest, and penalty, the defendants should be allowed a reasonable time within which to pay the same; and in default of such payment the plaintiff should be allowed in this action to proceed to foreclose the lien which he obtained by the purchase of the certificate from the county, and the plaintiff ought to be allowed his costs of action in the court below, but not his costs of appeal. Error.

CLARK, J., dissented.

WHITMAN v. DICKEY.

(Supreme Court of North Carolina. May 9, 1899.)

TAX CERTIFICATE—ASSIGNMENT BY COUNTY—FORECLOSURE.

The assignee of a tax certificate issued to county commissioners can only acquire the title by foreclosure, as provided by Laws 1895, c. 119, § 90.

Clark, J., dissenting.

Appeal from superior court, Rutherford county; Starbuck, Judge.

Action by H. L. Dickey against F. Whitman. There was a judgment for plaintiff, and defendant appeals. Reversed.

R. S. Eaves, B. A. Justice, and J. C. L. Harris, for appellant. M. H. Justice, Burwell, Walker & Cansler, and Shepherd & Busbee, for appellee.

MONTGOMERY, J. This is a controversy submitted without action, under section 567 of the Code. The facts agreed upon are as follows: At the time for listing the taxes for the year 1896 the defendant was the owner of the tract of land described in the complaint, and listed the same for taxation. The defendant made default in the payment of taxes.

proper advertisement, when the commissioners of the county purchased it, and received a certificate of sale from the tax collector. Afterwards the county commissioners assigned the certificate to the plaintiff. The tax collector executed to the plaintiff a deed to the land in pursuance of the sale, and under the certificate, after the time of redemption had passed. The plaintiff contends that the tax collector's deed conveys to him a good title. The defendant contends that the plaintiff's deed from the tax collector is of no force. Upon the facts the court was of opinion that the plaintiff's deed to the land from the tax collector was good, and that the plaintiff was entitled to the possession of the land, and gave judgment accordingly. For the reasons given in *Wilcox v. Leach*, 123 N. C. 74, 31 S. E. 374, we are of the opinion that his honor was in error, and that the plaintiff is not entitled to recover. But we are of the opinion, however, that as it does not appear from the facts agreed that the defendant has offered to pay to the plaintiff the amount of the tax, interest, and penalty, the defendant should be allowed a reasonable time within which to pay the same; and in default of such payment the plaintiff should be allowed in this action to proceed to foreclose the lien which he obtained by the purchase of the certificate from the county, and the plaintiff ought to be allowed his costs of action in the court below, but not his costs of appeal. Error.

CLARK, J., dissented.

COLLINS et ux. v. BRYAN et al.

(Supreme Court of North Carolina. May 9, 1899.)

TAXATION—PURCHASE BY COUNTY—ASSIGNMENT OF CERTIFICATE—RIGHTS THEREUNDER—COSTS.

1. As a county purchasing land at a tax sale is not entitled to a deed therefor, but merely to a foreclosure of the certificate as in case of a mortgage, the county's assignee only acquires the same right.

2. In an action by the assignee of a tax certificate, originally issued to a county, to recover the land, defendant will be allowed a reasonable time in which to pay the amount requisite for redemption, and, in default thereof, plaintiff allowed to proceed in the same action to foreclose his certificate.

3. An assignee of a tax certificate originally issued to a county, bringing an action to recover the land in which a new trial was granted because he had merely a right to foreclose his certificate, will be allowed costs below, but not an appeal.

Clark, J., dissenting.

Appeal from superior court, Halifax county; Norwood, Judge.

Action by J. A. Collins and wife against ettle J. Bryan and another to recover land. From a judgment for plaintiffs, defendants appeal. Reversed.

MONTGOMERY, J. This action was brought to recover the possession of the lands described in the complaint. The lands were sold by a tax collector of Halifax county in 1896 for taxes due upon the same. They were bid off at the sale for the county of Halifax, and certificates of the sale were afterwards issued by the tax collector to the county. The certificates of sale were assigned by the board of commissioners of the county to John A. Collins, and by him assigned to his wife, Mary W. Collins, the plaintiff in this action. Afterwards, on the 11th day of March, 1897, redemption not having been made by the owners of the lands, the tax collector made a deed in fee simple, conveying the same to the plaintiff Mary W. Collins. Under this deed the plaintiffs claim title to the land. The defendants requested the court to instruct the jury: "That, as purchaser of said lands, the county of Halifax was not entitled to a deed therefor, but was only entitled to foreclose the certificates of sale as in case of mortgage; that the plaintiffs, as assignees of the county, acquired no greater rights, and were not entitled to deeds for said lands." His honor refused to give the instruction, and told the jury to answer the issue "Yes." The instruction ought to have been given. We will not enter upon a discussion of the matter here, but simply make reference to the case of *Wilcox v. Leach*, 123 N. C. 74, 31 S. E. 374, for the reasoning upon which this case is decided. But we are of the opinion, however, that, as it does not appear from the pleadings that the defendants have offered to pay to the plaintiffs the amount of the tax, interest, and penalty, the defendants should be allowed a reasonable time within which to pay the same; and in default of such payment the plaintiffs should be allowed in this action to proceed to foreclose the lien which they obtained by the purchase of the certificate from the county, and the plaintiffs ought to be allowed their costs of action in the court below, but not their costs of appeal. There was error in the matter pointed out, for which there must be a new trial.

CLARK, J., dissented.

COLLINS v. PETTITT et al.

(Supreme Court of North Carolina. May 9, 1899.)

Motion for rehearing. Denied.

For former decision, see 31 S. E. 1001.

MacRae & Day, E. L. Travis, and Shepherd & Busbee, for appellant. Thos. N. Hill and W. A. Dunn, for appellees.

FURCHES, J. (concurring). This is a petition to rehear, and, as the opinion in this case is a per curiam, based on *Wilcox v. Leach*, 123 N. C. 74, 31 S. E. 374, it is, in fact, a petition to have the opinion in *Wilcox v. Leach* reviewed. Notwithstanding the severe criticisms made upon the opinion in that case in the arguments, at this term, of probably a half dozen cases, it still seems to me that the opinion in that case is based on sound principles, is a just and proper construction of the statute of 1895, and should be sustained. We were told that this court can have no policy; that its duty is to construe the law as it finds it, and leave matters of policy to the legislature. I agree with these suggestions. But it is somewhat singular that after these suggestions the greater part of the argument of the petitioner was taken up in discussing the policy to be pursued in collecting taxes to meet the demands of the government; how difficult it was to collect them before the statute of 1887; how the payment of taxes was evaded; what a burden this was on the honest taxpayers; that this decision was going back to the old policy; and that the state would not be able, if this opinion stands, to collect its just revenues. And what was equally as striking to me was that we were then told that, to remove the doubt this opinion had thrown upon this matter, the legislature of 1899 had passed an act providing against this erroneous construction of the act of 1895. This being so, the matter of public policy contended for is taken out of the case, and it is reduced to the dignity of an ordinary action, involving the title to land where the plaintiff claims title to 200 or 300 acres of land, for which the deed shows he paid less than \$20. The plaintiff is entitled to the full benefit of the law arising out of the transaction, and nothing more. He is entitled to nothing for the good of the public. There have been a number of cases similar to this before us, brought on deeds acquired upon certificates of sales by counties; but not one has come before us in which the county is a party. The counties do not seem to want land, for it would seem, if they are entitled to a deed upon their certificate, as it is contended they are, and this deed gives them the absolute fee simple to the lands, that they would take the lands, and sell them for their value, rather than sell their certificates for a pittance. We are told that *Stanley v. Baird*, 118 N. C. 75, 24 S. E. 12, involved the same question that is presented in this case, and it seems that this question was presented by the record in that case; but it was not called to the consideration of the court, nor was it considered in passing on that case, as every member of this court well remembers. But, as I have said, to my mind the opinion in *Wilcox v. Leach*

rendant. They are simply the agents and trustees of the counties to whom the taxes are due. To secure the payment of these taxes, they have a lien on the lands of the delinquent taxpayer in the nature of a mortgage, with a power of sale. At the sale the auctioneer, who cannot buy for the trustees or for the principal debtor, bids the land in and, under the statute, certifies that fact to the commissioners. Does this change their relations in the matter? Does it change their trust relations? Are they, by this transaction, the absolute owners of this land in fee simple? According to the clearest principles of law, which it seems to me that no good lawyer will dispute, they are not. Herein lies the distinction between a third person becoming the purchaser and the commissioners, who simply direct the crier to bid in the land if it does not bring enough to pay the taxes for which it is being sold; that is, if it does not pay the mortgage debt. When *Wilcox v. Leach* was decided at the last term of this court, it received the approval of every member of this court, and, in my opinion, it was correctly decided, and should stand.

CLARK, J. (dissenting). The courts have no public policy to declare or enforce. This lies outside of their province. It is for the legislature—the lawmaking power—to define and declare the public policy; and, when this is clear, whether it may seem a hardship or beneficial, it is equally the duty of the courts to declare the law as written. If of doubtful meaning, it is the duty of the courts to construe it in accord with the settled public policy as deduced from this and similar legislation, or to consider the evil to be remedied, and other like aids, in the endeavor to get at the true meaning of the act. The taxing power is essential to the existence of government, and justice requires not only that the taxes shall be laid on all “by a uniform rule, and ad valorem” (Const. art. 5, § 3), but that they shall be collected from all, for, if any property escapes payment of taxes, the property of others, who have already paid their share, must make good the default of those who evade payment. Formerly the holder of a tax deed had to prove the regularity of the many steps leading up to it, with the result, as a decision of the supreme court stated just before the tax reform act of 1887 became law, that no tax deed had, till then, ever been sustained in this court. As a consequence, no one, scarcely, would purchase at a tax sale, and the counties who bought in the lands of defaulting taxpayers from year to year in default of other bidders accumulated large bundles of worthless “tax-sale certificates.” Fifty years or so ago, when the average state tax was 9 cents or less on \$100, the temptation to any landowner to shirk payment of taxes was small, and the default of those who did throw

deaf, dumb, and blind, the penitentiary, and many other added subjects of expense, required by an advancing civilization, the aggregate of state and county taxes has run up often to the full limit of taxation (66% cents), with frequent recurrence of special taxes in excess of that sum. The increased temptation to avoid taxation—a temptation that was encouraged by a knowledge of the futility of tax sales—placed an increasing burden upon good men, and swelled the ranks of those who evaded the payment of their just public burdens. The complaint became general. The state treasurer and the governor repeatedly recommended a change as imperatively demanded, till finally the legislature of 1885 (Acts 1885, c. 238) appointed a commission of three eminent citizens to report a bill for an entirely new system of collecting taxes, the first and indispensable requisite being, of course, that the purchaser at a tax sale should get a good title. The commission reported to the legislature of 1887 their bill, which was in most particulars a copy of the law on the subject obtaining in most other states, and whose constitutionality had been sustained by many decisions of their courts and by the United States supreme court; and the change was suggested as valid if it should be made, by the opinion of this court in *Fox v. Stafford* (1884) 90 N. C. 296, at page 298. The report of the tax commission was adopted (Laws 1887, c. 137), and, with minor changes, is the law to-day. Its striking feature was a change of the burden of proof. The old law placed upon the purchaser at a tax sale the burden of proving that all the proceedings were regular, which it was almost impossible for him to do. Under the new law the burden was shifted, and the tax deed was made conclusive evidence of the regularity of matters of routine, and presumptive evidence of all other matters. Statutes substantially the same as the new statute had been sustained, as above stated, in numerous decisions in the states adopting the tax reform, and by the United States supreme court, many of which are cited in *Cooley, Tax'n* (2d Ed.) 521, note and since reiterated by the United States supreme court down as late as *Castillo v. McNico*, 168 U. S. 674, 18 Sup. Ct. 229, and *Ng v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 5. It is needless, however, to discuss the new statute, which has been sustained by this court in *Basnight v. Smith*, 112 N. C. 229, S. E. 902; *Stanley v. Baird*, 118 N. C. 24 S. E. 12 (Furche, J.); *Peebles v. Taylor*, 118 N. C. 165, 24 S. E. 797 (Faircloth, C.); *Sanders v. Earp*, 118 N. C. 275, 24 S. E. 8 (Montgomery, J.); *Moore v. Byrd*, 118 N. C. 23 S. E. 968; *Powell v. Sikes*, 119 N. C. 26 S. E. 38 (Montgomery, J.); *Lyman Hunter*, 123 N. C. 508, 31 S. E. 827; and other cases. The radical difference between two systems is noted by Furche, J., in 32 S.E.—62

ged the rule of presumptions, and now it is about as hard to defeat a tax title as it was before to establish one." The present is a rehearing of this case, decided by a per curiam (123 N. C. 769, 31 S. E. 1001), upon the authority of *Wilcox v. Leach*, 123 N. C. 74, 31 S. E. 374, and therefore, in effect, is a rehearing as to the grounds of the opinion in the latter case, which went off upon the point that the word "may," in section 90, c. 119, Laws 1895, giving to the county commissioners the right to foreclose upon a tax certificate, must be read "shall" or "must." The statute says, when the county purchases, the commissioners "may proceed by action to foreclose such certificates or liens," etc., making it plainly optional. The opinion held—inadvertently I think—(page 78, 123 N. C., and page 375, 31 S. E.) the county "must proceed to collect only by foreclosure." I find no warrant for this in the statute, and it is counter to other provisions in the act, and to the public policy of the present legislation on the subject. In view of the very plainly expressed policy in the statutes, which have been almost identical since the first enacted,—chapter 137, Laws 1887,—and the repeated decisions of this court upon it, this seems like looking back to the "pit from which we have been digged." Not only the word "may" shows that foreclosure was an optional procedure, but the other provisions of the statute confirm that view.

1. The county is authorized to "purchase," just as any one else. Section 85. It is held that, even independent of any expressed provisions of the statute, the government has the same right to purchase as any one else; and, if so, of course it would get exactly the same rights as any other purchaser. *De Treville v. Smalls*, 96 U. S. 517; *Cooley v. O'Connor*, 12 Wall. 391; *Douthett v. Kettle*, 104 Ill. 356. In the first of these cases, Mr. Justice Strong, speaking of the effect of a purchase by the government at a tax sale, says (page 522): "If the United States became the purchaser at the commissioner's sale, it was only to obtain the taxes by a resale; and such a resale, resting, as it must have done, upon the original sale made by the commissioners, needed the encouragement and support of a commissioner's certificate equally with a purchase by a bidder. It is not, therefore, to be admitted that the statute intended to put the United States in any worse condition than that occupied by any other successful bidder;" and adds that the argument to the contrary "is plausible, but unsound." Nor is there the slightest indication in our statute that it was intended to put the county, if it became a purchaser, upon a footing inferior to that "occupied by any other successful bidder." In the same case Mr. Justice Strong further says: "We are not unmindful of the numerous decisions of state courts which have construed away the plain meaning of statutes

of judicial refinement had rendered almost inoperative all legislative provisions for the sale of land for taxes. The consequence was that bidders at tax sales, if obtained at all, were mere speculators. The chances were greatly against their obtaining a title. The least error in the conduct of the sale or in the proceedings preliminary thereto was held to vitiate it, though the tax was clearly due and unpaid." It was to remedy that state of things, brought about, as Mr. Justice Strong says, by judicial legislation, with the resultant hardship to all honest taxpayers, that the reformed tax system was adopted in this and other states as a sheer necessity for the public treasury; and already astute counsel are besieging the court to construe away the new statute.

2. Section 85 (chapter 119, Laws 1895) not only gives the county the same right to purchase as any one else, but authorizes it to receive and assign certificates of purchase. It must be that its assignee stands in the same plight as the assignee from any other purchaser, for the certificate issued to the county is identical with that issued to any other purchaser, and its wording is prescribed in section 57, and provides, after the recital of sale and purchase, the following: "And I further certify that unless redemption is made of said estate in the manner provided by law, the said (here insert name of purchaser) heirs or assigns will be entitled to a deed therefor on and after the — day of —, A. D. 18—, on surrender of this certificate." When the plaintiff saw, in section 85, that the county could buy, receive a certificate, and assign it, like any one else, and that the certificate (whose form is prescribed in the statute) provides that, on failure of the tax defaulter to redeem in the time prescribed by law, he would be "entitled to a deed," he was justified in relying upon the statute, which did not put the county, when purchasing, "in any worse condition than that occupied by any other successful bidder,"—to use the language of the highest court in the land. Though section 90 does give the county the option to foreclose, by section 93 exactly the same privilege is given any other purchaser. Thus throughout the act there is not the shadow of a shade of an intimation by the lawmaking power of any discrimination or intention to discriminate between the county and any other purchaser. Both are authorized to purchase and to receive and assign the tax certificate; both receive the same tax certificate, drawn in a form prescribed by statute, and which on its face promises that the purchaser or his assignee shall be entitled to a deed if the tax defaulter does not redeem within a year; and to the county and to the other purchaser alike is given the option to foreclose if it is preferred to taking a deed. There is no indication in the statute of any legislative intention to place one who buys the tax certifi-

chases at the tax sale from necessity, to save its taxes. A speculator's certificate ought not to be preferred to that of a county, thus making the latter unsalable, for who will buy a lawsuit? The evident purpose of conferring the privilege of foreclosure is that, if there are tax certificates of prior date outstanding, it might be desirable, by a foreclosure, a proceeding in rem, to give holders of such other liens opportunity to come in, and thus clear the title.

3. It would be a serious discrimination against counties, which are often the only purchasers, to restrict them to a foreclosure. Frequently the taxes range from \$1 or less to \$20, and to require the county to go to an expense, probably, of \$20 in each such case, to foreclose, after waiting a year for the taxes, will result simply in exempting all land not paying large amounts from taxation, unless the owners volunteer to pay, for the county knows that the county will not spend \$20 to collect anything except large amounts.

4. This construction would put the county in a worse condition after the sale than before. It has already before the sale a lien and execution, and by this construction, after the purchase, it has only a bare right to bring an action of foreclosure, though the lien before sale was the lien of a judgment not of a mortgage. The county starts with an execution, and winds up with a right to bring suit. The law governing sales is as liberal as is consistent with the needs of the public treasury and the duty of every citizen to pay his share of the public burdens. Every taxpayer has the same right in which to pay his taxes. If not paid after every reasonable indulgence (which is usually liberal), there is public advertisement and public sale. Even after that 12 months are allowed in which to redeem the land, even then, since it might still be possible in some cases that the failure to pay is inadvertent, and not intentional, the statute requires that the purchaser shall give the defaulting taxpayer a written or printed notice before applying for his deed. This provision was in the original act of 1887 (Acts 1887, §§ 69, 82), but, having been dropped for some reason, was reinstated in the act upon the suggestion of this court in *Sanders v. Earp*, 118 N. C. 275, 24 S. E. 12. If the power to foreclose is as preferential in the similar statutes of other states as in ours, it is not strange that no such provision has not been raised in them. In one case,—*Otoe Co. v. Brown*, 16 Neb. 397, 20 N. W. 274, 641,—as it was here till last term, though in *Stanley*, 118 N. C. 75, 24 S. E. 12, this court held for the plaintiff in a case "on all facts," he being, like the plaintiff here, assignee of a tax certificate from the county. In the Nebraska case the court held for the county, instead of taking the tax d

chose, proceed by foreclosure, and thus off all other tax liens accruing before or the purchase by the county. A con-
 onaneous legislative construction is al-
 of value when the object is to ascertain
 legislative will. The general assembly
 99 has put in section 87 (which is section
 the act of 1895) an express provision that
 certificate shall issue to the county in the
 prescribed in section 57,—though that is
 ly so under the act of 1895, which pre-
 ed that form for all purchasers,—but the
 ss provision now is not only a legislative
 ruction, but was probably intended to cut
 uture discussion as to the rights of as-
 es from a county, as the form there pro-
 l is (as now) a contract that the holder of
 certificate or his assignee "shall be en-
 l to a deed" if the tax defaulter does not
 em his land within 12 months. By the
 ss terms of the law the defendant is
 rred from contesting the plaintiff's right,
 section 66 provides that he cannot do so
 is he first shows that "all taxes due upon
 property have been paid by them, or the
 ons under whom they claim title." The
 adant has not offered to do this. On the
 rary, this land has been sold several times
 successive failures to pay. In Moore v.
 l, 118 N. C. 688, 23 S. E. 968, this court

in construing the above section: "One
 has failed to discharge the lien he owes
 state for the taxes due and unpaid on
 and cannot complain that the state has
 sferred to another, who has paid off such
 nbrance, its prior lien, and that he cannot
 eard in the state's courts, when thus in
 alt, to contradict the title conveyed to the
 haser under such lien." When the cer-
 te of the former opinion of this court
 down, the judgment below was entered
 eordance therewith, it being first shown
 laintiff's counsel, and the costs paid by
 itiff as therein decreed. The defendant
 ends that this estops the plaintiff from
 rehearing. But he could not prevent the
 ment being entered below, and could only
 ct if not drawn in accordance with the
 late, for which purpose it was submitted
 is inspection. The rule of court (rule 53,
 E. xii.) requires, as a condition precedent
 rehearing, that the judgment "must be
 rmed or secured." Being only for costs,
 etitioner performed it by paying the costs
 ad of giving security. Instead of being
 pped, he has only done what the rule of
 t requires as an indispensable prerequisite
 rehearing. As the only object of the
 ts is to ascertain the legislative will, and
 true the statute to effectuate it, it would
 that this can only be done by adjudging
 the plaintiff, assignee of a county certifi-
 had the same right as an assignee from
 other purchaser to take a deed or fore-
 , at his election; that, even if only a
 gagee, he can recover possession from
 defendant in that capacity; and that the
 adant cannot be heard, as he does not

aver that he has yet paid the taxes. But, if
 the above conclusions were incorrect and the
 plaintiff were only entitled to foreclose, all
 the parties and all the facts are before the
 court, and upon all the principles of the Code
 it was error to render a judgment against the
 plaintiff for costs, and drive him to a new
 action for foreclosure, but the foreclosure
 should be decreed in this action. The plain-
 tiff is "not restricted to his prayer for relief,
 but should be decreed any relief to which
 the pleadings and facts proved or admitted
 show that he is entitled, and even though the
 plaintiff has misconceived his remedy." Jones
 v. Mial, 79 N. C. 168; Knight v. Houghtalling,
 85 N. C. 17; Patrick v. Railroad Co., 98 N. C.
 422; Harris v. Sneed, 104 N. C. 369, 10 S.
 E. 477; Barnes v. Barnes, 104 N. C. 613, 10
 S. E. 304; McNeill v. Hodges, 105 N. C. 52, 11
 S. E. 265; Skinner v. Terry, 107 N. C. 103,
 12 S. E. 118; Johnson v. Loftin, 111 N. C. 319,
 16 S. E. 179; Simmons v. Allison, 118 N. C.
 763, 24 S. E. 716; Adams v. Hayes, 120 N.
 C. 383, 27 S. E. 47; and there are many
 others, all to same purport.

NORWOOD v. PRATT et al.
 (Supreme Court of North Carolina. May 9,
 1899.)

APPEAL—TRANSCRIPT—CERTIORARI.

Failure to file all the transcript available
 at the first term after the trial below (Sup. Ct.
 rule 5, 121 N. C. 694, 28 S. E. v.), and to ask
 for a certiorari to complete it, is ground for dis-
 missal.

Appeal from superior court, Orange county.

Action by James Norwood, administrator,
 against Haynes Pratt and others. There was
 a judgment for plaintiff, and defendants ap-
 peal, and move for writ of certiorari. Dis-
 missed.

C. D. Turner, for appellants. John W. Gra-
 ham and P. O. Graham, for appellee.

MONTGOMERY, J. At November term,
 1898, of Orange superior court, this case was
 heard upon exceptions filed to a referee's re-
 port. All of the exceptions made by the de-
 fendants were overruled, and the report of the
 referee was confirmed. The defendants ex-
 cepted, seriatim, to the overruling of each ex-
 ception. By agreement between the counsel
 of both sides, the judgment was signed out of
 term, and it was filed in the office of the clerk
 on the 29th of November, 1898, and notice
 thereof promptly given to the counsel of the
 defendants. Ordinarily, at the first term of
 this court after the trial below, it is the duty
 of the appellant to have filed here the tran-
 script on appeal. Rule 5 (121 N. C. 694, 28 S.
 E. v.). If at that time the case on appeal
 has not been settled by the judge, and the
 appellant has not been guilty of any laches,
 he would be entitled to a writ of certiorari
 therefor, upon his filing "all of the transcript
 that was available." The district from which

ment and the docket entries in the case. The judge had not settled the case on appeal. The certificate attached showed the matter to be a "partial transcript of the record, sent at the request of the defendant's counsel." The appellants did not attempt to account for the balance of the record proper (although it appears that it had been for weeks in the clerk's office), and made a motion for certiorari to procure the case on appeal. In *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782, it was said: "In any event, since the appeal should be docketed here at the first term beginning after the trial below, it was the duty of the appellant at such first term to file all of the transcript that was available, and have asked for a certiorari to complete the transcript. His failure to do so is a lack of diligence, and forfeits his appeal." The allegation of the appellants is that the rest of the transcript was not furnished because the clerk would not make it out, notwithstanding the fact that their counsel tendered to him the fees necessary for that purpose. The clerk's affidavit was to the contrary. We need not, however, pass upon that contradiction. The appellants were not before this court according to its rules, and, before they could get a standing here, it was incumbent on them to show, to our satisfaction, that they had not been guilty of laches. We cannot say that that has been shown affirmatively, and we must therefore deny the motion for a certiorari and dismiss the appeal.

CLARK, J. (concurring). The settled practice upon such applications is thus stated in *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782 (which was an appeal from the same county, and in which the same counsel represented the appellant): "It was the duty of the appellant at such first term to file all the transcript that was available, and have asked for a certiorari to complete the transcript. His failure to do so is a lack of diligence and forfeits his appeal. *Brown v. House*, 119 N. C. 622, 26 S. E. 160; *Haynes v. Coward*, 118 N. C. 840, 21 S. E. 690; *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150; *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225; *State v. James*, 108 N. C. 792, 13 S. E. 112; *Collins v. Faribault*, 92 N. C. 310; and there are still other cases. There are some matters, at least, which should be deemed settled, and this is one of them." This has since been cited and followed in *Morrison v. Craven*, 120 N. C. 327, 26 S. E. 940; *Critz v. Sparger*, 121 N. C. 283, 28 S. E. 365; *Rothchild v. McNichol*, 121 N. C. 284, 28 S. E. 364; *Parker v. Railway Co.*, 121 N. C. 501, 28 S. E. 347; *McMillan v. McMillan*, 122 N. C. 410, 29 S. E. 361; and in other cases disposed of per curiam,—because reiteration was unnecessary,—among them the case last called immediately preceding this on the docket (*Trollinger v. Railroad Co.*, 32 S. E. 1038).

term, and delay of justice is often a denial of justice, and is one of the evils held so great that a provision against it was inserted in Magna Charta. Besides, there must, of necessity, be rules of procedure, or the administration of justice would be "confusion worse confounded." It is not material whether an appeal should be docketed "at the first term beginning after the trial below," as our rule requires, or at the second term, or at the third term, but, whatever the rule, it should apply to all. It is not material whether, on an application for a certiorari, the applicant must docket as a basis "a transcript of all the record that is available" (as our uniform decisions require), or only a copy of the judgment, or nothing, but, whatever the requirement, it must be impartially applied to all. An exemption of any litigant would be favoritism, or, at best, the uncertain "rule of the chancellor's thumb,"—varying in thickness. As far as possible, the courts should give their time to the decision of disputed right and eliminate, as far as they can, all matters of questions of practice, as to the proper manner of presenting cases in courts. This renders it of the gravest importance to have practice settled and to adhere to it impartially, letting all needed changes be made by statute or by changing the rules of court so as to be prospective. If this is not done, the courts will be deluged with questions of mere practice, "to the neglect of the weightier matters of the law."

CHARLOTTE OIL & FERTILIZER COMPANY v. RIPPY.

(Supreme Court of North Carolina. March Term, 1899.)

PARTNERSHIP — EVIDENCE — TRANSACTIONS WITH PERSONS DECEASED — INTEREST IN ESTATE.

A surviving partner is "interested person" of an action against the deceased partner on a partnership note, though not a party, and hence is disqualified, under Code, § 188, prohibiting "a party or a person interested in the event" to testify to personal transactions with a person since deceased.

On petition for rehearing. Dismissed. For former opinion, see 31 S. E. 87.

FURCHES, J. This case was before the court a year ago, and is reported in 31 S. E. 87, and is before the court upon the plaintiff's petition to rehear. The action is upon a promissory note, made payable to the plaintiff, executed by D. B. Bridges on the 15th of November, 1894, for the sum of \$430, signed, "D. F. Bridges & Co." The action is brought against J. P. Ripsey, administrator of William Ripsey, alone; and the allegation of plaintiff is that at the date the note there was a co-partnership exist-

the intestate or defendant; that William Rippy has since died, and defendant is his personal representative. The defendant answers, and denies that his intestate, William Rippy, was a member of said partnership, if any such partnership ever existed. On the trial the plaintiff introduced D. F. Bridges as a witness, for the purpose of proving that there was such a partnership as D. F. Bridges & Co., and to prove that William Rippy, defendant's intestate, was a member of said partnership at the time the note sued on was given. This evidence was objected to by defendant, under section 590 of the Code, and excluded by the court. The correctness of this ruling is the only question presented by the petition to rehear. And owing to the fact that, when the case was here before, the court held that plaintiff was entitled to the evidence, if the witness knew the fact outside of any "transaction or communication" with the deceased, so this petition must be treated and considered as asking the court to say that D. F. Bridges is a competent witness to prove communications and transactions he may have had with defendant's intestate. The question presented is not free from difficulty. It again brings before the court for construction that much-construed section 590 of the Code; and the great number of constructions it has received does not relieve the question of embarrassment.

Section 589 of the Code does away with all disabilities on account of interest. But this section is immediately followed by section 590, which contains the following: That "a party or a person interested in the event of the action shall not be examined as a witness in his own behalf or interest * * * against any executor, administrator, or survivor of a deceased person * * * concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator * * * is examined in his own behalf * * * concerning the same transaction or communication." These should be treated as exceptions to section 589, and as taking them out of the operation of that section. If this be true, the parties included in these exceptions stand upon the same footing they did before the adoption of the Code. Before the adoption of the Code, a party interested in the result of the verdict and judgment could not be a witness. This rule is now restricted to parties calling within the exceptions contained in section 590, and the only question to be considered is whether the witness D. F. Bridges falls within these exceptions or not. It is admitted that plaintiff proposes to ask him to testify as to personal transactions and communications with deceased's intestate, it is admitted that he is not a party to this action, and the only question left for our consideration is whether he is "interested in the event

determined upon reason,—logical deduction,—sustained by quite an array of authorities. It must be held that he is incompetent. It must be conceded that he is interested in an action brought upon a note given by him, and for which it is admitted that he is liable to the full extent of the note; and, if this evidence establishes the partnership alleged by plaintiff, the estate of defendant's intestate is liable to the plaintiff for the whole of the note, and the witness can only be compelled to contribute to defendants one-half of what he has had to pay. "It makes no difference, in any of these cases, whether the witness is called by the plaintiff or the defendant, for in either case the test of interest is the same; the question being whether a judgment in favor of the party calling the witness will procure a direct benefit to the witness." 1 Greenl. Ev. § 395. "So, in a suit against one on a joint obligation, a co-obligor, not sued, is not a competent witness for the plaintiff, to prove the execution of the instrument by the defendant; for he is interested to relieve himself of a part of the debt by charging it on the defendant." Id. Speaking of the competency of one partner, who is liable for the debt to a party sued, and who would be liable to contribution, if it be shown that he is a partner, he is incompetent to prove that fact. Mr. Starkie says: "It seems that, in general, where a witness was *prima facie* liable to the plaintiff in respect to the cause of action for which he sued, he was not a competent witness for the plaintiff to prove the defendant's liability; for his evidence tended to produce payment or satisfaction to the plaintiff at another's expense, and the proceeding and recovering against another would afford strong, if not conclusive, evidence against the plaintiff in an action against the witness. Thus, it was held that, where the witness was *prima facie* liable to the vendor of goods which he had purchased in his own name, he was not a competent witness for the vendor, against a third person, to prove that the defendant was either solely or jointly liable for the goods; for in such case the witness had a direct interest in causing another, either to pay or to contribute to the payment of the debt." Starkie, Ev. (10th Ed.) 120. "In a suit against one on a joint obligation, a co-obligor, although not sued, cannot be called as a witness for the plaintiff to prove the execution of the instrument by the defendant. The interest of such witness is against the defendant, for he may relieve himself of a part of the debt by charging the defendant." Marshall v. Thrallkill's Ex'r, 12 Ohio, 275. The American and English Encyclopedia of Law, in speaking of the right of one partner to be a witness against another, says that: "According to the weight of authority, he was not competent, for the plaintiff, to prove either the partnership or the liability of the defendant, because he was

29 Am. & Eng. Enc. Law, 576, 577. During the war of 1812 a company bought a vessel called the "Spitfire," which was sent to the plaintiff to be repaired and fitted up to be used as a privateer. The work was done, but the plaintiff was not paid, and he brought his action for making the repairs. The action was brought against Webb & Webb, who denied that they had any interest in the Spitfire, and denied that they were liable to the plaintiff for anything. On the trial the plaintiff called a witness by the name of Gomes, who was not a party, for the purpose of proving that the defendants were part owners of the Spitfire, and were liable to the plaintiff for the repairs he had made to the vessel. Defendants objected to the witness Gomes upon the ground of interest; and the supreme court of New York, after a careful consideration of the question, held that he was incompetent, and in rendering the opinion the court said: "The inquiry was whether the defendants were part owners of the vessel, and as such chargeable in the first instance with plaintiff's whole demand for repairs. * * * The witness confessed on his voir dire that he was a part owner of the Spitfire. He was then sworn in chief to prove that defendants were also part owners of the same vessel. He was undoubtedly interested to render the burden upon himself as light as possible, and to throw it on the defendants in part. It is true, the witness was liable to contribution; but the defendants could never controvert, afterwards, with the witness, in case they sued him for contribution, that they were not part owners of the vessel. They could not take the ground that a verdict had been recovered against them by the present plaintiff wrongfully. The very basis of a suit to be brought by them for contribution must be that they were part owners. Upon any other principle they would be remediless. The recovery in this case would be evidence of the amount they were compelled to pay. The witness, being confessedly, by his own admissions on the voir dire, a part owner, would be answerable in contribution; and his interest in making the defendants below owners was promoted by increasing the number of those chargeable, and thereby mitigating his own loss. * * * It is conceived that Gomes did not stand indifferently between the parties; for though, from his own disclosure, he would be liable to the plaintiff below, if he failed in this action, as a part owner, he was increasing the number of those who would be contributory, and thus lessening the amount which he was eventually to pay." *Marquand v. Webb*, 16 Johns. 89. We are therefore irresistibly led to the conclusion that the witness D. F. Bridges has a direct pecuniary interest "in the event" of this action. Like the witness Gomes, he admits that he is liable for plaintiff's demand; and, like Gomes, he is interested in making the intestate's estate share the liability with him. And

that his intestate was a partner, and sue the witness Bridges for contribution. If this question was *res integra*, it would seem to us that this ought to, and would, end the discussion of this question. But it is contended that the witness must not only be interested, but that he must also be a party to the action, to exclude his testimony. This position cannot be sustained, unless it be by statements made by some learned judges in the discussion of cases under consideration, when it was no necessary that they should have been made to support the judgment, and, with great deference, we think, without that consideration which usually characterizes their opinion. To adopt this rule of construction, that a witness must be a party to the action in which he is called as a witness, so that the judgment would be *inter partes*, and that where the judgment would be *res inter alios acta* as to the witness he would be competent to test as to the communications and transactions of the deceased, would be to substantially destroy the exceptions contained in section 5. The Code says that, if the witness is a party to the action, this, without anything else, disqualifies him; and, if he has to be a party before he is disqualified, why add "or interested in the event" of the action? It is both senseless and meaningless to do so. This section must be construed so as to give meaning and vitality to this important provision of the statute. In *Williams v. Johnston*, 11 N. C. 288, it is held that Monroe Williams was disqualified on account of interest, though a party to the action.

We are not inadvertent to the fact that this has been said by this court (*Jones v. El*, 115 N. C. 153, 20 S. E. 206) that if we abscond with the ground that the witness must be a party to the action, so that he would be bound by any judgment rendered in the case, we cut loose from moorings, and are like a mariner at sea without a compass by which he may take his bearings and be guided; that the question of disqualification will become one of likes and dislikes,—sentimental in its operation. We do not agree to this proposition. It did not come so before the passage of the statute (section 590), and we see no reason why it should become so now. It was then held that the interest of the witness, to disqualify him, was a direct, pecuniary interest in the event of the action. Why should it not be so now?

It is admitted that there is a distinction pointed out in the petition to rehear. In the case of *Lyon v. Pender*, 118 N. C. 81, 14 S. E. 744, and this case. In that case the witness was a party; in this case he is not a party. If this case is correctly decided, it did not matter whether the witness was a party or not, and *Lyon v. Pender* was equally decided, although the court, in that case, stated a ground that upon further investigation is found not to be tenable. Judgment in this case when here be-

RINAKE v. VICTOR MFG. CO.

(Supreme Court of South Carolina. May 11, 1899.)

NONSUIT—NEGLECT—MASTER AND SERVANT—EVIDENCE.

In an action by an employé for injuries from falling from a wing to a gangway leading to defendant's mill, the evidence for plaintiff tended to show that, though the plank or wing had been built by an independent contractor for his men, defendant's men, with the knowledge of its president, used the plank quite generally, and the president, after the injury, stated that he should have had it fixed; that it was a dangerous place. *Held*, that a nonsuit was improper.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Spartanburg county; J. C. Klugh, Judge.

Action by Fred Rinake against the Victor Manufacturing Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

Duncan & Sanders, for appellant. Haynesworth, Parker & Patterson and Hydrick & Wilson, for respondent.

POPE, J. The presiding judge, at the close of the testimony of the plaintiff, granted a nonsuit. The appellant now seeks to reverse the judgment entered upon that nonsuit. If there was any competent testimony material to the plaintiff's cause of action against the defendant, it was error to grant the nonsuit. First. What was plaintiff's cause of action? Second. Was there any testimony in support thereof?

Plaintiff sued defendant to recover \$12,000, as damages arising from the neglect of the defendant in its duty to the plaintiff as its servant in providing itself, or suffering some one else, with its approval, to provide, a plank to ascend to a gangway leading into its buildings, which said plank, so ascending and so leading, was suffered by the defendant to become loose, and to remain so loose for a long time, whereby any one who used such plank as aforesaid was subjected to great danger, and whereby the plaintiff, on the 2d of September, 1896, as said servant, by reason of the fall of said plank while he was upon the same, in his discharge of duty as watchman, in ascending, fell to the earth, and so was violently thrown to the ground. It is apparent that the cause of action of the plaintiff is the alleged breach of duty owed by the defendant to the plaintiff as its employé; in other words, that the defendant, having failed to discharge its duty to the plaintiff as its servant, was guilty of negligence, which negligence was the proximate cause of plaintiff's injury. It was the

is well said in 16 Am. & Eng. Enc. Law, pp. 465, 466, in discussing the subject of negligence: "The general rule is well known that questions of fact are to be submitted to the jury, and this includes, not only cases when the facts are in dispute, but also when the question is as to the inference to be drawn from such facts after they have been determined. It will be readily observed that few cases will arise in which there is no question as to the facts involved. The element of ordinary care must, from its very character, always require the decision of a jury, except when there is a violation of statutory duty, or when the facts are undisputed, and but one inference can reasonably be drawn from them. And the same is equally true as to the determination of the question of proximate cause; so that the following rules may be stated as applicable to every case: The issue of negligence should go to the jury (1) when the facts which, if true, would constitute negligence, are controverted; (2) when such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn; (3) when the facts are in dispute, and the inferences to be drawn therefrom are doubtful."

When Judge Klugh, at the close of plaintiff's testimony, on motion of defendant's counsel, granted a nonsuit, and the plaintiff presents an appeal from such order, it becomes necessary for this court to determine from the "case" for appeal if there was any material testimony offered by the plaintiff on the issue of defendant's negligence as the proximate cause of defendant's injury. If there was no such testimony, there was no error by the circuit judge; but if, on the contrary, there was such testimony, the circuit judge was in error, and the plaintiff is entitled to a new trial. The defendant admits in its answer that the plaintiff was in its employment, and in the discharge of his duties, at the time of his injury, as night watchman of its property, consisting of a manufacturing plant. There is no dispute that the discharge of the duties of such night watchman required that he should go every 25 minutes over and through the buildings of such cotton factory and its yard. There is no question but that, in the nighttime of the 2d of September, 1896, the plaintiff fell from a wing to the gangway leading from the ground to the second story of the mill building, and was thereby considerably injured. The defendant in its answer alleges that the injury of the plaintiff was not caused by the appliance which it furnished for its servants to enter and depart from its mill, but was caused by a plank placed against its gangway, which said plank was not a part of said gangway, nor was it constructed or furnished by this corporation as a way of approach to said building, nor was the use thereof in any way authorized or approved by it;

roll, or over any of his employes, or any of the appliances used by them. Again, the defendant alleges that said plank or wing to the gangway was not so placed by the defendant or by its order, or for the use of any of its employes.

Thus, it is made manifest that the question of the relation of the defendant to said plank against the gangway, so far as its construction, or its adoption by the defendant after its construction, for the use of defendant's employes or servants, becomes a very important issue between the plaintiff and the defendant. We have examined the testimony, and find that there is material testimony offered by the plaintiff, not only to the use of this plank or wing to the gangway by the employes of the defendant to the knowledge of the president or superintendent, but also that the president or superintendent of the defendant mill, one Mr. Burgess, admitted, before and after the accident to plaintiff, that the defendant ought not to have suffered such plank or wing to have remained unattended to. The plaintiff in his testimony stated, in answer to questions: "Q. You stated to counsel that Mr. Burgess knew it was dangerous. Who is Mr. Burgess? Who was president of the mill at that time? Ans. Mr. Burgess. Q. Where is he now? Ans. He is right there [in the room]. Q. How do you know that he knew it was dangerous? Ans. I don't know. He told it before the hands [workmen] when he put me in the wagon. He said he ought to have that plank fixed. It was a dangerous place; it pretty near broke down with him himself." F. L. Tillatson, a witness for plaintiff, testified: "He [Mr. Burgess] only said that morning [morning after plaintiff was injured] that he was down there that he was very sorry that Mr. Rinake got hurt. It ought to have been fixed, or he ought to have had it fixed, I can't be sure which." Charles Jackson, a witness for plaintiff, in his testimony stated that, on the afternoon of the day in the night of which plaintiff was injured, "Mr. Burgess came down in front of me, and, as I went on down, there were two little gangways, one on each side, and Mr. Burgess sorter slipped up, and he says, 'Such work as this won't do; this must be fixed.'"

But let us examine the testimony, and learn whether the independent contractor, McCarroll, and his hands, alone used these planks at the side of the main gangway. The plaintiff testified: "Q. How would you go up into the building when you went up into the building to see that everything was safe? Ans. I took the main gangway. But sometimes the main gangway was blockaded with lumber, so the only chance I had was to take the side gangway. Q. What do you mean by 'side gangway'? Ans. Planks that go up on the sides. Q. How often had you used that main

gangway and those side gangways? Ans. Most everybody that was working there. Q. Whom do you mean by 'everybody'? Ans. I mean all the hands who were working there." The witness Ben H. Walker testified: "Q. For whom were you working? Ans. For the company. Q. By contract or day laborer? Ans. Day laborer. Q. Who built the wings? Ans. Mr. McCarroll had them done, I think. Q. Who used those wings? Ans. The company, and Mr. McCarroll, too. Q. What did the company use those wings for? Ans. Sometimes there, when we were taking out anything, we would walk up these, but, if we were carrying anything heavy, we would go up the main gangway. I have walked up these a heap of times with a stick of timber with two men to it. Q. Where was Mr. Burgess when this work was going on about the mill? Ans. He was around there nearly every day. Sometimes he was gone a week or ten days. Q. What objection did he make to the hands of the mill using those wings? Ans. None at all, in my hearing. Q. The timber and material that were carried up the wings and main gangway were carried up for whom? Ans. The wood that was carried up there was for the company. Q. How long had the company been allowing the wood to be carried up there? Ans. Ever since it had been there we went up that way when it was easier to do it. In carrying window sash or anything like that, it was easier to do it. It was in the shelter, and we would generally come up the left gangway. They were nearer the wing than the main gangway. Q. Nobody ever told you to quit? Ans. No, sir; not to me they didn't." The witness F. L. Tillatson, examined for the plaintiff, testified: "Q. You know who built the main gangway and who built the wings? Ans. No, sir; I do not. They were built before I went there. Q. Do you know who used them? Ans. They were used, I think, by all parties. Q. When you say by 'all parties,' what do you mean? Ans. I mean they were used by the brick-mason men to get to their work, and the carpenters." John Dempsey, a witness for plaintiff, testified: "Q. From what you saw going on, do you know who had used the wing as well as the gangway previous to that time? Ans. It was used both by the company hands and Mr. McCarroll's hands while he was there at work. Q. When was Mr. McCarroll there? Ans. I rather think he was gone; I won't be positive."

In considering this testimony, and in reproducing parts of it, we must be understood as expressing nothing whatever as to its credibility. All we mean is to thus call attention to its materiality as to the issue of negligence. We think the circuit judge was in error in granting the motion for a nonsuit. It is the judgment of this court that the judg-

GARY, A. J. (dissenting). Being unable to concur in the opinion of Mr. Justice POPE, I will state briefly the grounds of my dissent. In order to understand what issues are raised by the pleadings, we will set out both the complaint and the answer. The complaint is as follows: (1) The first paragraph of the complaint alleges the corporate existence of the defendant. "(2) That it was the duty of the defendant to furnish and keep in safe and proper repair the approaches to its buildings, so as to allow its employes and other persons readily, easily, and safely to enter and leave its said buildings, but that, disregarding its duty in this respect, it knowingly, carelessly, and negligently allowed a plank, which had been arranged by the defendant, or which it had allowed to be arranged (and in which arrangement it had for a long time acquiesced), for the purpose of allowing its employes to ascend to a gangway leading into its buildings, and which the employes of the defendant, with its knowledge, acquiescence, and consent, used for the purpose of readily, easily entering and leaving its said buildings, to become loose, and to remain so for a long time, so that while in such condition it was dangerous for any one to use it in ascending or descending from said gangway; that on or about the 2d day of September, 1896, the plaintiff, being then an employe of the defendant, and being ignorant of the fact that the said plank had been allowed to become loose, and relying on the defendant's performing its duty towards its employes, undertook to ascend to the said gangway, by means of said plank, as he had often done before, when suddenly, and without warning, the said plank, while the plaintiff was ascending to said gangway for the purpose of attending to his duties, fell, and the plaintiff was thrown violently to the ground. * * *

The answer is as follows: (1) The first paragraph admits the corporate existence of the defendant. "(2) It admits that one of the approaches to the Victor building was a gangway referred to in the complaint, but alleges that this gangway was strongly and safely constructed, and furnished an easy and safe means of entering and leaving said building; that the said gangway was put up for temporary purposes only, and was used during the construction of said building and placing machinery therein; that the plank referred to in the complaint as having been placed against said gangway was not a part thereof, nor was it constructed or furnished by this corporation as a way of approach to said building, nor was the use thereof in any way authorized or approved by it; and it denies all the allegations of the second paragraph not admitted herein. (3) That, at the time referred to in the complaint, the defendant had not commenced business, and the building referred to, which consisted almost entirely of brickwork,

thin price therefor; that the defendant had no control or authority over the said Robert McCarroll, or over any of his employes, or any of the appliances used by them; that the plank referred to in the complaint was not placed against the gangway by the defendant or by its orders, or for the use of any of its employes, but was placed there and was used by the said Robt. McCarroll and his employes, and this defendant had no right to object to the use thereof by them. (4) This defendant admits that, at the time stated in the complaint, the plaintiff was its employe, and it alleges that he was employed as night watchman, and it was his duty to watch and protect said building during the nighttime; that his duties did not require him to go on said plank; that, besides the entrance by way of said gangway, there were others to said building, the doors opening directly from the ground, and all said approaches were easy and safe; that, if the plaintiff undertook to approach said building by said plank, it was at his own risk." (5) Paragraph 5 sets up the defense of contributory negligence, and denies all the allegations of the complaint not specifically admitted.

At the close of plaintiff's testimony the defendant made a motion for a nonsuit, on the ground that there was no testimony to sustain the allegations of negligence, and the practical question presented by the exceptions is whether there was error in granting the order of nonsuit on the ground that there was an entire failure of such testimony. In 16 Am. & Eng. Enc. Law, p. 389, actionable negligence defined as "the inadvertent failure of a legally responsible person to use ordinary care, under the circumstances, in observing or performing a noncontractual duty, implied by law, the failure is the proximate cause of injury to person to whom the duty is due." The question of negligence is to be determined by the facts of the particular case. In this testimony discloses the following: (1) The plank was not a part of the building provided by the defendant, but was placed against the gangway by an independent contractor, for his use in constructing the work on the building. (2) The plank was furnished by the defendant, but for mere convenience, and not out of necessity, but for mere convenience. The plank was in no way the duty of the defendant to remove the appliance even if it was the duty of the defendant to move them, there is no testimony that they were allowed to remain of any considerable length of time. (3) The testimony any ordinary care on the part of the defendant therefore disposes of the motion. POPE.

**BUILDING AND LOAN ASSOCIATIONS—RECEIVERS—
ACTIONS IN FOREIGN JURISDICTIONS—LIABILITY
OF STOCKHOLDER—CONTRACTS—USURY—PENAL-
TIES—WHAT LAW GOVERNS.**

1. The relation existing between a building and loan association and a borrower who is a stockholder when the loan is made is that of debtor and creditor.

2. A stockholder of an insolvent building and loan association, domiciled in a foreign state, cannot be held liable on an assessment on his stock made by the receivers to cover losses and expenses pursuant to an order, in an action in such foreign state to which he was not a party, where the order recited that it was not to be binding on any one concerned therein, without his consent, and such party had assigned his stock to the association prior to its insolvency.

3. A stockholder of a foreign building and loan association cannot be held liable in an action by its receiver for an assessment on his stock for losses, where no evidence is adduced as to what the losses were, and what assessment was necessary to meet them, except the proceedings of a court in such foreign state, to which he was not a party.

4. Where receivers of a foreign building and loan association invoke the aid of courts of the state to enforce a contract of a foreign state, usurious in both states, they are bound by the penalty fixed by the laws of the state, since it is a matter pertaining to the remedy.

Pope, J., dissenting.

Appeal from common pleas circuit court of Chesterfield county; Ernest Gary, Judge.

Action by Iredell Meares and another, as receivers of the Carolina Interstate Building & Loan Association, against Henry W. Finlayson, to recover a sum loaned to him by the association. There was a judgment from which plaintiffs appeal. Affirmed.

R. T. Caston, for appellants. Edward McIver and Stevenson & Matheson, for respondent.

POPE, J. In July, 1895, at the suit of one William H. Strauss, the Carolina Interstate Building & Loan Association (located at Wilmington, in the state of North Carolina, and doing business in that state and in the states of South Carolina and Georgia), in the superior court of New Hanover county, was declared insolvent, and its affairs ordered to be wound up. For this purpose the present plaintiffs were duly appointed by said court as the receivers of said building and loan association, and they have accepted, qualified, and entered upon the discharge of the duties of such office of receivers. The defendant, Henry W. Finlayson, in the year 1891 became a stockholder, by having issued to him 30 shares of loan stock; and upon these shares, as a basis, he borrowed \$3,000 of such building and loan association, and to secure such loan he assigned his 30 shares of the said stock to said building and loan association, and also executed a mortgage on real property located in Cheraw, in the state of South Carolina, to said building and loan association, as an ad-

dition in the year 1891, and in the year 1892 he borrowed \$700, executing an assignment of his stock, and a mortgage of a house and lot in Cheraw, S. C., to the building and loan association; but on the 4th February, 1893, the aforesaid Finlayson purchased from the said Fesperman the land so mortgaged, and his 7 shares of said stock, together with all his rights and interests therein and thereto, and assumed the obligations of the said Fesperman, as set out in the act incorporating the building and loan association and in its by-laws. Finlayson continued the payments on his own 30 shares of stock and the 7 shares purchased from Fesperman until the 5th day of March, 1895; but nothing was done between 5th March, 1895, and July, 1895, touching Finlayson's failure to pay, although this three months were out on 5th June, 1895. The plaintiffs, as receivers, were directed by the superior court of New Hanover, in North Carolina, to settle with the borrowers of the bankrupt building and loan association, in these words of the complaint herein: "That the court in said cause further ordered and decreed that the receivers, these plaintiffs, in ascertaining the value or amount of stock of the respective stockholders, should credit each stockholder with all that he had paid on his stock, whether held as borrowing or non-borrowing shares, including all payments of dues, fines, and all amounts, under whatever name, paid, and that in addition thereto he should be credited with an average interest of six per cent. thereon, and that the aggregate so ascertained should constitute the value of his stock or claim against the association as of the date of July 24, 1895, and that, upon this aggregate so ascertained he should be permitted to participate pro rata in the dividends declared from time to time; that the court in said cause further directed these receivers, in settling with the members of the association who have borrowed upon their stock, and either given their bond and mortgage or the said stock as collateral therefor, to charge them with the actual amount they have borrowed, with interest at the rate of six per cent. per annum to the 24th day of July, 1895, and to credit thereon a percentage of the value of their stock, after ascertaining the value in the manner hereinbefore alleged, as such stock would be entitled to receive as its pro rata dividend in the distribution of the assets of the association; and that upon the payment of the balance found to be due, with interest upon such balance from the 24th day of July, 1895, to the date of payment (such interest to be at six per cent.), to release and cancel the bonds and mortgages of the member so paying and settling his indebtedness to the association." Upon these orders the defendant, Finlayson, paid on his indebtedness for \$3,000 borrowed by himself, and for \$700 borrowed by Fesperman and assumed

which he and Fesperman had borrowed already been paid in full. The receivers then brought this suit to enforce against Finlayson what they conceived he owed. It should be stated just here that the suit of Strauss against the said building and loan association had, as ancillary to that in the state of North Carolina, been brought in the county of Richland, in the state of South Carolina, wherein Judge Witherspoon on the 4th September, 1895, appointed the plaintiffs as receivers, and directed them to file copies of the orders made in the original suit, in North Carolina, in the court in South Carolina, for the information of the court, and all persons interested in said cause. The answer of the defendant denied that the suit of Strauss against the Carolina Interstate Building & Loan Association was brought on behalf of all the shareholders of said association; denied that the plaintiffs, as receivers, were empowered to deduct 30 per cent. from the payments made by this defendant, because of losses made by the association; denied that the contract of the association with the defendant was a North Carolina contract, so to speak, but alleged, on the contrary, that it was a contract to be construed as contracted for performance in the state of South Carolina; alleged that the contract was usurious; and also alleged that the indebtedness of the defendant had been fully paid. Judge Ernest Gary, who heard the action upon the pleadings and an agreed statement of facts, decided, by his decree, that the contract of defendant with the Carolina Interstate Building & Loan Association was usurious under the laws of both the states of North and South Carolina; that the plaintiffs had no right to deduct 30 per cent. from the aggregated payments of defendant for and on account of losses of the association, for the reason that defendant is not bound by the decree in North Carolina, and was not before that court.

The plaintiffs appeal from the decree of Judge Gary on the following grounds, namely: "(1) His honor erred in not holding that the contracts of the defendant with the Carolina Interstate Building & Loan Association, of Wilmington, N. C., were North Carolina contracts, and should be enforced under the laws of that state as construed by its supreme court. (2) That he erred, after it was admitted that Finlayson was a stockholder in said association, and that the losses upon stock had been found by the North Carolina court to be thirty per cent., in not making said Finlayson responsible for his share of said losses. (3) He erred in holding that because the defendant, Finlayson, was not personally served with process in the Strauss case, that he was not bound thereby, under the decisions of the supreme court in said case, to the same settlement that all members of said association were held to be bound to make, and in

tably winding up the affairs of an insolvent corporation created by and under the laws of North Carolina, cannot decree an equitable adjustment and settlement, which will be binding upon all the corporators, unless all of said corporators were individually served with process, and made parties to the suit. (5) While each corporator must be sued, and process be served upon him before he can be made to settle his indebtedness to the association, he erred in holding that in such suit this defendant was not bound, as to the legality and construction of his contract, by the decisions of the supreme court of the state of the contract, and of the jurisdiction to which he voluntarily subjected himself by becoming a corporator in said association and borrowing money therefrom. (6) He erred in holding that the settlement directed by the courts of North Carolina, which the receivers ask to be enforced against defendant, is usurious. (7) He erred in sustaining the plea of usury against the officers of the court, who are endeavoring to enforce a settlement with defendant which had been directed by said court, and which said defendant had refused to make. (8) He erred in holding that the original contracts entered into by the defendant, Finlayson, and by Fesperman, his grantor, were usurious under the laws of either North or South Carolina, or that any usurious claim is made in complaint against defendant. (9) He erred in holding that Finlayson could plead usury against the Fesperman bond and mortgage, and that usury could be pleaded by defendant against these plaintiffs. (10) He erred in directing the referee to compute the amount due on bond and mortgage set forth in complaint, under section 1390, 1 Rev. St. S. C., and in holding that the claim set up in complaint by plaintiffs against defendant was obnoxious to said section of Revised Statutes. (11) He erred in not granting plaintiffs judgment of foreclosure for the amount asked in complaint, including ten per cent. as attorney's fees. R. T. Caston, Attorney for Appellants." We will examine these exceptions in their numerical order.

So far as the first exception is concerned, it seems to us that it must be sustained. In *Pollock v. Association*, 51 S. C. 420, 29 S. E. 77, this court held that a similar contract to that made by the respondent with the same association was a contract to be performed in North Carolina. All things being equal, the contract should be enforced under the laws of North Carolina, as construed by its supreme court.

As to the second exception: We might say at the outset that we are not entirely clear that the circuit judge was in error on this point; for the decision of the superior court (Judge Coble, presiding judge) held that 30 per cent. was proper, but qualified his holding with these words: "This order shall not be

contest the rule herein prescribed. It certainly is true that Henry W. Finlayson has not consented to this order. Therefore, by its very terms, no liability yet exists against him to pay the 30 per cent., or (what is the same thing, in effect) to allow his payments, diminished by 30 per cent. But we cannot see how Finlayson is to escape the consequences of his being a corporator in said association, so far as outside creditors of the Carolina Interstate Building & Loan Association are concerned. Indeed, we do not see how he is to escape liability for his pro rata share of the losses of said association. However, in the abundance of caution, we will not pass directly upon this question; and as it must go back, to go before the special master (Mr. Shipp), the parties will be granted leave to make this question as to Finlayson's liability for any debt, expense, or other liability in closing up such association.

As to the third exception: We may say that a person is not usually bound by the judgment rendered in an action to which he is not made a party. Now, so far as corporations created under the laws of a state are concerned, when it becomes necessary to place them in liquidation because of their insolvency, for example, certainly the courts of that state, clothed with jurisdiction in such matters, may properly, by their decrees, wind up all the concerns of such insolvent corporations; and such decrees would be binding and conclusive against all the corporators in such insolvent corporations, so far as the property and other assets of such corporations were concerned, while within the jurisdiction of such courts of the domicile. We are not by any means prepared to admit that such proceedings and judgments of said domiciliary courts could of themselves operate upon persons and property situated in another jurisdiction. In order to affect such persons and property in another jurisdiction, new or ancillary proceedings would be necessary in that other jurisdiction. So, therefore, so far as Mr. Finlayson is concerned, in the matter of the property and assets of the Carolina Interstate Building & Loan Association, he is bound and concluded by the action of the courts of North Carolina, and it is perfectly legitimate for these appellants in this action in the courts of this state (South Carolina) to fasten upon said Finlayson his liability as a corporator, upon due proofs of such liability. We mean, by the use of the words "due proofs," proofs of all matters of fact contested in the original action, and not records taken from an action to which he was not a party.

As to the fourth exception: We have already held that the courts of North Carolina could, by their judgments, conclude Finlayson, as a corporator, so far as the assets of the insolvent corporation were concerned, and

North Carolina, in order to reach Finlayson or his property new suits must be brought in this jurisdiction.

As to the fifth exception: We hold that the circuit judge was in error in not holding directly that the liability of Finlayson must be fixed as arising under a contract made by him to be enforced in the state of North Carolina.

As to the sixth exception: We cannot say that the circuit judge erred in holding that the contract of Mr. Finlayson with the Carolina Interstate Building & Loan Association was usurious; for the laws of the state of North Carolina, as construed by the supreme court of that state, clearly fasten the offense of usury upon this association. This is what the circuit judge meant in his reference to usury. It could not be that in providing for a plan to have corporators liquidate their share of the deficiency of assets of the association to pay expenses, etc., the sum of money necessary for each corporator to contribute for that purpose under the decree of a court would be usury.

As to the seventh exception: Under the views we have hereinbefore expressed, it will not be necessary to pass upon this exception.

As to the eighth exception: We have already announced our conclusion that the contracts of Finlayson and his assignee, Fesperman, were both usurious under the laws of the state of North Carolina, as construed by the supreme court of that state. They would certainly be usurious under the laws of this state.

As to the ninth exception: While Mr. Finlayson, as the assignee of Fesperman, could not hold the Carolina Interstate Building & Loan Association to the penalties for usury, because the plea of usury has been held by the courts of this state as a personal privilege, still, when he comes to settle with the association on a contract which he has made with such association, he can invoke the defense as a protection as far as it extends to payments made by himself.

As to the tenth exception: We think the circuit judge was in error as here pointed out. If this is a North Carolina contract, so to speak, and under the laws of that state it is usurious, clearly the penalties for usury as fixed by such laws should be applied by the special master, Mr. Shipp, and not the provisions of our laws touching usury.

As to the eleventh exception: We cannot view the decree of the circuit judge as erroneous in the matters set out in this exception. Certainly it was necessary to have a reference, in order to learn if there was anything due by the defendant. If it should be found that the defendant owes the plaintiffs nothing, why, then, no judgment for foreclosure would be proper. As to that part of the exception relating to the 10 per cent. as attorney's fee, we must hold, inasmuch as the Carolina Interstate Building & Loan Association, by its

the fault of having to resort to foreclosure proceedings was not that of Finlayson, nor was such fault such as was contemplated in the bond wherein this 10 per cent. attorney's fee was provided, and that there is no liability on Mr. Finlayson to pay any such 10 per cent. attorney's fee. It seems to me that those persons who hold that, when shares of a building and loan association are pledged as collateral for a loan to a stockholder, such shares no longer fasten upon such borrower any liability therefor, are unmindful of the fact that, if courts should sustain such a position as sound, serious loss would be entailed upon the borrowers; for thereby they (such borrowers) would forfeit all right to have their indebtedness reduced by the value of such stock at the date the building and loan association fails.

It follows that, in my opinion, the decree of his honor, Judge Gary, should be modified, and our judgment should read that. "It is the judgment of this court that the judgment of the circuit court be modified in these particulars herein required, and that the action be remanded to the circuit court, so that the special master, Mr. Shipp, may pass upon the issues referred to him, as modified by the judgment of this court." But the majority of the court seem to entertain views at variance with those herein expressed by me. Therefore it is the judgment of this court that the judgment of the circuit court be affirmed. But I dissent from such judgment.

McIVER, C. J. Being unable to concur in all the conclusions reached by Mr. Justice POPE, I propose to state the points upon which I differ from him, and indicate some of the reasons why I cannot agree with him.

The action in this case was brought to enforce the performance of a contract evidenced by the defendant's bond and mortgage to the Carolina Interstate Building & Loan Association; and the only question, as I understand it, is whether there is anything, and, if so, how much, still due the association by the defendant upon such contract. It is not an action brought by the receivers of an insolvent corporation to require a shareholder of such corporation to contribute his ratable proportion to the fund necessary to pay the debts of such insolvent corporation; for the necessary parties to such an action are not before the court, and there is no allegation in the complaint that the corporation owes a single debt to any third person. On the contrary, it is simply an action to recover from the defendant a sum of money loaned to him by the association; and the fact that the defendant was a shareholder of the association at the time this loan was made cannot affect the question, for ever since the case of *Association v. Bollinger*, 12 Rich. Eq. 124, followed in several other cases (notably, *Bulst v. Bryan*, 44

ply that of borrower and lender; and hence the only question is whether there is anything remaining due on the sum of money loaned, after applying all the payments which have been made thereon. I am therefore at a loss to perceive what the action of the court in North Carolina in the case of *Strauss v. Association*, as reported in 23 S. E. 450, and again in 24 S. E. 116, has to do with the present controversy, as it is now presented. But, even if I am in error in this, I do not think that the defendant herein was in any way bound by those decisions,—at least, so far as they authorized the receivers to assess all stockholders 30 per cent. of the amount paid in on their stock, in order to cover the loss and expenses as reported by the receivers,—for three reasons: (1) Because the defendant herein was not a party to that case. (2) Because the order of the circuit judge, from which there was no appeal, contained this express provision: "This order shall not be binding upon any one concerned therein, without his consent to the same." (3) Because the defendant herein had assigned his stock to the corporation long before the insolvency of the corporation occurred. In support of the third reason it will be sufficient to cite *Pullman v. Upton*, 96 U. S. 328, and *Bank v. Case*, 99 U. S. 628, where it is held that the assignee of stock, even as collateral security for the payment of a debt due by the assignor to the assignee, is liable as a stockholder for the claims of creditors, and that the original holder is no longer liable to such claims. See, also, *Efrid v. Iredell* (decision filed April 22, 1899) 32 S. E. 758. But, in any point of view, it seems to me that the defendant could not, in this case, be liable for the 30 per cent. assessment upon the amount paid on his stock, because there was no competent evidence adduced in this case to show what were the losses and expenses, and what assessment was necessary to meet losses and expenses; for, as I understand, it is conceded that the proceedings in the North Carolina court, based upon the estimate made by the receivers, were not competent evidence to show the amount of such losses and expenses. If so, I do not see the propriety of referring this matter back to the special master, as that would practically be allowing the appellants another opportunity of offering evidence which they have already had an opportunity to offer, of which they did not see fit to avail themselves.

If, then, the contract which the appellants are seeking to enforce is to be regarded as usurious, either under the laws of North Carolina or South Carolina, the next inquiry is whether the plaintiffs, when they invoke the aid of the courts of this state to enforce the contract, are not bound to the remedy afforded by the laws of this state. It seems that by the law of North Carolina the penalty for charging usury is simply the forfeiture of so

as well as costs; and our statute not only provides that the lender of money shall not be allowed to recover, in any court of this state, any portion of the interest unlawfully charged, but expressly declares that "the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this state to be the true legal debt or measure of damages to all intents and purposes whatsoever, to be recovered without costs." In the face of these explicit provisions, I do not see by what authority the courts of this state, when called upon to enforce a usurious contract for the loan of money, can render any other judgment, except for the principal sum loaned, after deducting all payments made thereon, without any interest or costs; otherwise, our courts would be undertaking to do that which they are expressly forbidden by statute to do.

It is contended, however, that this is a North Carolina contract, and must, upon the principle of comity, be governed by the laws of North Carolina, by which the lender of money upon a usurious contract is entitled to recover the amount loaned, with lawful interest. Assuming for the present that this is a North Carolina contract, there is no doubt that the rule of comity is well settled that when a contract is made in one state, or is to be performed in such state, its validity and construction are to be determined by the laws of that state. But to this rule there is an exception as well settled as the rule itself, which is thus stated by that learned jurist, Chancellor Kent, in his Commentaries: "That no people are bound, or ought, to enforce or hold valid in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or *violates a public law*." (Italics mine.) See 2 Kent, Comm. 458, recognized and followed in *Thornton v. Dean*, 19 S. C., at page 587; *Gist v. Telegraph Co.*, 45 S. C., at page 369, 23 S. E. 152. But, as is said by Mr. Justice McGowan in delivering the opinion of the court in *Thornton v. Dean*, supra: "As to all matters relating to the remedy, each state insists upon enforcing its own laws." And as is said in 3 Am. & Eng. Enc. Law (1st Ed.), at page 561: "The law to be applied to the remedy is the *lex fori* at the time such remedy is sought." And again, on the same page: "Where contracts are made in one place, and to be performed in another, they are to be governed by the law of the place of performance, as to validity, nature, obligation, and interpretation. But the remedy upon it will be governed by the law of the state in which a remedy is sought." And again, at page 578 of the same volume, it is said: "Where the laws of two states are brought into conflict, the rule is that the laws prevailing where the relief is sought must have the preference. The rule that the laws

to carry the remedy into another jurisdiction, and regulate the mode of enforcement of a contract in an action in the courts of another state." The following extract from the opinion of Evans, J., acting as the organ of the court, in *Pegram v. Williams*, 4 Rich. Law, at pages 224, 225, will be found instructive: "The nature, obligation, and construction of contracts are to be governed by the *lex loci contractus*, but the remedies by which contracts are enforced are to be according to the *lex fori*, which is strictly territorial in its operation. [Citing several sections from Story, Conf. Laws.] 'We all agree,' says Mr. Justice Heath (1 Bos. & P. 142), 'that in construing contracts we must be governed by the laws of the country in which they are made, for all contracts have relation to such law. But when we come to remedies it is another thing. They must be pursued by the means which the law points out where the parties reside. The laws of the country where the contract was made can only have reference to the nature of the contract, not to the mode of enforcing it.' In *De la Vega v. Vianna*, 1 Barn. & Adol. 284, Lord Tenterden said: 'A person suing in this country must take the law as he finds it. He cannot, by any regulation of his own country, enjoy greater advantages than other suitors here. He is to have the same rights which all the subjects of this kingdom are entitled to.' Judge Story, in his treatise on the Conflict of Laws (section 556), says: 'It is universally admitted and established that the forms of remedies, and the modes of proceeding, and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or, as the civilians express it, according to the *lex fori*.' And in section 557 he says: 'All that a nation can, therefore, be justly required to do, is to open its own tribunals to foreigners in the same manner and to the same extent as they are open to its own subjects, and to give them the redress, as to rights and wrongs, which it deems fit to acknowledge in its own municipal code for natives and residents.' This is what is meant by the 'comity of nations,' and I do not find it has ever been extended beyond what is here said." So, also, it was said by Johnston, Ch., in delivering the opinion of the court of errors in *Le Prince v. Guillemot*, 1 Rich. Eq., at pages 211, 212: "The general doctrine is reasonably settled that the validity and construction of a contract are, throughout the world, to be determined by the laws of the country where it was entered into (especially if, as in this instance, it was intended to be executed there), though its lien and operation, and all priorities of rights under it, are generally limited to that country: and in enforcing or executing it the tribunals of other countries are not bound to give it

effect, so far as it may contravene the policy of their own states." Accordingly it is settled that questions arising under the policy of limitations are to be determined by the *lex fori*, and not by the *lex loci contractus*.

See *McElmoyle v. Cohen*, 13 Pet. 324; *Boas*, 2 Bailey, 217, cited with approval in *Pegram v. Williams*, supra; *Rugby v. Keeler*, 3 Johns. 261. The reason is obvious. The courts of this state cannot render judgment upon a contract when the right of action is barred by our statute of limitations, even though it may not be barred by the laws of the state where the contract was made, or where it was to be performed, or use the laws of this state forbid it. For the same reason, where an action is brought in the courts of this state upon a usurious contract, no judgment can be rendered for interest or costs, because the laws of this state expressly forbid it. Again, in 27 & Eng. Enc. Law (1st Ed.), at page 936, said: "The general rule that the penalties of a statute have no extraterritorial operation, and will not be enforced out of the state where enacted, applies to penalties imposed by usury laws." If, therefore, it be true, as it is said, that by the laws of North Carolina the penalty for charging more than the legal rate, while here the penalty is the forfeiture of all interest, under the rule here stated the latter penalty must be enforced in an action brought in the courts of this state upon a usurious contract, notwithstanding the fact that such contract may be lawful under North Carolina law. I think, therefore,

that his honor, Judge Ernest Gary, was fully right, after sustaining the plea of usury, in directing the special master "to compute the amount due on the bond and mortgage set forth in the complaint under the statute law of this state (Rev. St. § 1390)." For these reasons, I am unable to concur.

Mr. Justice POPE in the views which he has taken of the several points herein considered, and, on the contrary, I think the judgment of the circuit court should be affirmed. If there was any error on the part of the circuit judge, it was in not holding that the contracts sued upon were North Carolina contracts. But as it is conceded that the plea of usury must be sustained, whether the contracts were North or South Carolina contracts, such error, if it be an error, is wholly harmless, and would not justify a reversal, or even a modification, of the judgment. It may be as well to say that here the marked difference between the case under consideration and the cases of *Clifton v. Vance*, 49 S. C. 402, 27 S. E. and 29 S. E. 204, and *Same Plaintiff v. Man*, 50 S. C. 303, 27 S. E. 692; for in these cases, after it was determined that the contracts sued upon were Georgia contracts, it followed necessarily that they were to be construed under the Georgia law, by which there was no usury in those contracts, while

here it is conceded that the contract under consideration was usurious whether construed under the laws of North or South Carolina. But I am not prepared to admit that even this was error. The only authority cited to sustain the plaintiffs' first exception, raising this question, is *Pollock v. Association*, 51 S. C. 420, 29 S. E. 77. As I did not sit in that case, being disqualified, I know nothing of that case except what appears in the official report. There I see that the majority of this court concurred only in the result; and, as it appears to me that there were other grounds upon which such a concurrence might have rested, than the conclusion of the writer of the opinion that the contract there in question, similar to this, was a North Carolina contract, I do not know that it has been authoritatively decided that the contract here in question is a North Carolina contract. If it still be an open question, it seems to me that there is great force in what was said by the North Carolina court in *Rowland v. Association*, 18 S. E. 965. The defendant, it seems, was a Virginia corporation, and one of the questions was whether the case was to be governed by the laws of Virginia or by the laws of North Carolina. In considering that question the court used the following language: "It is in no true sense a Virginia contract. The labored efforts of the association to make it so appear but add to the conviction that it is not so in fact. Where a party litigant in the courts of this state asserts that his rights are to be adjudicated, not by the laws of this state, but by those of another,—that a contract illegal here shall be enforced because it is legal under the laws of another forum,—he must be able to show clearly and conclusively that his case is one that entitles him to make such a demand. In this case the borrower was in this state, he applied for the loan here, there was a local board of managers here, it had a treasurer, the money was paid to the borrower here, he secured its repayment by a mortgage on land situated here, and the mortgage was executed here. Calling it a Virginia contract does not make it one. Sending the application to the 'home office,' as it is called; remitting the money from Richmond; calling the local board and its treasurer the agents, not of the corporation, but of the members who live in that locality; providing in the bond that it shall be paid in Virginia,—all these things cannot enable the foreign corporation to evade the usury laws of this state." This language is directly applicable to the facts of this case. Of course, I do not cite this case as authority; for, according to my view, it is not authority here. It is only cited for the force of the views there expressed, not only as to this immediate question, but also, in another part of the opinion (which I have not quoted), for the clearness with which it is shown that such a contract as that here in question is usurious. But, as I do not consider that the question whether this is a

ASHLEY et al. v. HOLMAN et al.
(Supreme Court of South Carolina. May 9,
1899.)

COMMITTEE OF LUNATIC—ACTIONS—POWERS OF
EXECUTORS—INTERFERENCE BY COURT OF
EQUITY—PARTIES.

1. A committee of a lunatic, in an action previously brought to assess certain estates for the support of his ward under a will, wherein it was found that a fund set aside for such support was not exhausted, subsequently moved for such assessment. *Held*, that a refusal to dismiss, because movent should have resorted to a new action, was not error, since, as plaintiff also sought in such action a larger allowance for the support of his ward, his right of action, as existing when it was commenced, had not entirely failed.

2. Testator set aside a fund for the support of an incompetent child, and directed that, if it failed, his executors should, "by a fair and equal assessment" of the property of other legatees, raise a sufficiency for its support. *Held*, that a court of equity could interfere with an improper exercise of such power by the executors, it being a limited, and not a general, power.

3. Where a testator directs that his executors may assess the estate of his legatees for the support of an incompetent child, and such estate is sold, the purchasers should be made parties to proceedings to enforce such assessments.

Appeal from common pleas circuit court of Barnwell county; O. W. Buchanan, Judge.

Action by William Ashley, a lunatic, by his committee, L. A. Ashley, and by the latter as committee and in his own right, against W. A. Holman and others, to ascertain what would be a reasonable allowance for the support of such lunatic, and to assess the same against the property of plaintiff L. A. Ashley and defendants. From a decree, certain defendants appeal. Affirmed.

Patterson & Holman (Bellinger, Townsend & O'Bannon, of counsel), for appellants. Henderson Bros., for respondents.

POPE, J. By the judgment of this court in the above-named action, rendered on 16th day of April, 1895, and reported in 44 S. C. 160-168, inclusive, and 21 S. E. 624, the judgment of the circuit court was modified by requiring L. A. Ashley to account before the master for certain funds of his cestui que trust which he had improperly allowed the administrator of his predecessor in the office of committee of William Ashley, the younger, to absorb by illegal payments; the principles underlying the accounting were stated; the said L. A. Ashley, as committee, was to be given credit in his accounts, after the date of 22d day of June, 1892, for the sum of \$515 each year, as compensation for his care and maintenance of his cestui que trust, William Ashley, the younger; and also that when the said annual payment of \$515 should exhaust the estate of

committee, is allowed to demand that the executors of the last will of William Ashley, deceased, shall, during each year, assess, collect, and pay over to him, as said committee, the said sum of \$515; and in case any one of the legatees and devisees under the will of William Ashley, the elder, shall fail to pay the amount assessed against him or her by the said executors, the master, under the process of the court therefor, should sell such legacies and devisees to raise the respective assessments of such children and grandchildren of William Ashley, deceased, for the support of the lunatic, William Ashley, the younger. Accordingly, A. Howard Patterson, Esq., as master for Barnwell county, recast the accounts of L. A. Ashley, the committee, and found that the said L. A. Ashley, as said committee, had in his hands, as the estate of his cestui que trust, on the 22d February, 1896, the sum of \$59.87. No exception was taken to this report. On the 30th day of June, 1896, the attorneys for the plaintiffs gave the following notice:

"Please to take notice that, upon the call of the equity docket at the ensuing term of the court at Barnwell, we will, upon the affidavits of L. A. Ashley and L. A. Bush, herewith served upon you, and upon the pleadings and proceedings herein, and especially upon the former assessment of the executors of William Ashley, move the presiding judge, in open court, for an order of reference to the master to take testimony and make an assessment upon the property devised by the testator, Wm. Ashley, to his children and grandchildren under his will, to pay the amount now due for the support of the lunatic, Wm. Ashley, the younger, as reported by the master.

"State of South Carolina, County of Barnwell. Personally appeared L. A. Ashley, who, being duly sworn, says: That he is the committee of Wm. Ashley, the lunatic, who lives with him. That no part of the allowance due under the decree of the court has been paid, and he has no means of support. That the assessment made by the executors of Wm. Ashley is not fair and equal. That as to his lands, which came to him by the will of Wm. Ashley, it is assessed by the executors at 700 acres, and valued at \$10,000, whereas, in fact, by actual survey, at which he has sold it, that there are but 552 acres. Deponent says when he received this land under the will it was a very poor and unimproved place. It came to him about 1870. He lived on it about eighteen years, and has improved it a great deal. He has built on it a gin house, sawmill, engine and boiler, store, stable and barns, and added six rooms to the house; also built several tenant houses. These improvements actually cost deponent not less than five thousand dollars. Deponent was among the first in Barnwell county to put up a steam cotton gin on his place for

greatly improved the place. The testator in his lifetime sold this place to Barney Cave for about \$2,500. Cave went on the place, and after one year gave it up to the testator. The testator put this deponent on the place in 1870. That year he attended to gathering the rents for the testator, and deponent knows that the tenants made on the place that year not over 1,100 pounds of seed cotton, and the corn crop was very poor. It was an ordinarily good year. After the deponent had lived on the place and improved it he sold it to Buford for \$10,000, on ten years' time, without interest, in yearly installments of \$1,000. That sale included some goods in store and farming utensils. L. A. Ashley.

"Sworn to before me this 29th day of June, 1898. D. S. Henderson, N. P. of S. C."

"State of South Carolina, County of Aiken. Before me personally appeared L. A. Bush, who, being sworn, says: That the assessment made by the executors of the estate of Wm. Ashley, deceased, for the maintenance of Wm. Ashley, the younger, does the heirs of Mary C. Bush, deceased, great injustice—First, by assessing her six hundred acres of land instead of five hundred and twenty-four acres; second, by valuing her lands at about \$9 per acre, while lands of the other heirs in the same township, equally as good or better, are only valued at \$2 per acre and less. And he further says that W. A. Holman and W. A. Bailey, the executors, have acknowledged to him that the lands belonging to the heirs of Mary C. Bush, have been appraised too high, and that they both were willing to have it reduced, or all of the lands belonging to the estate of Wm. Ashley, deceased, equalized. He further says that the lands belonging to Mary C. Bush, deceased, have been and are assessed on the tax books at \$3.50 per acre, and the lands of W. A. Bailey, Mrs. Jennie Miller, and S. J. Bailey, heirs of the estate of William Ashley, deceased, and lying in the same township, are assessed at \$3.75 and \$4.00 per acre. L. A. Bush.

"Sworn and subscribed to before me this 24th day of June, 1898. James A. Bush, Notary Public."

Accompanying these papers was the assessment of the lands of the children and grandchildren of William Ashley, the elder, made by the executors just after Judge Townsend's decree on circuit had been made, and before the same was modified by this court. By the assessment, the lands of L. A. Ashley were assessed as being worth \$10,000, and those of Mrs. Bush as worth \$5,400, while all the other lands were assessed at lower figures.

The matters came on to be heard before Judge Buchanan, who passed the following order: "Upon the notice of motion herein, and the affidavits and documents produced, and the pleadings and proceedings in this ac-

tion, and the assessment to collect the allowance due the lunatic could not be made in this action, but must be by a new action; also that the discretion given to the executors under the will of the testator cannot be controlled by the court, it is ordered that it be referred to the master of this court to take the testimony, and to report what would be a proper assessment under the tenth clause of the will of the late William Ashley upon the property given to the beneficiaries therein mentioned, and who are parties to this action, and to state the respective assessments upon the respective pieces of property, considering their valuation at the time the said property came, respectively, to the said parties, in order to raise the amount already reported by the master as due for the allowance to the lunatic, and what would be due upon the same basis, up to the date of the report of the master. It is further ordered that, when the master shall have made said report, the plaintiff in this action be, and he hereby is, authorized to apply to this court for an order for the sale of the property of the respective parties who do not within twenty days after the confirmation of the report of said master pay their respective assessments."

From this decree of Judge Buchanan the defendants have appealed, and by their appeal virtually raise these questions: First. Was not the circuit judge in error in entertaining any question raised by the plaintiffs herein, whereas the report of the master, which was not excepted to, showed that there was no deficiency of assets in the hands of the plaintiff, as committee, when he brought this action, on 22d June, 1892? Second. If the circuit judge was not in error in failing to dismiss the plaintiffs' action after the master's report made on 22d February, 1896, was he not in error in interfering with the exercise of the discretion of the executors of William Ashley, the elder, under the tenth clause of his will?

The first question presented by the appellants is not without difficulty. Unquestionably, the plaintiffs' right of action must have existed on 22d June, 1892, which was the date of the commencement of the action. Under the decision heretofore made, and as the same was developed by the master's report of 22d February, 1896, the plaintiffs had no right to call upon the executors to make any assessment upon the legacies and devises of the children and grandchildren of William Ashley, the elder, for the support of William Ashley, the younger, until after the 22d February, 1896. If nothing else existed as plaintiffs' right of action, there appears to be considerable force in the position of the plaintiffs. If our attention were only to this part of the plaintiffs' cause plaintiffs must need be dismissed.

had previously been fixed by the court of equity, and this relief has been accorded the plaintiffs in this very action. Such being the case, we cannot say the plaintiffs' right of action, as it existed in June, 1892, has entirely failed. So this position of appellants is untenable.

Appellants next contend that the circuit judge was in error, as embodied in the second proposition heretofore stated. If the power conferred upon the executors of the will of William Ashley, the elder, in making the assessment of the legacies and devises in the children and grandchildren of said William Ashley, the elder, was a general power,—that is, something confided by the testator to the absolute discretion of the executors,—it would no doubt present a very difficult matter to this or any other court, when such discretion was endeavored to be controlled. But we do not look upon the power of these executors in levying the assessment in question as a general power. On the contrary, by the tenth clause of the will, the executors are required, "*by a fair and equal assessment of the property given to my children and grandchildren by this will, to raise a sum sufficient for the decent support for my son William.*" (Italics ours.) It will be noticed that such said assessment is required to be a fair and equal assessment. What, therefore, is there to prevent the court of equity from controlling the exercise of this power by the executors in order that such an assessment so made by them shall be fair and equal? In *Fronty v. Fronty*, Bailey, Eq. 521, Judge O'Neill, speaking for the court, said: "Powers may be general or limited. In the execution of a general power, there can be no rule but the discretion of the party to whom it is confided. In a limited one, the limitations contained in it constitute the rule by which it is to be executed. In the former, no court can undertake to control that which the party creating the power intended to leave to the honesty, good faith, and discretion of the person to whom he confided it. In the latter, the courts do no more than execute the intention of the party by whom it is created by declaring the execution of the power contrary to the limitations contained in it void." See, also, the case of *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797.

We fail to discover any difficulty in the case at bar for a circuit judge to interfere with the improper exercise of a limited power by these executors. Still, we see no reason why the executors should not be required to execute this power. Their first attempt to do so was without authority, because Judge Townsend's order for them to make the assessment was set aside by this court. We must, therefore, modify the circuit decree so that these executors shall be required to make the assessment in question, and not the mas-

Another matter must be considered by us, and that is that the plaintiff L. A. Ashley, in his affidavit, states that he has sold the lands devised to him by his father to one Barney Cave, who is now in possession of the same. It seems to us that said Barney Cave should be a party to these proceedings. There may be others who may have sold their lands. If so, the plaintiffs should be required to amend the whole complaint, alleging such sales, and making all such alienees parties defendant, including Barney Cave, and such amendment shall be made in 30 days after the remittitur reaches the circuit court. When these amendments have been made, then let the executors assess each of the tracts of land devised by William Ashley, the elder, to his children and grandchildren, no matter in whose hands as owners the same may now be, and let such assessment be made within 30 days after the amendments have been made to the complaint and filed in the office of the clerk of the circuit court for Barnwell county. After such assessment has been made and filed, either party, plaintiffs or defendants, may, upon 10 days' notice, apply to the circuit court for confirmation of such assessment by the executors; and if any party to the action, either as child, as grandchild, or as an alienee of such child or grandchild, shall fail to pay to the master of Barnwell county the sum assessed each year for the maintenance of such lunatic, William Ashley, the younger, for 60 days after notice to him or to her of such assessment, then, and in that event, an application may be had, upon 10 days' notice, to the circuit judge, for an order to sell said lands of the person so neglecting to pay the assessment made against him or her, on such terms as to the circuit judge may seem proper. It is the judgment of this court that the order appealed from be modified as herein required, and thereafter in all other respects be affirmed.

GREATHOUSE v. GREATHOUSE et al.
(Supreme Court of Appeals of West Virginia.
March 18, 1899.)

EQUITY—INJUNCTION—WASTE—PLEADING.

1. Trivial and vexatious allegations of waste, capable of pecuniary compensation, are insufficient to give equity jurisdiction or authorize the granting of an injunction.

2. An injunction which inhibits a life tenant from "cutting or removing any timber from said land, and from removing the buildings thereon or any part thereof, or from otherwise injuring the same," is entirely too broad and indefinite, and interferes with the life tenant's proper enjoyment of his tenancy.

3. A bill for an injunction to stay waste must state facts sufficient to show the injury threatened is irredeemable by the ordinary process of legal procedure.

(Syllabus by the Court.)

appeal from circuit court, Roane county; see Blizzard, Judge.

Bill by W. D. Greathouse against E. W. Greathouse and Eli Rogers. Decree for plaintiff and defendants appeal. Reversed.

Chilling & Starkey, for appellants. William H. Bishop, for appellee.

W. D. Greathouse filed his bill in the circuit court of Roane county praying injunction against E. W. Greathouse and Rogers, her son, to stay the commission waste. The defendant Mrs. Greathouse, aged lady, 76 years old, is the life tenant in possession of a dower interest in 25 acres of land, of which plaintiff owns the reversion.

The allegations of waste are that she is not properly cultivating and taking care of the land, permitting the same to grow up in brush, the fencing and buildings to decay, not repairing the same, and in plowing some sod land, and cutting down an old tree worth \$15, and some 20 cross-ties worth \$1 per tree, the whole damage being less than \$100. The court, by its decree in perpetuating the injunction, fixed the damages at \$35. The injunction is in these words: "They [the defendants] are hereby enjoined and restrained from committing waste on said 25 acres of land mentioned and described in plaintiff's bill, and from cutting and removing any timber from said land, and from removing the buildings thereon, or any part thereof, or from otherwise injuring the land."

The jurisdiction of equity in restraining waste rests upon the necessity of preventing irreparable injury. High, Inj. § 649; Bett v. Harness, 42 W. Va. 433, 26 S. E. 271. An injury complained of must be destructive to the substance of the inheritance, or of that which gives it its chief value, or be irreparable. If the facts relied on show the injury complained of is susceptible of complete pecuniary satisfaction by the ordinary legal remedy, an injunction does not lie. Watson v. Bell, 34 W. Va. 406, 12 S. E. 724; Cox v. Glass, 20 W. Va. 175; McMillan v. Ferrell, 1 Va. 223.

On its face, the bill shows complete want of equitable jurisdiction, for it is plain, from its language, that the plaintiff had a complete, adequate remedy at law, and the allegation of irreparable damage is simply made a pretext for equity interference. The evidence makes the case still clearer; for it is not so strong as the allegations of the bill, and does not pretend to establish irreparable injury. To this may be added the admission of counsel in his plea that this cause is "a rara avis, which, if deprived of its fuss and feathers, is a matter of \$35." He created the fuss and feathers to annoy this old lady, and now would willingly tear them off and burn them to avoid the jurisdiction of this court, yet would permit an injunction to hang over her which virtually deprives her of the

use of her dower. By it she is forbidden to cut timber for any purpose, although the bill alleges the fences are in need of repair. She is also forbidden to injure the land or buildings thereon in any manner, without any limitation on the character of the injury included. The natural wear and tear is an injury to the property, yet she is entitled to this. The failure to repair is an injury, yet she is not bound to do this. The wasting of the land by crops or pasturage is an injury. Either doing nothing or doing anything on the land may be proven to be an injury, according to the view of witnesses called. How is the aged defendant to avoid being in contempt of this injunction if the reversioner is disposed to continue his vexatious harassment of her? The only way is by surrendering her life estate, and this is probably the animus underlying this proceeding. The decree complained of is reversed, the injunction dissolved, and the bill dismissed for want of equity.

ARGABRIGHT v. JONES.

(Supreme Court of Appeals of West Virginia.
April 1, 1899.)

LIBEL—INNUENDO—EVIDENCE.

1. In an action for libel, the defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo cannot make the person certain who was uncertain before.

2. As an innuendo is merely explanatory, it is not capable of proof.

3. An innuendo may serve for an explanation to point a meaning where there is precedent matter expressed or necessarily understood or known, but never to establish a new charge.

(Syllabus by the Court.)

Error to circuit court, Mercer county; J. M. Sanders, Judge.

Action by A. B. Argabright against H. C. Jones. Judgment for plaintiff. Defendant brings error. Reversed.

Johnston & Hale, for plaintiff in error. R. C. McLaugherty, J. M. Anderson, and G. J. Holbrook, for defendant in error.

ENGLISH, J. A. B. Argabright on the 4th of February, 1897, brought an action of trespass on the case, for libel, in the circuit court of Mercer county, against H. C. Jones. The declaration was filed at April rules, containing six counts. The defendant demurred to the declaration, and to each count thereof. The plaintiff joined. The demurrer was overruled as to the first, fourth, and fifth counts, and the plaintiff submitted to the second, third, and sixth counts of his declaration. The defendant pleaded not guilty, and issue was joined thereon. The defendant then moved for a continuance of the case, which motion was overruled. The cause was then submitted to a jury, which resulted in a verdict against the defendant for \$1,000. A mo-

upon the defendant obtained this writ of error.

The article published by defendant in the Bluefield Telegraph, upon which the plaintiffs claim for damages is predicated, reads as follows: "It has been represented to the shop and railroad men that I had attached the wages of A. B. Argabright, at Graham, and that his wages were held on that account, and, further, that the debt was unjust; and, on these false representations, money has been raised among the shopmen to help Argabright to carry on his lawsuits and support his family. It is all untrue, and a false representation, from beginning to end. The only litigation I have had with A. B. Argabright is that I obtained a judgment before J. M. Anderson, when he was justice of the peace, against Argabright, for about \$26, which he had been owing a good while for house rent. At that time there was \$10 medical account, on which I did not sue. About three months ago I had a suggestion issued on the judgment, and served on the railway company. He paid that off by schedule; so that has ended our litigation, so far. Neither I nor any one else has ever attached him on my judgment in Virginia. It is a violation of the law to obtain goods under false pretense, and those who have been gulled by misrepresentations would do well to investigate the above case. Respectfully, H. C. Jones."

The first error assigned and relied upon by the defendant is the action of the court in overruling defendant's demurrer to the first, fourth, and fifth counts of the declaration. Was this assignment well taken? It seems to me that the vice found in each one of these counts consists in the fact that the pleader misconstrued and misinterpreted the language used in the article upon which the suit is predicated. In the first place, the publication lacks certainty as to the person alleged to have been defamed. It begins, "It has been represented to the shop and railroad men"; suggesting, by way of innuendo, "meaning the plaintiff had represented." But is this innuendo warranted by any portion of the article? It does not say who, or how many, had made the representations which follow. On this point we find the law thus stated in 13 Am. & Eng. Enc. Law, 391: "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo cannot make the person certain which was uncertain before." So, in Sanderson v. Caldwell, 45 N. Y. 398, it was held that: "In libel or slander the plaintiff cannot, by innuendoes, extend the meaning of the words beyond what is justified by the words themselves, and the extrinsic facts with which they are connected." Again, in Odgers,

used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory." Now, it cannot be said the words above quoted, by any fair construction, were published of and concerning the plaintiff. The words "It has been represented" do not name any person as having made the representation. It is true, the article proceeds to state that "on these false representations money has been raised among the shop men to help Argabright to carry on his lawsuits, etc.," but he does not say who made these false representations. When we come to the concluding words, "It is a violation of the law to obtain goods under false pretense, and those who have been gulled by misrepresentation would do well to investigate the above case," we find them, taken in connection with the rest of the publication construed and averred in the first count, to mean that the defendant charged that plaintiff did and had obtained goods under false pretense; and in the fourth count it is averred to mean that the plaintiff had obtained money from his co-employees, the shop and railroad men of the Norfolk & Western Railroad Company, by falsely and fraudulently representing to them that said defendant was oppressing him by suing out a foreign attachment against his wages, and that, too, on an unjust demand, and, in so doing, accusing said plaintiff of "obtaining goods under false pretense," and those who had been gulled "would do well to investigate the above case," etc. And in the fifth count the same construction is placed on this clause of the article. Now, in regard to innuendo, we find the law thus stated under "Libel and Slander," 13 Enc. Pl. & Prac. 51: "An innuendo cannot introduce new matter, nor enlarge, extend, or change the natural sense or meaning of the alleged defamatory words." See, also, Moseley v. Moss, 6 Grat. 534, where it is held that: "If plaintiff does not declare under the statute, his declaration must set out a common-law slander; and, if the words charged do not amount to slander, they cannot be helped by the innuendo." On same page, 13 Enc. Pl. & Prac., above cited, we find: "If the words charged are in themselves innocent of any defamatory meaning without prefatory allegations or explanatory facts, they cannot be rendered actionable by an innuendo. Words that are not actionable *ex vi termini* cannot be made so by an innuendo, but must be aided by a proper averment and colloquium which will warrant the explanatory meaning given them by the innuendo." Page 54, *Id.* the same author says: "As an innuendo is merely explanatory of that which is already expressed, it is not capable of proof." Looking, then, at the article as it appeared, we cannot say its language was aimed at the plaintiff; nor can we say that it warrants the con-

action sought to be placed upon it by the vendoes. It was held in the case of State v. Lively, 39 W. Va. 549, 20 S. E. 585, that "an endo may serve for an explanation to it a meaning, where there is precedent mat-expressed, or necessarily understood or vvn, but never to establish a new charge." In view of the authorities above cited, my conclusion is that the court erred in overruling the demurrer of the defendant as to the first, fourth, and fifth counts of plaintiff's declaration. The judgment complained of is reversed, the demurrer is sustained as to said first, fourth, and fifth counts, the verdict is set aside, and the cause is remanded.

MORRIS v. CLIFTON FORGE GROCERY CO. et al.

Supreme Court of Appeals of West Virginia.
April 1, 1899.)

PLAINT AS AGENT—DISCLOSURE OF PRINCIPAL.

Where any person transacts business as an agent with the addition of the word "agent," fails to disclose the name of his principal partner, as required by section 13, c. 100, of Code, all the property, stock, and choses in real or acquired or used in such business shall be liable to the creditors of any such person, be liable for his debts, unless such person be a licensee, auctioneer or commission merchant.

(Held by the Court.)

Reversed to circuit court, Monroe county; J. McWhorter, Judge.

Reversed to circuit court, Monroe county; J. McWhorter, Judge.
Reversed to circuit court, Monroe county; J. McWhorter, Judge.
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Reversed to circuit court, Monroe county; J. McWhorter, Judge.

ENGLISH, J. The questions presented by record in this case arise out of the following facts: In the month of July, 1895, C. L. Morris, who had been engaged in merchandising in Monroe county, W. Va., made an assignment for the benefit of his creditors, and in such suit, brought for the purpose of setting up the transactions of the trustee in the case of assignment aforesaid, the Clifton Forge Grocery Company obtained a decree against said Morris for \$197.07 as of the 17th of March, 1896, and Bowling, Spotts & Co. for \$72 as of the same date. The proceeds of the sale under the assignment only a per cent. of the indebtedness of said Morris, leaving still due said grocery company a sum of \$195.07, and said Bowling, Spotts & Co. of \$72, as of March 17, 1896. After the assignment, Morris began business again at the same place in the name of C. L. Morris, Agent, and the said Clifton Forge Grocery Company and Bowling, Spotts & Co. sued for executions under said decree, and had levied on all the personal property held by C. L. Morris sufficient to pay off said exe-

cutions and costs. A question arising as to the ownership of the property levied upon, the cases were heard together by consent, and C. L. Morris showed that his wife put \$165 into the hands of T. C. Lively, and his brother put into Lively's hands \$100, which amounts were turned over to Morris, upon which he started said business; that after Morris, Agent, had been doing business for some time in this way, Lively assigned his interest to J. T. Morris, who put in the \$100; that this was all the money put into the business, and the executions were not issued or levied until after this transfer. On October 29, 1897, in the case of J. T. Morris against the Clifton Forge Grocery Company and Bowling, Spotts & Co. by consent of parties, the question as to the right of property levied upon under said executions was submitted to the court in lieu of a jury upon a statement of facts agreed upon by plaintiff and defendant; on consideration whereof the court found that the right to the property was in the plaintiff, J. T. Morris, and quashed the executions, and the property was placed in said Lively's hands as receiver, who was directed to make sale of them, but was required before doing so to enter into bond in the penalty of \$300; to which judgment said execution creditors objected, excepted, and moved that the same be set aside as contrary to the law and the evidence, and that a new trial be awarded, which motion was overruled, and said execution creditors again excepted, and obtained this writ of error.

Now, among the facts agreed, those I regard as material for the determination of this case are the following, to wit: That, after getting the \$265 mentioned, the said C. L. Morris carried on a general mercantile business as agent for said Lively, doing all the buying, selling, and trading as agent, which business was carried on at Pickaway, Monroe county; that no sign at all was placed at the store, nor was any notice ever published in any newspaper in said county setting out said agency, or disclosing the name of the principal or partner, although there were two papers published in Monroe county at that time as well as the present; that in March or April, 1897, J. T. Morris bought out said Lively, and since then C. L. Morris has carried on a general mercantile business as the agent of J. T. Morris, but no sign at all setting out said agency, or disclosing his principal's name, was placed at the store, nor any notice published in any newspaper in said county; that while C. L. Morris was acting as agent for Lively he bought over \$400 worth of goods from the Clifton Forge Grocery Company, and about \$300 worth from Bowling, Spotts & Co.; that all of the property levied on belongs to the business of C. L. Morris as agent, and is part of the stock and business, and grows out of the \$265 above mentioned, and the credit obtained by C. L. Morris, Agent; that in the conduct of said business said C. L. Morris signed his name "C. L. Morris, Agent," without say-

that he was acting as Lively's agent, but there is no evidence that this fact was made known to the execution creditors by their respective traveling men; and, if there was such evidence, I do not regard it material, for the reason that it would not bring said C. L. Morris within the purview of our statute (section 13, c. 100, of the Code), which is imperative, and provides that: "If any person shall transact business as a trader with the addition of the words, factor, agent, and company or & Co. and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the town or county wherein the same is transacted, or if any person transact such business in his own name without such addition, all the property, stock, choses in action, acquired or used in such business shall as to the creditors of any such person be liable for the debts of such person. This section shall not apply to a person transacting business under a license to him as an auctioneer or commission merchant." There can be no question that C. L. Morris, in the business he was pursuing, could be properly classed under the general description of "trader." Webster defines this word as meaning "one engaged in trade or commerce; one who makes a business of buying and selling, or of barter; a merchant." The agreed statement of facts shows that he carried on a general mercantile business, and that the property levied on under said executions belonged to said business, and was part of the stock in said business. We must therefore hold that the circuit court erred in holding that the property levied on was not subject to the debts of the plaintiffs in error. See *Hoge v. Turner* (Va.) 32 S. E. 291.

It is contended by counsel for the defendant in error that the record does not show that the amount in controversy does not exceed \$100, exclusive of costs, and for that reason this court cannot take jurisdiction of this case. Now, the real question involved in this case was the right to the property levied upon, and whether it was subject to levy and sale under the executions levied thereon. The property levied on consisted of 1 bay horse 6 years old, 1 bay horse 7 years old, 1 bay mare 10 years old, 1 buggy, 1 wagon harness, 2 ladies' saddles, 3 men's saddles, 1 open Franklin stove, 1 set buggy harness, 2 cases boots, and 2 chamber sets. The executions in the hands of the officer aggregated \$267.09. The sheriff, in performance of his duty, is presumed to have taken enough to satisfy his judgments, and common experience would teach us that said property would be worth \$100; and, in addition to this, we have the estimate of the circuit court. When he appointed a receiver to take charge of and sell

had been taken to show the value of the property, we would have had to rely on the opinion of men at last, and here we have the opinion of the sheriff and the judge, both acting under oath, and I conclude the amount in controversy is sufficient to give jurisdiction.

The sole question in the case is whether the property levied on under the statement of facts agreed was liable to levy for and satisfaction of the debts of C. L. Morris under the provisions of section 13, c. 100, of the Code; and, it appearing that said C. L. Morris transacted his business as a trader, with the addition of the word "agent," without complying with the requirements of said section, my conclusion is that the property acquired or used by him in said business was liable for his debts, and the court erred in holding that it was not so liable, and in quashing the executions levied on the same for the debts of said C. L. Morris. The judgment complained of is reversed, and the cause remanded.

CUNNINGHAM v. CUNNINGHAM.

(Supreme Court of Appeals of West Virginia.
March 18, 1899.)

SPECIFIC PERFORMANCE—ADMISSIONS OF ANSWER—RESCISSION OF PAROL CONTRACT—ABANDONMENT—WAIVER—EVIDENCE.

1. If an answer admits an oral contract for the sale of land, the same, or substantially the same, as that alleged in a bill, and the statute of frauds is not relied upon as a defense, no proof of the contract, or of delivery of possession under it, is required, and no writing is required to attest the contract.

2. A contract, written or oral, for the sale of land, may be orally rescinded; but mere oral rescission does not divest the party of his estate, or bar him of specific performance, without destruction of the written contract, or, if oral, surrender of possession.

3. Oral waiver or abandonment of an oral contract for the purchase of land will, in equity, defeat specific performance asked by the purchaser, if possession be surrendered to the vendor, but not otherwise.

4. An oral waiver of a contract, oral or written, to defeat specific performance sought by the purchaser, must be clear, positive, and above suspicion, and, besides, cannot be proven by mere loose, casual conversations.

(Syllabus by the Court.)

Appeal from circuit court, Wetzel county; R. H. Freer, Judge.

Bill by Thomas M. Cunningham against Thomas Cunningham. Decree for plaintiff. Defendant appeals. Affirmed.

W. S. Wiley and E. O. Keifer, for appellant. Thos. P. Jacobs, for appellee.

BRANNON, J. This is a chancery suit in the circuit court of Wetzel county by Thomas M. Cunningham against Thomas Cunningham to enforce specific performance of an oral contract for the sale of land, in which a decree for the plaintiff was made, from which the defendant appealed.

counsel for defendant argues the case as if there were no contract of sale, on the idea that the contract alleged in the bill is not the same as that proven or admitted in the answer. The bill sets out an oral contract, and the answer admits it, and does not rely on the statute of frauds as a defense, and therefore there is no need of proof of the contract by a writing to show it. *Barrett v. McEter*, 33 W. Va. 738, 11 S. E. 220; 9 Enc. & Prac. 713. Of course, the contract admitted must not be a substantially different one from that alleged in the bill, to apply the above rule. There is no such substantial difference in this case. The bill states the sale of the land on certain terms, and the answer admits it as so stated; the only difference being that the bill says that the defendant was, within a reasonable time, to make a deed retaining a lien for deferred purchase money, while the answer, admitting the sale on its terms, says an executory contract was made, and a deed on payment of purchase money. What difference to either party of that form of written instrument the sale to be shown? A deed with a lien was as safe to the vendor, and important to the vendee, as conferring at once legal title, obliging him to sell, and telling the world that the lien rested on the land, and avoiding the necessity of suit to get a deed in case of refusal of the vendor to make a deed.

The land is in the oil region, where a deed, to show title, would be material to the plaintiff, and justify him in insisting on it, if such was the contract. The important question is whether there was a contract or not, and its terms, not the form of manifesting it. Defendant says, also, that the contract was that the plaintiff was to cut timber. This is not stated in the bill but it does not make a material difference, as equity would enjoin cutting timber, whether so agreed or not, if it depreciated the vendor's security for his money. The difference in the contract as stated in bill and answer being immaterial, it is no bar to specific performance. *Barrett v. McAllister*, supra.

The plaintiff took possession of the land. Defendant says that he did so as tenant, not under the said oral contract. This would raise the question whether mere remaining in possession after the contract could be considered delivery of possession required by equity to make an oral contract good, as likely would be; but this question does not arise, because the contract is admitted, and the statute of frauds is not relied upon, and neither writing, nor evidence of delivery of possession to take its place, is required. Besides, the evidence of plaintiff that he took possession first under the contract of sale conflicts with that of the defendant, that possession was first taken as tenant, and we would not follow the circuit court under this head.

Other defense is that the contract was rescinded, or, I should rather say, disavowed, renounced, or abandoned, by plain-

tiff, as there surely is no definite contract of rescission. Counsel for the plaintiff takes the position that a contract of rescission, or a waiver of the sale contract, is not valid unless executed by a surrender of possession. I think this is so. There was no surrender of possession, nor anything further than mere words. The contract vested an equitable title in the plaintiff, and he could not divest himself of it by mere word of mouth, unaccompanied by the surrender of possession, any more than an oral sale can be enforced unless accompanied by delivery of possession. There is no doubt but that an executory contract for the sale of land, whether written or oral, can be rescinded or waived, in equity, by word of mouth, if possession be given up, or the writing be destroyed, but not without something done by way of execution of the rescission or waiver. *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891; *Straley v. Perdue*, 33 W. Va. 375, 10 S. E. 780; *Fry, Spec. Perf.* § 691; *Wat. Spec. Perf. Cont.* § 386. But such verbal rescission or waiver, because it is merely verbal, must be clear, positive, and above suspicion, and it must be proven not by mere loose conversation. "The court requires as clear evidence of the waiver as of the existence of the contract itself. Abandonment of a contract, according to the law of this court, is a contract in itself." And, accordingly, "loose conversation, which was alleged as a waiver of a contract for a lease, was held not to amount to a new contract." *Fry, Spec. Perf.* § 698; *Falls v. Carpenter*, 28 Am. Dec. 593. "Declarations of a vendee, after entry and valuable improvements, that he would throw up his article, and hold as tenant to his vendor, his possession continuing as before, are insufficient to divest his interest." *Bowser v. Cravener*, 56 Pa. St. 132. Just so is this case. This sale was made in April, 1889; and plaintiff took possession, made considerable improvements, cleared 10 to 15 acres of land, and paid taxes, and was still in possession when he brought this suit in January, 1897. The waiver alleged was in March, 1892. Why did defendant let the plaintiff remain in possession five years, paying no rent, if there was such waiver or rescission? Plaintiff paid \$230 on the \$1,000 purchase money. The parties engaged in a quarrel or disagreement, owing to the defendant's forbidding the plaintiff from cutting timber, and, they casually meeting at a lumber shanty, the defendant, as he states it, wanting more pay on the land, asked plaintiff what he was going to do about it, and said that they had better fix it up, and had better get writings drawn; and plaintiff replied that he had no fixing to do, but was going to give the land up, as the defendant would not let him cut timber, and the defendant consented. There is some evidence of loose, casual declarations made by plaintiff on other occasions to third parties to the effect that the defendant would not let him cut timber to help him pay for the land, and that the defendant could

of waiver, and can only go in corroboration of the defendant's version of what took place at the lumber shanty. The witnesses differ materially as to the words and import of that conversation at the lumber shanty, showing how unsafe it is to go upon loose conversations in grave matters, which the statute of frauds sought to have put in written memorial. The plaintiff squarely denies that he said he would give up the land, and says that when asked by his uncle, the defendant, what he was going to do about paying, replied that he would do nothing more till a deed was executed. The evidence is materially conflictive as to the declarations of plaintiff as to abandonment of the contract, and, the circuit court having found against it, we cannot reverse the decree. I am, however, free to say, under the law above given, that this loose conversation, taken even as the defendant claims it, is not sufficient to cancel the contract and destroy defendant's vested interest. The declarations were likely only angry declarations when the plaintiff was worried and excited about his uncle's refusal to let him cut timber, even if we take them for the most they are worth under the defendant's statement of those declarations. People must put their contracts and cancellations of contracts in writing, and not expect courts to act on loose conversations, related differently by different witnesses, especially where the burden is on him who pleads that a once valid contract has been annulled by a subsequent agreement or waiver to show the same clearly.

The plaintiff explains his delay of payment by the defendant's neglect to make a deed. It was the duty of defendant to execute such deed. *Clark v. Gordon*, 35 W. Va. 736, 14 S. E. 255. The decree required the defendant to convey the land on payment of \$1,120.35, the amount unpaid and due at the date of the decree, and a reservation of lien to secure what was thereafter to become due. Regarding the decree as right, we affirm it.

FIRST NAT. BANK OF BRADDOCK, PA., v. HYER et al.

(Supreme Court of Appeals of West Virginia.
March 18, 1899.)

JUDICIAL SALE—PROPERTY ACQUIRED—RESERVATIONS IN DECREE—RIGHTS OF PURCHASER.

1. In a suit to sell land for its purchase money, on which is a sawmill that is part of the freehold, and the decree to sell provides that the sale shall not include the mill, a sale of the land does not pass the mill to the purchaser.

2. A court, having jurisdiction to sell land, reserves from sale a sawmill thereon. Though there is nothing in the record to warrant the reservation, it is not void, but voidable only by appeal, and cannot be collaterally assailed.

3. A purchaser under a decree is held to

sale, passes no title to such property, and is void.

(Syllabus by the Court.)

Appeal from circuit court, Braxton county; W. G. Bennett, Judge.

Suit by the First National Bank of Braddock, Pa., against J. S. Hyer and others. Decree for defendants, and plaintiff appeals. Affirmed.

V. B. Archer, for appellant. W. E. Hammond and Bland & Bland, for appellees.

BRANNON, J. John Adams conveyed to Reed a tract of land in Braxton county, taking notes for deferred purchase money. J. S. Hyer became assignee of some of the notes, and the First National Bank of Braddock of some of said notes. The land was later conveyed to the Braxton Lumber & Coal Company, which erected a sawmill upon the land. Smith, Meyer & Schnier sold the lumber company a boiler, engine, and other articles of machinery; and the same made up the said mill, which was in a mill house of permanent structure on the premises. Smith, Meyer & Schnier recorded a paper called "Notice of Reservation of Title," claiming to reserve title to said boiler, etc., until purchase money therefor should be paid. The said Braxton Lumber & Coal Company failed. One Miles filed a laborer's lien against said mill, and brought suit in equity against said lumber and coal company to enforce the said lien against the said mill, or, rather, its machinery; and Smith, Meyer & Schnier also brought a chancery suit, claiming a lien upon the machinery in said mill which they had sold said company, and to which they claimed to have reserved title; seeking by their suit to sell said machinery for its purchase money. In these two suits a receiver was appointed, and later there was a decree to sell the machinery for Miles' debt, subject to the claim of Smith, Meyer & Schnier; and later that decree was set aside, and the said machinery was directed to be sold absolutely, and not subject to their claim, and the proceeds to be held and disbursed under the direction of the court, according to the rights of various creditors of the said lumber and coal company. Ruhl, Kobleger & Co. issued an execution against said lumber and coal company, and under their judgment and execution claimed a lien upon said mill, and, as defendants in the suit of Miles, they filed an answer to enforce their lien, and contesting the validity of the lien against said machinery set up by Smith, Meyer & Schnier; and there was a decree holding that they had no lien. J. S. Hyer brought a suit to enforce against the said tract of land the lien for the purchase money assigned to him, and the First National Bank of Braddock, by petition, became a party to this suit, and set up a claim to a part of the purchase money

this suit there was a decree subjecting the land to sale for the payment of the moneys going to Hyer and the bank, and in this decree is the clause which is the source of the trouble in this cause, reading, "The sale aforesaid shall not be construed to include the mill of the Braxton Lumber & Coal Company, mentioned in the proceedings in this cause." The special commissioner sold and conveyed the land under this decree to the said bank, not mentioning the reservation of the mill either in his notice of sale or deed to the bank. The bank, hearing of the said decree in the suit of Miles and the suit of Smith, Meyer & Schnler against the Braxton Lumber & Coal Company to sell the said mill, brought this suit against all the parties in interest, for the purpose of annulling the decree in the case of Hyer, which reserved the said sawmill from sale, and to annul the decree in the suits of Miles and Smith, Meyer & Schnler against said lumber and coal company, which subjected the mill to sale, and to enjoin the sale of the mill, and claiming that it (the bank), under its purchase of the land, acquired title to not only the land, but to the mill, also, and claiming that the reservation in the decree had been procured through the fraud of Smith, Meyer & Schnler, and to enjoin the sale of the mill. The injunction was granted. A demurrer to the said injunction bill was interposed, and it was sustained, and the injunction was dissolved, and upon the whole case the bill was dismissed, and the bank appeals.

First, if the claim of Smith, Meyer & Schnler to retain title to the machinery sold by them to the Braxton Lumber & Coal Company had been properly presented to the court, it is likely that the exception found in the decree would have been proper, since machinery already under mortgage which is annexed to the freehold, which freehold was already under mortgage, becomes part of the freehold, and therefore subject to the realty mortgage, if it cannot be severed without material injury to the freehold; yet, if it can be so severed, the owner of the mortgage on the machinery, or the purchaser under that mortgage, may remove it. *Hurxthal's Ex'r v. Hurxthal's Heirs* (W. Va.; decided Dec. 10, 1898) 32 S. E. 237; *Jones, Chat. Mortg.* § 132a. But it is not necessary to so decide. Certain it is that that exception of the mill is the decree. The question arose in my mind, is that exception null and void? If so, the purchaser would, perhaps, get the mill with the land. If the court, without anything in the record to justify it, in decreeing land under a vendor's lien should except a house or the timber, would the exception be void? If so, would the purchaser get the house or timber, or get only what he bargained for? But, if such a reservation would be void, still it does not show that a reservation of what is only a fixture would be void; for a fixture is

was the sale of the land, with these fixtures upon it, and the decree severed the fixtures, and that was embraced within the scope of the subject; and this exception in the decree, absolving the mill from liability and sale, as I interpret the clause, is not a mere nullity, but an irregularity, at most, and binding the bank as a party until reversed. The bill of the bank is only a collateral attack upon it, which cannot be allowed on any theory that it was error to insert that reservation. It can be changed only by appeal or bill of review, and then only if the bank was aggrieved by it in its debt not being paid from the proceeds of sale. As purchaser it could not reverse it for that cause. It is like a clause in a decree, "without prejudice," which, if improper, can only be corrected by appeal. *Bodkin v. Arnold* (W. Va.) 30 S. E. 154; 2 Black, Judgm. § 721. So the bank did not get the machinery in its purchase, because it was severed by the force of the decree from the freehold, and not sold. Had the commissioner expressly sold it, his sale would be void, as a sale of a tract of land or thing not decreed to be sold is a nullity. *Ror. Jud. Sales*, § 489. "A sale without order of court is not a mere irregularity, which must be objected to by some proceeding in the court where the decree ought to have been sought and granted, and which, if not so objected to, is waived or ratified. It is a proceeding without any legal support. A conveyance in pursuance of it has no force whatever. It may be shown to be void when collaterally attacked. In fact, no attack, collateral or otherwise, may be made." *Freem. Jud. Sales*, § 9. "The decree of the chancellor must be construed to conform to the sale prayed for in the petition, and a sale beyond that is not rendered valid by final ratification." *Shriver's Lessee v. Lynn*, 2 How. 43. More so where the decree prohibits the sale of the particular thing, as in this case. Confirmation cures voidable, not void, sales. If sale is void "because it included property not described in the decree of sale, an order confirming it is necessarily inoperative." *Freem. Jud. Sales*, § 44. A sale of a parcel of land in addition to that described in the decree, is void. *Burbank v. Semmes*, 99 U. S. 138. *Estill v. McClintic's Adm'r*, 11 W. Va. 399, does not controvert this doctrine; rather, the reverse. It holds that if a commissioner, without authority, sell land, the court should set aside the sale, at the request of any party in interest, after the purchaser is summoned; that is, where the thing is expressly sold, which is not the case here. The question here is whether the machinery was sold, not whether a sale of it shall be set aside. The fact that the commissioner made no exception in his sale notice and deed does not help the bank. He could not sell what he was not authorized to sell, but was prohibited from sell-

conferred by it. Even an ordinary agent cannot do an act not authorized by his power of attorney. The bank, as a formal party to the suit, and as purchaser, must take notice of the authority of the commissioner, and of what was in the decree, as a purchaser must know what is in his title papers. *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014; *Williamson v. Jones*, 43 W. Va. 563, 590, 27 S. E. 411. On the day of the sale, and before confirmation, the president of the bank had actual notice by information given to him; and he bid the property in, or allowed confirmation of the sale, without objection on the score of this reservation. It seems to me, this bars this suit.

I think the machinery did become a part of the realty, except as to Smith, Meyer & Schnler. But what of that? The bank did not buy it. The decree had severed it from the freehold. The bill charges that Smith, Meyer & Schnler procured the reservation in the decree by fraud. If so, still the bank did not buy that machinery. Equity will avoid a judgment or decree procured by fraud, but it is not shown that they procured this reservation by fraud. Proof fails of this allegation; and if, on demurrer, it were taken as true, the plaintiff would have no right to set the decree aside, as it had no title to the machinery. But the court read the whole record, and it appears that Smith, Meyer & Schnler were not parties, and did not participate in the suit. If they had, in the suit, appeared and asserted their claim, that would not be fraud, since it would be only the case of a party asserting a demand in open court under the law of the land; and, though that claim be found to be unsustainable ultimately, it is no fraud to assert it. That claim was perhaps good, if sustained by proof, against everybody except creditors of the lumber company. But in fact that reservation was put into that decree at the suggestion of the plaintiff in that case, Hyer, under the impression that the claim of retention by Smith, Meyer & Schnler of title was valid, and that firm had nothing to do with its insertion. So, the bank, having no title to this machinery, could not maintain an injunction to stop its sale under decree in the suits named, and the decree dissolving it and dismissing the bill is affirmed.

PARSONS v. HARROLD et al.

(Supreme Court of Appeals of West Virginia.
March 25, 1899.)

SURETY—RELEASE—EXTENSION OF DEBT—CONSIDERATION—KNOWLEDGE OF CREDITOR—MAKERS OF NOTE—PRESUMPTIONS.

1. The defense by a surety that he has been discharged by indulgence to the principal, or by a surrender of a security for the debt, may be made in a court of law, where the debt is

made valid a contract to extend payment of a debt, so as to discharge a surety, but a mere naked unexecuted agreement to pay such interest will not discharge a surety.

3. To release a surety by indulgence of the principal or by surrender of a security for the debt, the creditor must know, when he agrees to indulge or surrenders the security, that the party is a surety.

4. When two persons make a note, the prima facie presumption is that they are both principals, and the payee may so treat them, unless the note, or the parties, or the circumstances, plainly inform the payee that one is a surety. The surety may so notify the payee, and then the payee must have regard to his rights as such.

5. If indulgence be granted a principal debtor, with consent of the surety, or if, with knowledge of past agreement to indulge, the surety promises payment, such indulgence will not release him.

(Syllabus by the Court.)

Error to circuit court, Cabell county; E. S. Doolittle, Judge.

Action by Warren J. Parsons against C. B. Harrold and others. Judgment for plaintiff, and defendant T. W. Peyton and others bring error. Affirmed.

Campbell, Holt & Campbell, for plaintiffs in error. Williams, Scott & Lovett, for defendant in error.

BRANNON, J. Parsons brought an action before a justice against Harrold, McCullough, and Peyton upon a promissory note in favor of Parsons, signed on its face by Harrold, upon which Peyton and McCullough indorsed their names before its delivery, thus giving Parsons right to treat them all as joint makers. The case went by appeal to the circuit court of Cabell county, and resulted in a judgment against all the defendants, and Peyton and McCullough bring the case to this court.

The answer filed before the justice set up the defense—First, that Harrold was principal debtor, and Peyton and McCullough only sureties, and that Parsons, without their consent, had extended indulgence to Harrold; and, second, that Parsons had waived a deed of trust upon property given to secure the note, by agreeing to allow a deed of trust to be made to a building association, and subordinating to it, in point of priority, the trust given for the note. As this case is based on an unsealed instrument, the defenses specified can be made in a court of law, as shown in *Glenn v. Morgan*, 23 W. Va. 467, by Judge Snyder. If it were a sealed instrument, the defense could not be made at law. *Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554 (Syl., point 9). After maturity of the note, the creditor agreed with Harrold to give one year's indulgence in consideration of payment of 10 per cent. interest in advance, which was paid; and at the close of the second year Parsons agreed with Harrold for another year's indulgence on the same terms, paying, however, only a little of the interest,—not as

has one year's lawful interest. It seems by law that payment actually made in advance of usurious interest, under a contract for payment, will discharge the surety, if he does not consent to it; but a mere naked, unexecuted promise to pay such usurious interest would not do so. 2 Brandt, Sur. § 5 Rob. Prac. 787. So, the actual payment of one year's interest, though usurious, would constitute ground for the release of the surety. As to the payment of less than legal interest in advance for the second year, as the law is that payment in advance of lawful interest is a valid contract, and, if executed, releases the creditor from suing, that would release the surety; and, as the payment of a year's lawful interest in advance would tie the hands of the creditor from suit for the period to which such payment discharges interest, that partial payment would release such surety. *Glenn v. Morgan*, 23 W. 467, 470; 5 Rob. Prac. 787. Therefore, as evidence shows that Peyton and McCullough were sureties, the facts just stated would exonerate them from liability, if it is fixed upon Parsons that he knew that they were sureties; for, to make the defense of indulgence to the principal available for the release of a surety, it must appear that the creditor knows that the surety is only liable when he makes the contract of indulgence. Per Judge Snyder in *Glenn v. Morgan*, supra; per Justice Gray in *Insurance v. Hanford*, 143 U. S. 191, 12 Sup. Ct. 437; Brandt, Sur. § 375; 2 Daniel, Neg. Inst. § 1; Long v. Campbell, 37 W. Va. 666, 17 S. E. 197. But the question whether Parsons was that Peyton and McCullough were sureties was one of fact before the jury upon evidence, and, to discharge them by reason of indulgence, we would have to oppose and reverse the finding of the jury. Therefore we will not allow the defense of indulgence. Next, as to the defense of the waiver of the deed of trust. Because of the verdict of the jury finding that Parsons did not know of suretyship, we have to deny this defense to Peyton. It is true that the release by a creditor of a lien or hold upon property of a principal debtor, constituting a substantial security for the debt, without the consent of the surety, releases the surety. *Bank v. Parsons*, 17 Va. 137, 24 S. E. 554 (Syl., point 8); 45 W. Va. —, 32 S. E. 271 (Syl., point 3). Parsons not knowing of the suretyship, the defense does not apply, any more than the defense of indulgence. He had the right to regard them simply as joint debtors, while the express release by contract of a joint debtor is the release of all, this is so where the release operates upon principals of equity from indulgence to the principal debtor, or the surrender of a security for debt. In this connection, I must refer to position taken in the able brief of counsel Peyton and McCullough, based on their construction of the case of *Good v. Martin*, 95 S. 90, in which an instruction was held

proper that if "defendant wrote his name upon the back of the note before delivery to the payee, and that he did not then make any statement of his intention in so doing, he is presumed to have done so as the surety of the makers, and for their accommodation, to give them credit with the payee, and is liable for the payment of the note." From this counsel argue that if two facts appear, namely, that the defendant wrote his name on the back of the note before delivery to the payee, and made no statement at the time of the delivery, the presumption is that he was surety. The court did not mean that. The opinion does not say so. It meant that there is a presumption, in case of silence, that he was a joint promisor, either as principal or surety, as distinguished from guarantor or indorser. It did not mean that as to the creditor signature and silence created the presumption that a party was surety and not principal. That would fly in the face of a volume of authority; for when, as between payee and maker, it comes to the question whether one promisor is surety for another, authorities generally show that, when parties put their names on the face of a note, or on its back, not regularly as indorsers, before delivery, they are to be taken simply as joint promisors, and not any of them as sureties, whatever may be the understanding between themselves, unless, by the addition of the word "Surety" to a name, or otherwise, the paper tells the creditor that one is only surety, or he is expressly informed of it, or it is clearly shown by the circumstances. The great question is, not whether prima facie the parties are all principals, but whether any oral evidence can be received to show that one of the parties was but a surety; but, though conflicting, the weight of authority is that such evidence is admissible. 24 Am. & Eng. Enc. Law, 723; *Creigh v. Hedrick*, 5 W. Va. 140; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; 2 Daniel, Neg. Inst. § 1332-1338; 5 Rob. Prac. 773; 1 Brandt, Sur. § 29. The case of *Good v. Martin*, supra, involved the question whether, as between creditors and debtors, the debtors were to be treated as original makers or indorsers, while we have the question whether, as to the creditor, a party is a principal or surety. I think the cases of *Burton v. Hansford*, 10 W. Va. 470, and *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197, and *Milling Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612, though not just on this point, contain principles sustaining the views above expressed.

Next, as to McCullough. The same may be said as to ignorance of Parsons of suretyship as is said above as to Peyton. In fact, Parsons gave the check payable to McCullough, and delivered it to him. And, furthermore, there was evidence before the jury that McCullough knew of the first year's extension, and said to Parsons, "Let it run another year longer." There was evidence that he consented to the waiver of the deed of trust lien. While there is not evidence that he explicitly

that year, and said that he would see Harrold about it. He did not object, and, though one extension consented to does not warrant a second without the surety's consent, yet if the party agrees to pay, knowing of such extension, that waives the release which would otherwise flow from the extension. 24 Am. & Eng. Enc. Law, 832. Is not the statement by McCullough, when told of this second year's extension, that he would see Harrold about paying the interest, equivalent to an agreement or assent to continue bound?

I should add that \$100 of the money raised by the mortgage, in favor of which the waiver was made, was applied on this debt, which was a consideration for McCullough's consent to it. It is well settled that, where a release of lien is made for the betterment of the debt, it does not discharge the surety. Of course, that \$100 did not injure the surety, and as, crediting that \$100, there would be a difference of only \$270 between the old prior mortgage and the second one, in favor of which the waiver was made, it would not discharge the debt, but would only go to its discharge pro tanto, even if available as a defense. Brandt, Sur. § 429; 24 Am. & Eng. Enc. Law, 853. But I do not think, for reasons above given, that defense available. Furthermore, it does not appear that, after payment of that mortgage, the property will not be sufficient to pay this debt. The law is settled that, to discharge a surety by the surrender or waiver of a lien, the surety must be actually injured.

The court and jury below have decided that this just debt shall be paid by all those who contracted to pay it, and we do not see any adequate reason why we should reverse this decision, and cause the loss of an honest debt to its owner. Those parties agreed to pay it, and, if they demand a discharge under the law, they should make out a very clear case.

The plaintiffs in error complain of an instruction given on the motion of the plaintiff, Parsons, to the effect that if, when the note was delivered to Parsons, it was payable to him, and was signed by Harrold, and had written on the back the names of Peyton and McCullough, then Parsons was entitled to hold them as joint makers; and if Peyton and McCullough signed their names on the back of the note at the time it was made as security for the maker, and for his accommodation, to give him credit with the payee, such proof did not alter the right of the payee to hold them bound as original promisors or guarantors or indorsers, as he might elect. It is said that this instruction is misleading, and not relevant to the case, or, at least, not meeting it, and that it should have been modified so as to inform the jury what they should do if they found that Parsons had given extensions or released a lien without the consent of the sureties. Clearly, it is relevant and pertinent to the case, because it tells the jury

under Mining Co. v. Watkins, 41 W. Va. 181, 24 S. E. 612. As to the point that it did not advert to the facts or evidence tending to show the effect of indulgence or release of a lien, if the instruction were what is called a "binding instruction,"—that is, one which, after stating certain facts, tells the jury that, if those facts exist, the jury must find in a certain way,—and there are other material facts involved in the evidence ignored by it, then this instruction would be open to the objection made against it; but it does not do this, as it simply tells the jury the legal effect of a note under the facts stated in the instruction, as one of the elements of the case. A party has a right to have the opinion of the court as to the law upon a given state of facts, though they do not cover the whole ground of the case, and he has the right to have an instruction in his own language, if clear, intelligible, and properly propounding the law. If the defendants wanted an instruction as to the effect of indulgence or surrender of lien,—matters entirely separate from the legal effect of the note,—they should have asked it. Judgment affirmed.

BLOXTON et al. v. McWHORTER, Judge.
et al.

(Supreme Court of Appeals of West Virginia.
March 22, 1899.)

MUNICIPALITIES—INCORPORATION—ISSUE OF CERTIFICATE—PROHIBITION.

1. Under section 9, c. 47, Code, "upon filing of such certificate [of the result of the vote upon the question of incorporation] and upon satisfactory proof that all the provisions of the foregoing sections of this chapter have been complied with, the circuit court shall, by an order entered of record, direct the clerk of the said court to issue a certificate of the incorporation of such city, town or village." In deciding upon the sufficiency of such proofs, the court was exercising the legitimate powers conferred upon it by the statute; and, having jurisdiction of the subject-matter, prohibition will not lie.

2. And in entering the order directing the clerk of said court to issue a certificate of the incorporation of such city, town, or village, after deciding upon the sufficiency of said proofs, the court was performing a merely ministerial duty, as it had no discretion after being satisfied with the proofs, and prohibition will not lie.

(Syllabus by the Court.)

Application of R. J. Bloxton and another for a writ of prohibition against J. M. McWhorter, judge of the circuit court, and others. Denied.

St. Clair & Walker and Brown, Jackson & Knight, for petitioners. C. W. Dillon and Flournoy, Price & Smith, for respondents.

McWHORTER, J. Application was made to the circuit court of Fayette County by John Poteet, Stewart Blake, J. S. Boggess, W. W. Garrettson, and N. M. Jenkin, under the provisions of chapter 47 of the Code, for the in-

acres, and a population of 281. On the 1st day of March, 1898, an order was made by the said court reciting that satisfactory proof was made that all the provisions of chapter 47 of the Code had been complied with, and incorporating the said territory; describing the same as appeared by the report of the surveyor made and filed in the case, as prescribed, and appointing three legal voters residing within said territory to act as commissioners of election at the first election to be held in said town. On the 12th day of March, 1898, R. J. Bloxton and J. E. Garrett, residents and voters within the boundaries of said town, appeared by counsel, and objected to the court authorizing a charter to be issued to said town, and moved the court to set aside the order entered on the 1st day of March, on the ground that the survey and map filed with the application were not in compliance with the statute in such case made and provided, and tendered in support of said motion the affidavits of H. L. Tansill and Thomas Nichol, which were filed; and the applicants, by their counsel, appeared and objected to said motion, which motion, being argued, was overruled, to which ruling of the court said Bloxton and Garrett, by their attorneys, objected and excepted. The said Bloxton and Garrett tendered their petition to this court, praying a writ of prohibition against J. M. McWhorter, judge of said circuit court, and the said applicants, and W. E. Harvey, John Poteet, and S. E. Wriston, the commissioners so appointed to hold the said first election, praying that all of said defendants, except McWhorter, judge as aforesaid, be prohibited and restrained from holding any election for officers of said pretended town, which petition was verified by affidavit. A rule was issued requiring said defendants to appear and show cause why such writ of prohibition should not issue as prayed for, and prohibiting and restraining said defendants, except McWhorter, judge as aforesaid, to appear or be present at said election, as prayed for in the said petition, until the further order of the court. On the 1st day of March the parties appeared by their attorneys, and the respondents demurred to the petition, and moved the court to quash the rule; and the case was fully heard upon said petition, and said motions and arguments of counsel. It is insisted by respondents that this court has no jurisdiction, because, in the discharge of its duties imposed upon it in relation to the incorporation of cities, towns, and villages, the circuit court is acting as a subordinate council or tribunal of the legislature, and not the judicial department of the state government, and therefore its proceedings in such matters cannot be controlled by the judicial department. Section 8 of chapter 47 provides for the return of the election of such notice was given in the application under section 6, and that the result of the vote

that, upon the filing of such certificate and upon satisfactory proof that all the provisions of the foregoing sections of this chapter have been complied with, the circuit court shall, by an order entered of record, direct the clerk of the said court to issue a certificate of the incorporation of such city, town or village, in form or in substance as follows:” (giving the form of the certificate of incorporation); such section closing with, “and from and after the date of such certificate the territory embraced within the boundary mentioned in said certificate shall be an incorporated city, town or village, by the name specified in the said notice and certificate.” In re Town of Union Mines, 39 W. Va. 179, 19 S. E. 398, Syl.: “(1) Chapter 47 of the Code, in relation to the incorporation of cities, towns, and villages, in so far as it confers on the circuit court functions in their nature judicial and administrative, although in furtherance of the legislative department of the state government, is constitutional and valid. (2) The circuit court, in the discharge of such functions, acts as a subordinate branch or tribunal of the legislative, not of the judicial, department, and is not subject to the appellate jurisdiction of the supreme court of appeals of this state.” And Judge Dent, in discussing the subject in that case, says, “The circuit court being engaged in the discharge of a legislative function in aid of the legislative department of the state government, the petitioners had no right to appear and contest the issuance of the certificate of incorporation in such manner as to be made parties litigant in a judicial sense, any more than before a committee of the legislature. * * * This court could with as much propriety, and with equal authority, review the judicial functions exercised by the legislature in enacting the charter of a city or town having over two thousand inhabitants, as to review the proceedings now under consideration.” Section 1, c. 110, Code, provides that “the writ of prohibition shall lie as a matter of right, in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-matter in controversy, or having such jurisdiction, exceeds its legitimate powers.” Had the circuit court jurisdiction, and, if so, did it abuse its powers? The circuit court is given a special and exclusive jurisdiction in the matters in question, under chapter 47 of the Code,—partly legislative and partly judicial and administrative. Under section 9, “upon the filing of such certificate and upon satisfactory proof that all the provisions of the foregoing sections of this chapter have been complied with the circuit court shall by an order entered of record direct the clerk of said court to issue a certificate of the incorporation of such city, town or village,” etc. The action complained of is that, although the court decided the proof was satisfactory, it was not sufficient; there-

case; and, whether it decides right or wrong, it is only exercising the powers conferred upon it; and in deciding that the proofs were satisfactory the court was exercising its legitimate judicial functions; and, having jurisdiction of the subject-matter, prohibition will not lie; and in entering the order, being satisfied with the proof, it was performing merely a ministerial duty, and prohibition will not lie. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267, Syl. point 4: "Prohibition lies only in case of the unlawful exercise of judicial functions. Acts of a merely ministerial, administrative, or executive character do not fall within its province." And point 6: "Mere errors and irregularities of such commissioners, proceeding within their jurisdiction, are not subject to prohibition." Petitioners contend that the certificate of incorporation is void because of alleged defects in the proceeding. It appears from the record that the proceedings were all regular, and the court judicially passed upon the proof of all things done, and held that the same was satisfactory to the court; that all the provisions of chapter 47 had been complied with. Petitioners say that while this court held "in *Re Town of Union Mines*, supra, that objectors to incorporation cannot be made parties litigant in the proceedings, and have no right to an appeal or other ordinary appellate writ, it has in the same case indicated that the action of the circuit court is subject to the supervision of this court by mandamus or prohibition. And we see no reason why it should change the opinion thus expressed." The opinion says: "In discharging these functions the circuit court does not act under the judicial branch of the government, and is not subject to its supervision, except by mandamus or prohibition, in a proper case, but acts as a part of the legislative branch of the government, under the express authority of the constitution, and is subject to its supervision and control only, however, by impeachment or amendment or repeal of the law. Hence its action in discharging these legislative-judicial functions cannot be reviewed by this court by a writ of error or other ordinary appellate writ, notwithstanding their judicial character." That is, in case persons desiring to obtain a certificate of incorporation of proper territory should comply fully with all the requirements of the statutes for the purpose, and make application in due form, and the circuit court should arbitrarily refuse to entertain such application, mandamus would lie to compel action; or, on the other hand, if the court should undertake to incorporate territory included within another incorporated city, town, or village, or containing a resident population of less than 100, or containing less territory than one-fourth of one square mile in extent, as provided by statute, it would probably be "a proper case" for prohibition. Petitioners

are somewhat similar to ours, permitting towns and villages, however, to incorporate for free-school purposes only. This was a proceeding by information against the trustees, in the nature of a quo warranto; and Lightfoot, C. J., in his opinion, says: "The leading question raised on this appeal is this: The petition of the citizens who sought the incorporation of Waskern and vicinity for school purposes having failed to designate the boundaries of the proposed incorporation, would the order of the county judge designating a boundary, and an election held thereon, be a compliance with the statute?" In the case at bar we have the same boundary described in the application, the report of survey of the surveyor, and also in the order and certificate of incorporation. The several cases cited by petitioners (*State v. Tucker*, 48 Mo. App. 531; *Town of Enterprise v. State*, 29 Fla. 128, 10 South. 740; *Furrh v. State*, supra) are all proceedings in the nature of quo warranto. In the Florida case (*Town of Enterprise v. State*) Syl. point 6: "The rule is well settled that no collateral attacks can be made upon the existence of a corporation. Such bodies derive their being from the sovereign will of the people, and, so long as the state does not question their existence, it cannot be controverted in a collateral way on account of irregularities and defects in their organization." Also, in the case of *Howell v. Kinney*, 99 Ga. 544, 27 S. E. 204, cited by petitioners, where the change of militia lines were brought in question in a collateral proceeding, Justice Lumpkin, in his opinion, says: "It has frequently been held by this court that the determination by an ordinary, or board of county commissioners, in proceedings to change militia district lines, cannot be directly reviewed by certiorari or otherwise. While we are not in the least degree disposed to call in question the correctness of this proposition, we are at the same time quite sure that it is within the power of the superior court or of this court to declare such proceedings, and the final action taken therein, absolutely void, whenever it becomes apparent that there was no law authorizing the same, or is manifest that no attempt is made to conduct them in conformity with valid existing regulations governing such proceedings, or that the action taken was in utter disregard thereof." It will be readily seen that the case at bar is wholly different. Here it is only claimed that the court erred in granting the order of incorporation because the description of the boundaries of the territory was not sufficient. The court, in the exercise of its judicial functions, solemnly decided that the proof was sufficient. And it was acting in a matter in which it unquestionably had jurisdiction directly under the statute, and upon questions which the law required it to pass upon judicially; and, if the

petitioners' complaint, also, of the large extent of the territory incorporated. This question is fully discussed and disposed of in Davis v. Town of Point Pleasant, 32 W. Va. 289, 9 S. E. 228, and cases there cited. The writ of prohibition is refused, and the petition dismissed.

FISHBURNE v. BALDWIN et al.

(Supreme Court of Appeals of West Virginia.
March 18, 1899.)

SUMMONS—VALIDITY—JUSTICE OF THE PEACE—JUDGMENT.

1. A judgment of a justice, which is plainly intended to be against two defendants named in the heading and summons, is not invalid for the reason that the word "defendant" is used in the body thereof instead of the word "defendants."

2. The fact that the justice does not state in so many words on his docket that he waited one hour for the appearance of the defendants does not render the judgment invalid. The statement that "the defendant not appearing" is a sufficient compliance with section 179, c. 50, Code.

3. The judgment of a justice cannot be attacked collaterally for mere amendable clerical omissions not in any wise invalidating the judgment, or rendering it uncertain as to time, parties, or the amount thereof.

(Syllabus by the Court.)

Appeal from circuit court, Mercer county; J. M. Saunders, Judge.

Suit by J. R. Fishburne, special receiver, against Kate A. Baldwin and others. Demurrer to the bill sustained, and plaintiff appeals. Reversed.

W. W. McLaugherty, for appellant. A. W. Reynolds, for appellees.

DENT, J. In the case of J. R. Fishburne, special receiver, against Kate A. Baldwin and others, being a suit in chancery instituted in the circuit court of Mercer county to enforce judgment lien, the following proceedings were had, to wit: The bill was taken for confessed, and a reference was had to a commissioner. He reported that the plaintiff had no judgment, and thereupon the circuit court sustained a demurrer to the bill and dismissed it. The record of the judgment exhibited with the bill is as follows:

Exhibit Judgment. J. R. Fishburne, Spl. Receiver, Plff., against D. B. Baldwin and Kate A. Baldwin, Defts.

"This day summons issued and made returnable before me at my office in the district Beaver Pond, at Bluefield, Mercer county, West Virginia, on the 19th day of December, 98, at 9 o'clock a. m., and placed in the hands of W. W. Thompson, C. M. C. Same day the plaintiff filed his complaint, amounting \$120.82. Given under my hand this, the 19th day of Dec., 1898. [Signed] H. E. Thomas, J. P."

appearing, judgment is rendered by default in favor of the plaintiff against the defendant for the sum of \$120.82 and \$2.55 cost. Give under my hand this, the 19th day of December 1898. [Signed] H. E. Thomas, J. P."

The objection to this judgment is that it is invalid for uncertainty, for the reason that the word "defendant" is used instead of "defendants." This is a mere clerical and amendable error, and does not vitiate the judgment.

The second objection is that the record does not show that the justice waited an hour before rendering judgment. This is of little consequence with the first, and both are untenable in view of the repeated decisions of this court and of other states. *Moren v. Fire-Clay Co.*, 42 W. Va. 42, 28 S. E. 728; *Davis v. Town of Point Pleasant*, 32 W. Va. 191, 27 S. E. 397; *Roach v. State*, 767, 17 S. E. 228.

Judgments of justices are not liable to collateral attack for such mere clerical errors as are amendable on motion, and which do not affect the validity of the judgment. *Wade*, 43 W. Va. 283, 286, 27 S. E. 273. The foregoing reasons the decree of the circuit court is reversed, the demurrer is overruled, the exception to the verdict is sustained, and this cause is remanded to the circuit court, to be further proceeded with according to the rules and practice.

MILLER v. STATE BOARD OF AGENCIES

(Supreme Court of Appeals of West Virginia.
April 1, 1899.)

MANDAMUS—ENFORCEMENT—AGAINST

1. A mere private contract is not enforceable by mandamus.

2. As the state cannot compel other judicial process officers or boards to execute a contract with the state. Though a party, such suit is a private one, and is not a suit against the state.

(Syllabus by the Court.)

Application by Miller for mandamus against the State Board of Agencies. Refused.

Flournoy, Pr.
Watts & Ashby.

BRANNON, J. The bill is returned into a writ of mandamus against the state, to compel the state to print and publish for two years the printed public law book, and to print, and

quash the mandamus nisi, which motion raises the questions of law on which the case turns. At once we meet the question whether we can compel the board to do what is asked of it. Miller's right grows only out of his contract. Mandamus does not lie to enforce contract rights of a private and personal nature. High, Extr. Rem. § 25. But, as courts do by mandamus compel public officers to perform acts purely ministerial, I suppose, where no other principle prevents, that, if a person has a right to have an officer perform such act for his benefit under the law, the fact that it grows out of contract would make no difference. It is claimed that when this contract is once made it is the duty of the departments of government to which it applies simply to execute it, and they have no discretion in the matter, and the duty is simply a ministerial one, commanded by the statute. I shall not enter that wide field of intricate law as to how far the courts can control the administration and functions of the executive department; but, treating the action which we are asked to compel the board to do as purely ministerial, and not discretionary with it, I shall inquire whether this court can compel that action by mandamus. In *Railway Co. v. Miller*, 19 W. Va. 408, it is held that, although the state cannot be sued, yet an injunction will lie against the auditor to restrain him from the performance of a mere ministerial duty, and the opinion states that the right to sue a state officer, when the state cannot be sued, either to require or inhibit the performance of a mere ministerial duty, has been repeatedly held. That case was to enjoin the auditor from taxing a railroad company in disregard of an exemption claimed by it. It can afford no precedent for this case. This case is the enforcement of a contract against the state. The general law is that a state cannot be sued without its consent. Const. art. 6, § 35, provides that "the state of West Virginia shall never be made a defendant in any court of law or equity." The question then arises, is this a suit against the state? It is not, in name, a party, and Chief Justice Marshall once laid down that, in order to say that a suit is against a state, it must be a party to the record in name. *Osborn v. Bank*, 9 Wheat. 738, 857. But the supreme court has, as I think properly, overruled that position. The state acts only by officers, and where the action against them is based on no personal interest, but only because officers, and the liability falls, not on them, but the state, the state is the real party. The federal constitution prohibits a suit in a federal court against a state by a citizen of another state or country, and thus the question has arisen in the supreme court as to when a suit is against a state, and it has been held that whether a state is the actual

not in every case by reference to the nominal parties to the record. In order to secure the manifest purpose of the constitutional exemption guaranteed by the eleventh amendment, it should be interpreted, not literally and too narrowly, but with the breadth and largeness necessary to enable it to accomplish its purpose; and must be held to cover, not only suits brought against a state by name, but those against its officers, agents, and representatives, where the state, though not named, is the real party against which the relief is asked and judgment will operate. If a bill in equity be brought against the officers and agents of the state, the nominal defendant having no personal interest in the subject-matter of the suit, and defending only as representing the state, and the relief prayed for is a decree that the defendants may be ordered to do and perform certain acts, which, when done, will constitute a performance of an alleged contract of the state, it is a suit against the state for the specific performance of the contract within the terms of the eleventh amendment, though the state may not be named as a defendant; and, conversely, a bill for an injunction against such officers and agents, to restrain and enjoin them from acts which they threaten to do, in pursuance of a statute of the state, in its name for its use, and which, if done, would constitute a breach on the part of the state of alleged contract between it and complainants, is in like manner a suit against the state within the meaning of that amendment, although the state may not be named as a party defendant. In *re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164. *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 603, asserts the same principle. I have recently observed that the case of *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, reiterates this doctrine, and contains a full discussion of it. In *Publishing Co. v. Larrabee*, 78 Iowa, 97, 42 N. W. 593, mandamus was asked against the executive council to compel it to enter into a contract for printing pursuant to an accepted bid, and to enjoin it from making a contract with another, and it was held that, "though the state is not nominally a party, it is the real defendant, and such an action cannot be maintained against it without its consent." Same principle in *Board v. Gannt*, 76 Va. 455. In *People v. Dulaney*, 96 Ill. 593, the commissioners of the penitentiary made a contract with a party to furnish convicts for labor, and the supreme court refused a mandamus to compel the commissioners to furnish them, for the reason, among others, that the constitution, like ours, provided that the state "shall never be made a defendant in any court of law or equity, and prohibits this court from enforcing a contract made by the commissioners for convict labor by mandamus, as its effect would be to give an action

ist the state." "State officers cannot be respondents in a petition for mandamus the effect will be to make the proceeding it against the state in a case where the cannot be sued." 13 Enc. Pl. & Prac.

The board of agriculture is a "department of the state government," in the language of section 9, c. 33, Acts 1895. Its members are state officers. They have no personal interest in this matter. The board and members are parties only as representing state. What they may be compelled to will operate only against the state. Miller only is enforcing a private contract with state by compelling one of its agencies to perform it. So far as it lies with that board reform that contract, it alone can do so; contract cannot otherwise be performed; it therefore follows that the suit is purely against the state to enforce its executive contract, and the constitution says it cannot be sued, even if the legislature were consent. A contract with the state is without legal sanction, as it cannot be enforced judicial action. The only remedy is against the officers charged with its execution, and, when executed, to the legislature pay. If the governor, auditor, or superintendent of schools were to refuse to execute contract, could we compel them? I think

Neither could we compel this board. cannot compel the state officers to carry an executory contract. It rests with them. Mandamus refused.

MURDOCH v. BAKER et al.

Supreme Court of Appeals of West Virginia.
March 22, 1899.)

FRUDULENT CONVEYANCES—PURCHASERS—NOTICE—EVIDENCE—HUSBAND AND WIFE.

Where it clearly appears, in a chancery case brought by a creditor to set aside a deed made by his debtor for all of his property, that the debtor, for the purpose of escaping such creditor, conveys all of his real and personal estate to a purchaser, even for value, who has knowledge of the creditor's pursuit, and is aiding the debtor to escape the same, such purchaser will be held to have participated in the fraudulent purpose of his grantor, and his conveyance will be avoided as to such creditor.

A creditor cannot purchase the goods of a debtor at a price in excess of his debt, when he knows that the excess so paid such debtor by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not.

Where the circumstances connected with a conveyance, fraudulent as to the grantor, only establish the complicity of the grantee in the fraudulent intent, it is not necessary to prove by direct and positive proof notice to the grantee of such intent.

Where a lot is conveyed to a husband and wife, and in a suit to subject the land the bill alleges that she paid no money for the property, the burden is on her to show that she paid it, and, in the absence of proof, the presumption is that her husband furnished the means of payment.

(Syllabus by the Court.)

Appeal from circuit court, Mingo county; E. S. Doolittle, Judge.

Bill by J. N. Murdoch against Eli Baker and others. A decree was rendered, from which complainant appeals. Reversed.

Prichard & Jones and Merrick & Smith, for appellant. H. K. Shumate, for appellees.

ENGLISH, J. On the 12th day of July, 1895, J. N. Murdoch filed his bill in the Mingo county against Eli Baker, Hally Baker, J. L. Weinstein, Moses Weinstein, and the Huntington Brewing Company, a corporation, alleging that he was a wholesale druggist in Parkersburg, and that prior to the 12th of March, 1895, as such druggist, he sold to the defendant Eli Baker certain goods and merchandise, and since then other goods, and that on the 1st of May, 1895, Eli Baker executed to plaintiff his negotiable promissory note for \$183.20, payable, 60 days after date, at the Williamson Bank, for the amount due for goods sold to said Baker previous to March 6, 1895, which note was presented for payment, payment refused, and was protested for nonpayment; that after the 6th of March, 1895, plaintiff sold to said Baker other goods to the amount of \$246.35, an account of which was exhibited with his bill. These various bills became due and payable 60 days after date, and bore interest from maturity, but that neither note nor account has been paid to him by said Baker or any other person. The plaintiff further alleged that Allen Ferrill and Rebekah R. Ferrill, on March 12, 1895, conveyed to Eli Baker and Hally Baker, his wife, a certain lot for the consideration of \$125, as expressed in said deed,—the lot known as "No. 15" in the town of Thacker,—and about that time said Eli Baker erected on said lot a hotel, and the purchase money for the lot and the cost of building said hotel was borne and paid for by Eli Baker; that about the 1st of May, 1895, the defendant Moses Weinstein became interested in the saloon conducted on the premises; that the money used in conducting the saloon as well as the hotel was furnished solely by said Eli Baker; that on the 22d of June, 1895, a deed from Eli Baker and Hally Baker, his wife, to the defendant J. L. Weinstein was admitted to record in the clerk's office of Mingo county court, which deed bears date June 1, 1895, conveying said house and lot, together with the personal property about said hotel, the consideration named being \$300 cash in hand paid. The plaintiff, however, charges that in fact there was no consideration paid for said property, and that said deed was made for the purpose of hindering, delaying, and defrauding the creditors of Baker, especially the plaintiff. It is also alleged that, if there was any consideration passed from Weinstein to Eli Baker, it was the canceling of a pre-existing debt due Weinstein by Baker, and, if such indebtedness existed, the deed operated as a general assignment for the benefit of all of said Eli Baker's

of March 12, 1895, was made to said Baker and his wife, yet in fact said Hally Baker put no money into said property, and, so far as her interest on said property under said deed is concerned, the same was a voluntary conveyance, and is void as to the creditors of Eli Baker, and especially the plaintiff; that a large portion of plaintiff's claim was contracted prior to the execution of said deed of March 12, 1895; that the Huntington Brewing Company is a creditor of said Baker in the sum of about \$105; that the note above referred to came due on July 3, 1895, and that on the 2d of July said Baker wrote to plaintiff from Thacker, stating that he was not able to meet the note when due, and asking for further indulgence,—a copy of which letter is exhibited; that at the time this letter was written said Baker was preparing to leave the state; that he has since absconded, and his present whereabouts are unknown. Plaintiff therefore prays that said deed dated July 1, 1895, from Eli Baker and Hally Baker to J. L. Weinstein be declared null and void, canceled, and set aside as being made to hinder, delay, and defraud the creditors of Baker, and especially the plaintiff; that the deed of March 12th, executed by Allen Ferrill and Rebekah R. Ferrill, in so far as it conveys one-half interest to Hally Baker be declared a voluntary conveyance to her; that her interest in said deed be held liable for the debts of said Eli Baker; that said property be sold, and the proceeds applied to the debts of Eli Baker, and especially to plaintiff; that a receiver be appointed to take charge of the personal property mentioned in said deed of June 1, 1895, and dispose of same under the order of the court; and that an injunction be awarded to restrain said Weinstein from conveying, encumbering, or in any wise disposing of said house and lot; and for general relief. On September 10, 1895, the Blue Grass Liquor Company, a corporation, filed its petition in the cause, claiming to be a creditor of said Eli Baker to the amount of \$66.01 for goods, etc., sold to him, joined in the allegation of the bill as to the deed from Baker and wife to Weinstein being fraudulent and voluntary, and prayed to be made a party, and allowed to share in the costs of the suit, that its debt be declared a lien on said property, and the property sold to discharge the liens thereon. On September 19, 1895, said Weinstein filed his demurrer to plaintiff's bill, and the same was set down for argument, and tendered his separate answer, to which plaintiff replied generally. The defendant, by his answer, put in issue the material allegations of the bill, and claims that \$800 was the true consideration paid for said property; that at the time of the purchase the sum of \$182 was due him from Eli Baker and Hally Baker upon a joint note executed to him by them; that Eli Baker at that time owed him \$33.50 for borrowed mon-

\$200, which he paid to him a short time before the purchase of said property; that he also paid to the Pabst Brewing Company, as part of the consideration for said lot, \$100; also to Leon Sternberger \$67, for the same purpose; and at the time of said purchase he paid to defendants Eli Baker and wife the sum of \$235 cash,—making a total of \$817.50, the \$17.50 excess of the consideration being for some shingles and brick which he was to get from them. On the 14th of January, 1896, the cause was referred to a commissioner to ascertain and report: (1) The debts of the defendant Eli Baker, their dates and amounts, to whom due, and the interest thereon. (2) What property the defendant J. L. Weinstein received from said Baker, the consideration paid therefor, and the value thereof. (3) What property said Eli Baker now owns, and the value thereof. (4) Any other matters which he might deem pertinent, or might be requested by any party interested. Subsequently the same commissioner was directed to ascertain and report what interest Hally Baker had in the property conveyed by the defendant Eli Baker and Hally Baker to said Weinstein by deed dated June 1, 1895; second, the value of the property conveyed by said deed; and, third, as to whether the defendant Eli Baker, at the time of the execution of said deed, was insolvent. The commissioner, in pursuance of said decree, made his report, which was excepted to by said Weinstein, the exceptions sustained on May 21, 1897, and the cause referred to another commissioner, with the same instructions and requirements under which the first commissioner acted. Depositions were taken by both of said commissioners, and said second commissioner reported the debts of said Eli Baker, with interest to September 13, 1897, to be as follows: To the Blue Grass Liquor Company, \$75.38; to J. N. Murdoch, \$491.44; and that Baker was indebted in the sum of \$600 or \$700 prior to the agreement of sale of the property described in the deed of June 1, 1895. That the amount paid for said property by said Weinstein was \$600, paid as follows: \$235 in cash, June 22, 1895; \$200 to N. J. Keadle in May or June, 1895; \$100 to Pabst Brewing Company, June 5, 1895; \$67 to Leon Sternberger in May or June, 1895; and \$198 indebtedness of Baker to Weinstein, intended to be canceled, and treated as a cash payment by Weinstein on said purchase. The commissioner also reported that said Baker had no other property than that conveyed to Weinstein; that the aggregate value of said property was about \$872.91, and, in addition thereto, Weinstein received the benefit of the liquor license for more than nine months, the value of which was \$277.00,—making the aggregate value of all received by him from Baker about \$1,150, for which he paid \$800, including \$198 of pre-existing debts. To the commissioner's own

guage, the report says: "From the evidence and from all surrounding circumstances the case said Baker, after the conveyance June 1, 1895, had no property subject to his debts and meet his obligations, and, far as Baker is concerned, commissioner leaves from the evidence, exhibits, and his grant acts and doings, that he deliberately about to dispose of his property, both real and personal, pocket the proceeds, and leave his creditors with the bag to hold; and this evidently did." This report was excepted by plaintiff, and the exceptions overruled except as to the commissioner's fees charged, in other respects the report was confirmed, the injunction dissolved, and the bill dismissed.

From this decree the plaintiff appealed. The appellant claims that the court erred in sustaining Weinstein's exceptions to the report of the first commissioner (O'Brien), and overruling plaintiff's exceptions to the report of the second commissioner (Strother), in dissolving the injunction and dismissing the bill, because plaintiff had clearly shown himself entitled to the relief prayed for by the evidence and the findings of the commissioners based thereon. Can we sustain the action of the circuit court in dismissing plaintiff's bill? When we refer to the findings of this court in like cases, we find, in *Lesple v. Allen*, 37 W. Va. 675, 17 S. E. 1 (Syl., point 2), the law thus stated: "Where the uncontroverted facts in the case show that a debtor, for the purpose of escaping a pursuing creditor, conveys his real estate to a purchaser, even for value, who has knowledge of the creditor's pursuit, and is aiding the debtor to escape the same, such purchaser will be held to have participated in the fraudulent purpose of his grantor, and his conveyance will be avoided as to such creditor." In the case under consideration, *Eli Baker*, on the 22d of June, 1895, conveyed away all of his property of every description, including his hotel, lot, furniture, and bar, to J. L. Weinstein, and received in payment therefor the cancellation of a debt owing Weinstein, together with the assumption and payment by said Weinstein of various debts owed by Baker to different parties, also \$235 cash; and, having disposed of all his property in this manner, said Baker, on July 2, 1895, wrote to the plaintiff, Murdoch, expressing regret that it was impossible to meet his obligation to him falling due July 3d, and hoping in a short time to be on his feet, and guaranteeing to meet his obligation as promptly as possible, offering to pay protest fees, and asking to renew his note; and this letter was written a few days after Weinstein testified he had paid him \$235 in cash. Did Weinstein receive notice of the indebtedness of Eli Baker to Murdoch at the time he received the conveyance of this property? Joseph P. Hanks, agent of Murdoch, in his deposition in answer to question 19: "Did you ever have a conversation with Eli Baker, in the presence of J. L. Weinstein, as to the payment of the

account mentioned, as well as the payment of the note described in the bill of complaint, and, if so, state what it was?" says: "Yes, I had a conversation with those two men just previous to the time of the license being taken out in Weinstein's name, at Baker's Hotel at Thacker, in which I insisted on Baker's paying the account, or giving a negotiable note with Isaac Weinstein on the note with him. Isaac Weinstein had full knowledge of the existence of this debt." It appears that this conversation occurred some time in May, 1895, as shown by the deposition of J. L. Weinstein, who, when asked if he remembered the substance of the conversation, answered: "All I remember is that Hanks or Baker wanted me to indorse a note of Baker's for \$130 or \$132, given to Hanks, or Hanks' house. It was on 30 days' time. He wanted me to go on as security." Although Weinstein states that he remembers the conversation spoken of by Hanks, and that it occurred after he had purchased the property, when asked to fix the time of that conversation as accurately as he could he answered, "It was some time in May," when the evidence shows that the property was not conveyed to him until June 22, 1895, so that said Weinstein, at the time he took a conveyance of said property, not only knew that this large debt was owed by Baker to Murdoch, but that Murdoch was pressing him for a settlement. Murdoch held Baker's note for \$183.20, dated May 1st, and due July 3d. On the 3d of April he had sold him another bill, amounting to \$246.85. He owed J. L. Weinstein and others. The brother of J. L. Weinstein had been allowing Baker to use his name in conducting his hotel bar, and, when pressed for debt by Murdoch, it was natural he should seek a solution of his pecuniary troubles by consulting J. L. Weinstein, who claims to have had some money; and the sale to said Weinstein was resolved upon. Out of the proceeds the debt of Weinstein was to be paid, and certain other creditors satisfied as preferred creditors. The receipt of the Pabst Brewing Company, filed with the deposition of said Weinstein, bears date June 25, 1895, three days after the conveyance was made, so that it is apparent that Baker had the utmost confidence that his friend and accomplice Weinstein would pay this portion of the purchase money for the hotel property, as he trusted he would pay it after the deed was made and delivered. As to the fraudulent intent of Baker, there can be no doubt, when we read the professions of honesty contained in his letter to Murdoch of July 2, 1895, and he had sold and conveyed to Weinstein, not only his hotel and lot, but his furniture and bar fixtures, paying with the proceeds such debts as he saw proper to prefer, pocketing the surplus in cash, and leaving the state a few days afterwards. In the case of *Reynolds' Adm'rs v. Gawthrop's Heirs*, 37 W. Va. 3, 16 S. E. 364, this court held: "While the burden of proving a deed fraudulent in fact as to creditors is upon the

the relation and situation of the parties to it and to each other. Circumstantial evidence, if adequate to satisfy the court of such fraudulent intent, is sufficient, and often the only evidence obtainable;" and that: "Where the circumstances connected with a conveyance fraudulent as to the grantor plainly establish the complicity of the grantee in the fraudulent intent, it is not necessary to show, by direct and positive proof, notice to the grantee of such intent." In addition to the circumstances hereinbefore detailed tending to show notice on the part of Weinstein of the fraudulent intent of Baker in this transaction, we may notice that Weinstein, in his testimony, shows that he was fully cognizant of the amount and character of Baker's indebtedness, nearly all of which was contracted in buying supplies for his bar, which was carried on in the name of Moses Weinstein; that he assisted Baker in paying for his saloon license; and, with his brother in charge of the bar, in a little town like Thacker, it would be unreasonable to presume that such an amount of bar supplies could be purchased by Baker, and J. L. Weinstein be ignorant of the fact. As we have shown, he knew of the plaintiff's debt which had accrued in that manner; and when Eli Baker came to him to sell his entire property, including all his furniture, and proposed his paying for same by canceling a large debt of his own, by paying a small portion of Baker's creditors to the exclusion of others that stood on the same footing, and by paying the balance in cash, he must have known that Baker would not have made this sweeping sale if he intended to remain at Thacker, and he must have known it was his intention to defraud his other creditors. So, in *Hart v. Sandy*, 39 W. Va. 644, 20 S. E. 665, this court held that a creditor cannot purchase the goods of his debtor at a price in excess of his debt when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purchase be to aid him or not. See *McVeagh v. Baxter*, 82 Mo. 518. On the question of notice, *Bump, Fraud. Conv.* 494, states the law thus: "The notice of the fraud need only be sufficient to put a man of ordinary prudence and experience in business transactions upon inquiry. * * * Whatever is sufficient to direct his attention to the prior rights and equities of creditors, and to enable him to ascertain their nature by inquiry, will operate as notice. When a purchaser has knowledge of any fact sufficient to put him on inquiry, he is presumed either to have made the inquiry, and ascertained the extent of the right that he may possibly prejudice, or to have been guilty of a degree of negligence fatal to the claim to be considered a bona fide purchaser. This notice may be derived from the statement

There is no difference between those who form the design and those who afterwards enter into it with a knowledge of its character, and aid in carrying it out." The circumstances shown by the testimony in this case clearly indicate that Weinstein had notice of the intention of Baker, and aided him in getting his property beyond the reach of the plaintiff and his other creditors; and under the ruling of this court in *Gillespie v. Allen*, supra, the deed should be avoided as to the plaintiff's debt, set forth in his bill, and as to the claim set forth in the petition filed in this cause by the Blue Grass Liquor Company. As to the interest of Hally Baker, wife of Eli. In said lot, it is charged in the bill that said Hally put no money into said property, and that, as to her, the deed was voluntary, and is void as to creditors of Eli Baker. The burden was on her to prove that she paid for said interest, and, in the absence of such proof, the presumption is that her husband furnished the money to pay for it. See *Rose v. Brown*, 11 W. Va. 122; *McMasters v. Edgar*, 22 W. Va. 673. For these reasons the decree complained of must be reversed, and the deed from Eli Baker and Hally Baker, his wife, to J. L. Weinstein, dated June 1, 1895, is avoided as to the claims of J. N. Murdoch set forth in plaintiff's bill, and as to the claim of the Blue Grass Liquor Company set forth in its petition, and this cause is remanded for further proceedings to be had therein according to the rules governing courts of equity.

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MCVEY v. CHESAPEAKE & O. RY. CO.
(Supreme Court of Appeals of West Virginia.
March 25, 1899.)

**RAILROADS—NEGLIGENCE—SPEED—TRESPASSERS—
EVIDENCE.**

1. The speed of a passing train is not a question of science, but of observation, and any one possessing knowledge of time and distance is competent to testify in relation thereto.
2. When a railway company has an exclusive right of way running parallel with, and adjoining to, a public street through a populous town, although the tracks be used by the public habitually as a footway, it is error to instruct the jury that, in running its trains and cars over such right of way through such town, it is the duty of such company to use the same degree of care to avoid injury to persons using such right of way as a footway as it would be required to use if the tracks ran lengthwise through said town upon a public street or highway.
3. The fact that the tracks upon the company's right of way are so used by the public in such town imposes upon the company the obligation to use greater care and prudence in running and managing its trains at such a place than would be required at places where the tracks are not so used.
4. The defendant, in operating its road on tracks so used by the public, should use ordinary care and diligence; and what constitutes ordinary care and diligence depends upon circumstances. It must be commensurate with

dangers incident to the handling of its cars
1 trains at that particular place.

2. In an action for damages for the death of
person killed by a train of a railroad com-
pany, the fact that no proof is offered to show
t the decedent, in going on the track, stop-
1 and looked for an approaching train, does
raise the presumption that he did not stop
1 look, unless the evidence shows that he
st have seen the approaching train if he had
ked.

Syllabus by the Court.)

Error to circuit court, Kanawha county;
mes H. Couch, Special Judge.

Action by George W. McVey, Jr., adminis-
trator, against the Chesapeake & Ohio Rail-
way Company. There was a judgment for
intiff, and defendant brings error. Revers-

Simms & Enslow, for plaintiff in error. O.
Aldrich and Watts & Ashby, for defendant
error.

McWHORTER, J. George W. McVey, Jr.,
administrator of the estate of William H.
Robinson, brought his action against the Ches-
apeake & Ohio Railway Company, in the cir-
cuit court of Kanawha county, to recover
damages for the death of his intestate, who
is killed by defendant's cars, at Montgom-
ery, on the night of the 10th day of December,
1896. The case was tried before a jury, and
verdict rendered in favor of the plaintiff for
\$500 damages. The defendant moved the
court to set aside the verdict and grant it a
new trial, which motion was overruled by the
court, to which ruling of the court the de-
fendant excepted, and the court rendered
judgment upon said verdict. Defendant ap-
pealed for and obtained from this court a writ
of error to said judgment, its petition setting
forth eight assignments of error.

The first assignment is that the court ad-
mitted improper testimony of the witness
Huffine as to the speed the train was moving.

It was a material fact as to the speed the
train was moving at the time Robinson was
killed, because the evidence was elicited to show
at the speed of trains was reduced within the
town limits to six miles per hour by the town
of Montgomery, and the court allowed Huffine
to testify as to his opinion as to the speed the
train was moving, and it was not shown he
ever had any experience in handling
trains; and it is claimed that Huffine, not be-
ing an expert, should not have been permitted
to express an opinion as to the speed of the
train. In *Railroad Co. v. Van Steinburg*, 17
Mich. 99, it is held that: "Testimony con-
cerning the speed of a passing train of cars
may be given by any one possessing a knowl-
edge of time and distance. It is not a ques-
tion of science, but of observation." This
witness had been in business at Montgomery
many years, had worked some five months on a
gravel train prior to that time, and was fa-
miliar with the movements of trains. It
would seem that any man of ordinary intel-
ligence, living for years along the line of a

trunk railway, would be competent to form a
fair judgment of the speed of a passing train;
and, especially should this witness, Huffine,
be able to express a pretty correct opinion of
a train moving at a rate not exceeding 10 or
12 miles per hour, as the gravel trains, with
which he had several months' experience,
moved in a similar manner.

The second assignment is that "the court
erred in allowing evidence of a signboard
which had been put up by the mayor of the
city, without showing that it was by author-
ity of an ordinance." On motion of defend-
ant to exclude all evidence in regard to the
putting up of signboards, because of the fail-
ure to prove the ordinance of the town of
Montgomery, the court struck out all evidence
in regard to the authority by which the sign-
boards were placed there, but refused to
strike out the evidence of the fact of the
existence of the two signboards, to which
ruling of the court the defendant excepted.
I am unable to see how this evidence could
prejudice the defendant. Under the evidence,
the rate of speed at which the train was mov-
ing (and the lowest rate claimed by defendant
was five miles per hour) is quite immaterial,
as the principal question is whether the train
was properly guarded and managed,—whether
the front end of the car being pushed or back-
ed was supplied with a light or a watchman
to avoid and prevent accident.

The third assignment is that the court erred
in giving on behalf of plaintiff instruction No.
1: "The jury are instructed that if the plain-
tiff has shown by a preponderance of the evi-
dence that the right of way of the defendant
through the town of Montgomery, in Fayette
county, West Virginia, is adjoining and par-
allel to the principal street of said town, and
with no fences or other objects to show to
the public where the street line is, and has
also shown by a preponderance of the evi-
dence that the people of the town and sur-
rounding country have continuously and gen-
erally used the ground covered by said right
of way as a common and public footway to
pass through the town, and from one part
of the town to another, from the year 1872
to the 10th day of December, 1896, such
facts, if so proven, rendered it the duty of
the defendant, in running its trains and cars
over said right of way in said town, to use
the same degree of care to avoid injury to
persons using the right of way as a footway
as it would be required to use if the tracks
ran lengthwise through said town upon a
public street or highway; and if the defendant
has failed to use such degree of care, and by
reason of such failure William H. Robinson
was killed by a train of cars operated by de-
fendant on the evening of the 10th day of De-
cember, 1896, then defendant is liable for the
death of said Robinson, and the fact that at
the time of his death said Robinson was using
said right of way as a footway will not of it-
self defeat the action for his death." This
instruction goes too far, in requiring the de-

to persons using such right of way as a footway as it would be required to use if the tracks ran lengthwise through said town upon a public street or highway, and on failure to use such high degree of care, and by reason of such failure Robinson being killed, it should be liable for his death. However long may have been such use of the right of way by the people, and to whatever extent it may have been so used, the fact remains that "the railroad company has the exclusive right of way, upon which no unauthorized person has a right to be," as stated by Judge Brannon in *Spicer v. Railway Co.*, 34 W. Va., at page 517, 12 S. E. 554. And in *Baltimore & O. R. Co. v. State*, 62 Md. 479, it is said that: "Any one who travels upon such track as a footway, and not for any business with the railroad, is a wrongdoer and a trespasser; and the mere acquiescence of the company in such use does not give the right to use the track, or create any obligation for special protection." And in *Mulherrin v. Railroad Co.*, 81 Pa. St. 306: "The man who steps his foot upon the track does so at his peril. The company has not only a right of way, but it is exclusive, at all times and for all purposes." From the very nature of the case, while the public may take the risk, and so use the right of way as a footway, they can never acquire any rights therein. All this being true, the fact that the tracks are so used by the public imposes upon the company the obligation to use greater care and prudence in running and managing its trains at such a place than would be required at places where the tracks are not so used. And on tracks so used the defendant, in operating its road, should use ordinary care and diligence; and what constitutes ordinary care and diligence depends upon circumstances. It must be commensurate with the dangers incident to the handling of its cars and trains at a particular given place. "The fact that pedestrians are accustomed to travel on a railroad at a particular place makes it the duty of such railroad company to exercise greater caution and prudence in the operation of its road at that place." *Nuzum v. Railway Co.*, 30 W. Va. 228, 4 S. E. 242; *Barrickman v. Oil Co.*, 45 W. Va. —, 32 S. E. 327; *Brown v. Railroad Co.*, 50 Mo. 461. It is insisted that by the use of the right of way by the public as a footway for so great a length of time the public has acquired the right so to use it; and appellee cites in support of his position *Railway Co. v. Pointer*, 9 Kan. 620, 628, and quotes: "Plaintiff had a right to show that the place where he was injured was on a public street of Leavenworth; and, if he could not show that it was a public street in law, he still had a right to show it was a public street in fact. And for this purpose, if for no other, he had a right to show it was a public street in fact. And for this purpose, if for no other, he had a

the railroad company. If he could show that the place where the injury occurred was on a public street, either in law or in fact, he would not be such a trespasser as would relieve the railroad company from exercising reasonable and ordinary care and diligence towards him. In fact, he would not be a trespasser at all. The railroad company, in such a case, would be bound to run its trains with reference to him, and to every other person who might be rightfully occupying the street." In that case both the public and the defendant had the right to use the street. The same opinion says: "In fact, in this case the legal right of the railway company and that of the public to use this ground as a street seem to be about equal. Both derive their right from a city ordinance. If it should be shown on a retrial of this case that the plaintiff had no right to be on the ground when the injury was received, the law of the case with respect to care and diligence would be very different from what we have stated it. The railway company would not then be bound to run their trains with reference to persons who might be on the track. The fact that people have often trespassed upon the track, and the company have not stopped them, does not imply consent to use the track and will not create any right in the public to use it." *Spicer v. Railway Co.*, supra. "When a railroad company by authority of law goes into possession of land for the objects of its creation, is not that an appropriation to certain great, specified public uses? And can it divert its use to purposes wholly inconsistent with those which it is authorized to pursue,—purposes which may imperil the lives and property of travelers on its trains,—without incurring a forfeiture of its privileges? To ask, it seems to us, is to answer, these questions." *Railroad Co. v. Briason*, 70 Ga. 207, 241.

The evidence in the case at bar shows that deceased, with three or four other persons, including W. H. Robinson, who was killed, left the church after 9 o'clock p. m., and went onto the east-bound track, and started west, and saw a train leave the depot, going east, on the same track; that they stepped off of that track, and onto the west-bound track. Mary Hall, one of the party, says that, when they got on the west-bound track, "We looked back to see if there was a train coming, and we didn't see any;" that, when they had walked about forty feet, Charlie Dandridge looked back and said, "There comes a train," and they looked back, and got off the track; that Robinson and Miss Rogers were a little behind them, and they did not see Miss Rogers until they got off the track. She was asked: "When you looked back and got off the track, what did you see, in the way of a light, or a man, or anything, there? A. Didn't see anything,—only the box car coming down. We

ted back, and the box car was right on us when we looked back, and we just had time to step off the track. Didn't see any light on the box car. Could have seen it if there had been one. The train was going pretty fast. It gave no sound or signal." Witness Lillie Dolin, another one of the party, testifies to the same effect: That they looked back for a moment. "Didn't see any. Then Charlie Dandridge looked back, and told us there was a train coming on that track"; and the train was right upon them, coming rear end. "Saw the light but not the box car. Saw no man or light on it." That Charlie Dandridge threw them off the track, and they stood there till the train passed by. Did not see Robinson when he got off the track, but saw Miss Rogers. She was a little way behind. She got off on the same side of the track as witness did. Says, "The train was running pretty tolerably fast." Miss Rogers (witness) was walking with Robinson. When the east-bound train was passing them, and they on the west-bound track, the locomotive whistled, and witness says, "This train scares me," and stepped right in front of him. He let go her hand, and she stepped off the track, and he looked a little behind her; and, just as witness was about to step back on the track, Miss Dolin, who was in front of her, "threw her arms to throw herself off the track. She was aiming to step up on the track, and I needed my head to see what was the matter, so I threw myself back to keep the cars from striking me. The end of the box car was right at me, and I just fell back out of the way. The rear end was backing down." Witness says, "There was no light and there was no man on the car," and says, "I don't know exactly how fast the train was moving, but it was moving pretty fast." R. C. Taylor, witness for the defendant, was brakeman on the train. Says he was on the head car, backing down. "Was on the head car until it got out the cross-over switch, and I went back and set a brake on the rear end, and was fixed to stop there, so as to cross in on the other track to get Straughan's loads. I went to the rear end of the car to set a brake on." And witness says Robinson was found right at the cross-over switch on the west-bound track; that he (witness) went back to the rear end of the car just before they got by there. "Q. Do you know when Robinson was hit? A. He was hit against the cross-over switch on the east-bound track. Q. How long is that switch? A. It is about 75 or 80 feet, I guess. Q. Who showed you where he was hit? A. Curry Vickers was the first one to show me, and then I could see myself. What sign did you see? A. Where we dragged him. Q. Did you go back on the rear end above or below the point? A. Just out that point when I left the front end of the car. Q. State whether there was any light on that car. A. None except my lantern. I had my lantern with me. Q. What did you do with it? A. I set it down on the

running board." Says his lantern was a common white railroad lantern. Says train was going at rate of about four miles an hour. On cross-examination, says he does not know whether he was on the front end of the car when Robinson was struck, or not, and thinks he had not more than got back to the east end of the car when he was struck; that, when he set his lantern down on the running board, it was at the east end of the car, and it could give no light in front of the west end. And he states that he remained with his light at the east end of the car until he left the train, near the depot. Curry Vickers, another brakeman on the train, next to the engine, says the train was running, he thought, about between four and six miles an hour at the time Robinson was killed. The engineer, J. E. Gwinn, says they were running not over four or five miles an hour. D. G. Perry, fireman, says he supposes they were running about four or five miles per hour.

Instruction No. 2 given for plaintiff is as follows: "The jury are instructed that if a railroad company should, about the hour of nine o'clock in the evening on or about the 10th day of December, back a train of 23 loaded cars at a speed of from five to ten miles per hour over its tracks running lengthwise over the public streets of a town, when the people are generally and continuously in the habit of using the right of way in such street as a public footway, and should back said train without keeping a lookout on the head end of the forward car of the train so being backed, and without keeping a light on the head end of such front car, such omission to keep either a light or watchman would be gross negligence upon the part of such company, and render said company liable for the death of any person who is killed by reason of such omission." This instruction is subject to the criticism of counsel for appellant, in that it refers to defendant backing "a train of twenty-three loaded cars at a speed of from five to ten miles per hour over its tracks running lengthwise over the public streets of a town," and also because it makes the defendant liable without considering whatever the contributory negligence of the decedent, Robinson. Defendant's tracks do not, as appears from the record, run lengthwise over the public streets of Montgomery. While it is true it appears from the evidence that there is no fence or mark to separate the defendant's right of way from the streets, and that the same runs parallel with and adjoining the street, yet it has an exclusive right of way, which is occupied by its tracks, which tracks are sufficient notice to the public that the street does not occupy the same ground. An instruction which leads the jury to understand that the public have equal rights with the defendant is misleading. Appellee insists that the several instructions were prepared as paragraphs of a charge to be considered together, and the second, third, and fourth are to be considered as explanatory of the first;

first and second. This is not the case, when instructions are drawn, as these are, separate, independent, and distinct from each other, so that one or more may be given and others rejected without in any way affecting the force of those given; and, so being independent, they should be complete in themselves severally, to prevent confusing or misleading the jury. *McCreery's Adm'x v. Railroad Co.*, 43 W. Va. 116, 27 S. E. 327; *Webb v. Packet Co.*, 43 W. Va. 800, 29 S. E. 519; *Fisher v. Railroad Co.*, 39 W. Va. 371, 19 S. E. 578. Speaking only for myself, as a majority of the court does not agree with me in the proposition, I claim that the backing of a train of 23 cars over tracks running through a populous town or village, in the nighttime, where the people habitually use the right of way as a public footway, and so backing such train without keeping a lookout on the head end of the forward car of the train being so backed, and without keeping a light on the head end of such front car, such omission to keep either a light or watchman would be gross negligence upon the part of the railroad company; and in this I am supported by the court in *Nuzum v. Railway Co.*, supra (Syl., points 5, 6).

Plaintiff's instructions Nos. 3 and 4: "(3) The jury are instructed that they are entitled to consider all the facts and circumstances proven, for the purpose of determining whether defendant was guilty of negligence. If they believe that William H. Robinson was killed by a train operated by defendant on the 10th day of December, 1896, at Montgomery, West Virginia, and if they should find that defendant was guilty of gross negligence, under the circumstances, they should find for the plaintiff, unless said Robinson himself was guilty of negligence which directly contributed to his death. (4) The jury are instructed that if they are satisfied by the evidence that defendant's train killed William H. Robinson on the night of December 10, 1896, at Montgomery, West Virginia, and that such train was not, under the circumstances shown in evidence, run with reasonable care to prevent accidents, this will render defendant liable for his death, unless it is shown either by the evidence of plaintiff that said Robinson was himself guilty of negligence which was in part cause of his death, or defendant has shown such negligence by a preponderance of the testimony,"—were properly given, although appellant contends that No. 4 is bad "because it makes the defendant liable for running its trains without reasonable care to prevent accident as to trespassers, and does not limit it to reasonable care after the discovery of the danger of the decedent, who was on the track as a trespasser." Under the circumstances of this case, as shown by the evidence and the authorities hereinbefore cited, No. 4 is a proper instruction.

Plaintiff's instruction No. 5: "The jury are

failure on part of the plaintiff to offer proof that he did look does not create such presumption, unless the evidence shows that he must have seen the approaching train if he had looked in its direction,"—appellant's counsel claim is wrong, because it instructs the jury that "a person who goes upon the track, where he has no right to be, is presumed to have stopped and looked. This presumption is only applicable to persons at a railroad crossing, where they have a right to be. Unless it is shown that they did not stop, look, and listen, the court will presume they did." The instruction will not bear that construction. There was no evidence offered to show that decedent did stop and look for a coming train when he got upon the west-bound track, and the instruction is that failure to offer proof to that effect does not raise the presumption that he did not stop and look, unless the evidence shows that he must have seen the approaching train if he had looked. Two of the persons who were in company with decedent (May Hall and Lillie Dollin) testify that when they got onto the west-bound track they looked back for a train, and saw none. It cannot be presumed that decedent did not stop and look. For the reasons herein given, the judgment will be reversed, the verdict set aside, and a new trial awarded.

CLEAVENGER v. ROHRBAUGH, Sheriff,
et al.

(Supreme Court of Appeals of West Virginia.
April 1, 1899.)

ERROR TO CIRCUIT COURT—WHEN LIES.

A writ of error lies to the order of the circuit court reversing the judgment of a justice, and setting aside the verdict of a jury on which such judgment is founded, and directing a trial de novo. Such writ will not be sustained by this court unless such circuit court has plainly erred, but the judgment will be affirmed.

(Syllabus by the Court.)

Error to circuit court, Barbour county; J. H. Holt, Judge.

Action by C. G. Cleavenger against B. B. Rohrbaugh, sheriff of Barbour county, and others. From an order setting aside a verdict for plaintiff and granting defendants a new trial, plaintiff brings error. **Affirmed.**

J. Hop Woods and W. T. George, for plaintiff in error. W. I. Ice, for defendants in error.

DENT, P. C. G. Cleavenger sued B. B. Rohrbaugh, sheriff of Barbour county, and his sureties on his official bond, for \$110, and \$50 damages, before a justice of said county. Nothing in the pleadings or in the justice's record shows what the suit is about, or gives the cause of action. But it appears in the evidence that it was to recover the value of a

ain spring wagon and eight head of sheep under an execution in favor of J. N. B. n against F. A. Cleavenger, a brother of ntiff. No objection, however, was made to want of proper pleadings, as the parties e fully aware as to the matter of contro- sy. They took it for granted the courts ld be, likewise; and hence the evidence t be deemed amendatory of the pleadings, supply the place of both allegata and pro- i. After two jury trials, a verdict was d in favor of plaintiff for \$100. The jus- refused to set the same aside, and end- judgment thereon. The defendants took ral bills of exception to the rulings of justice, and applied to the circuit court a writ of certiorari, which was granted. plaintiff moved the dismissal of the cer- iari, but the circuit court overruled the e, set aside the verdict of the jury, and cted a new trial of the issue between the ias. From this order the plaintiff ob- ed a writ of error. The defendants object such writ as being granted prematurely re a trial had in the circuit court. In port of this contention, reliance is had on case of *Morgan v. Railroad Co.*, 39 W. Va. 19 S. E. 588, in which this court held that rit of error would not lie to an order over- ing a motion to dismiss an appeal from a lce's judgment, as such order was not a l judgment. In that case there was no r setting aside the verdict of a jury, as in present case, which latter order is ex- sly made appealable by clause 9, § 1, c.

Code. In the case of *Arnold v. Lewis* nty Court, 38 W. Va. 143, 18 S. E. 476, held that "a final decision on a writ of iorari is reviewable on writ of error from court according to the rules of law and tice in other cases." And in the case of *gan v. Railroad Co.*, 39 W. Va. 17, 19 S. 588, it is held that: "A judgment of a ut court upon a writ of certiorari re- ing a judgment of a justice, setting aside verdict of a jury upon which the jud- t was based, and granting a new trial, a final judgment, though it retained the r for retrial, and cannot be set aside on e motion at a subsequent term." Being ial judgment, it is appealable. Such has r regarded the settled law by this court. *yun v. Schwartz*, 32 W. Va. 487, 9 S. E.

Straley v. Payne, 43 W. Va. 185, 27 E. 359. A conclusive reason why such : of error was improvidently granted is large discretion invested in the circuit t by sections 2, 3, c. 110, Code, to review ments of justices founded on verdicts of es by certiorari. *Harrow v. Railroad Co.*, N. Va. 717, 18 S. E. 928; *Michaelson v. tley*, 46 W. Va. —, 32 S. E. 170. In the r case this court held "that, unless such retion is plainly abused, this court can- interfere therewith," and "if the evi- e presents mixed questions of law and . material to the issue involved, about ch two reasonable men learned in the

law might differ as to the proper determina- tion thereof, the circuit court commits no appealable error in awarding a new trial." In the case under consideration the evidence shows that the matter in controversy is a spring wagon and eight sheep sold under execution levy in the open market at the price of \$15.75 and \$21, respectively, amount- ing to \$36.75. The opinion of various wit- nesses was taken in relation to the value of this property. They differed widely in their estimate,—one placing a fancy value on the wagon, as having belonged to plaintiff's de- ceased father. This, of course, was incom- petent and improper. The plaintiff was also permitted to testify that, in addition to the value thereof, he was damaged to the amount of \$50. This was also improper evidence to go to the jury. The sale, being fair and in the open market, is the best evidence of the value of the property. *Sedg. Meas. Dam.* § 475. This being an action for the conversion of personal property, the measure of the dam- ages is the value of the property at the time of the conversion, with interest. *Id.* § 493; 2 *Tuck. Comm.* 88. Such is the general rule, to which there may be exceptions, but there is nothing special in this case to take it from under this rule. Regarding the sale value as the true value of the property, plaintiff was not entitled to recover exceeding \$40, and a liberal estimate would be not exceeding \$60, if entitled to recover anything, which is a disputed question of law and fact arising on the evidence, about which reasonable men learned in the law might differ. The jury allowed him \$100, which is clearly excessive, according to the decided preponderance of the evidence, and was undoubtedly occasioned by the improper evidence admitted by the justice as to the damages and value of the property heretofore referred to. The excess is not suf- ficient to give this court jurisdiction, but it is within the jurisdiction of the circuit court. The circuit court, therefore, did not abuse its discretion in setting aside the verdict and granting the defendants a new trial. The judgment is affirmed.

TOWN OF PARSONS v. MILLER et al.
(Supreme Court of Appeals of West Virginia.
April 8, 1899.)

EVIDENCE—CORPORATION BOOKS—TOWN SERGEANT
—LIABILITY ON BOND.

1. The corporation books concerning the gov- ernment of a city, town, or village, when they have been publicly kept, and the entries have been made by a proper officer, as well as duly- authenticated copies therefrom, are admissible evidence of the facts witnessed in them.

2. Sureties on an official bond are liable for money in the hands of their principal at the date of the bond, provided such money forms a part of the fund which the bond was intended to secure, and came to the hands of the prin- cipal obligor in the course of a precedent term of office or employment. If they make the de- fense that the money was collected or otherwise came into the hands of the principal before the

Error to circuit court, Tucker county; J. H. Holt, Judge.

Action by the town of Parsons against M. V. Miller and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. B. Maxwell and A. J. Valentine, for plaintiff in error. L. Hansford, for defendants in error.

McWHORTER, J. The town of Parsons brought its action before M. F. Lipscomb, a justice of Tucker county, against M. V. Miller, late sergeant of the town, and S. A. Moore and L. M. Austin, sureties on his official bond, and filed an account, as bill of particulars, against the defendants, by name, as indebted to the town of Parsons, "on account of money had and received by said M. V. Miller, late town sergeant (on official bond), \$300.00," and filed the following notice: "Parsons, W. Va., Nov. 10, '96. At a meeting of the town council of Parsons held November 9th, 1896, the following motion was made and carried: 'On motion, it is ordered that M. V. Miller, late sergeant of this town, do pay over to L. H. Layten, the present sergeant, all money due the town from him as late town sergeant, and that L. H. Layten, town sergeant, is directed to present a copy of above order to the said M. V. Miller, and demand immediate payment. F. M. Kelly, Recorder. Wm. G. Conley, Mayor.' Executed the within notice by delivering to the within-named M. V. Miller a true copy hereof this the tenth day of November, 1896. L. H. Layten, Town Sergeant." The defendants made no answer, either oral or in writing. The justice heard the case, and rendered judgment for plaintiff for \$86.58, with interest and costs. Plaintiff appealed from this judgment to the circuit court. On the 12th of March, 1898, a jury was impaneled to try the case; the plaintiff introduced its evidence, to which evidence the defendants demurred, and in which plaintiff joined; the defendants offered no evidence; and under the direction of the court the jury returned the following verdict: "If the law be for the plaintiff, then we, the jury, find for the plaintiff, and assess its damages at \$249.50; but, if the law be for the defendants, then we find for the defendants." The court took time to consider of the demurrer, and on the 21st day of June, 1898, entered an order sustaining the demurrer, and giving judgment for defendants for costs. In the course of the trial, plaintiff took three several bills of exception, which were duly signed and made a part of the record. The plaintiff sued out a writ of error, and assigns as error the refusal of the court to permit plaintiff to give in evidence the settlement referred to in, and made part of, the first bill of exceptions, which says "that upon the trial of this case a settlement made with M. V. Miller as town sergeant, dated on the 31st day of August, 1895, in the words and

ing report, ending Aug. 1st, 1895: M. V. Miller Sergeant, Dr.,"—then proceeds to give a number of items under the "Dr." column and a number under the "Cr." column, and striking a balance, and signed "J. R. Sellar, M. H. Godwin, R. F. Rightmire, Committee." To the introduction of which defendants objected, and the objection was sustained, and exception taken. There is nothing to connect this report in any manner with the records of the town council. It does not purport to be a part of the record of plaintiff, or a copy from its minutes; and, while the bill of exception says it "was offered to be introduced in the evidence of C. W. Minear," the only evidence found in the record of any "Minear" is the following, without caption or closing, interjected into a deposition of witness Howard Shaffer: "Mr. Minear: Q. What office do you hold? A. Recorder of the town of Parsons. Q. What is this book? A. Record Book." With nothing more to show its connection with the case, it was properly rejected as evidence.

The second assignment is for error in refusing to permit plaintiff to give in evidence the settlement referred to in, and made a part of, bill of exception No. 2, introduced and offered as evidence with the evidence of R. F. Rightmire. The evidence offered was a settlement made with M. V. Miller, town sergeant from the 1st day of February to September 21, 1895. This report or settlement is made out precisely in the same form as the former, and signed by a committee of the council, and in addition is shown to have been by the town council made a matter of record, and is identified and proven by the record of the town council, by witness Howard Shaffer, and by witness Rightmire, who was a member of the council committee who made the settlement. "The corporation books concerning the government of a city or town, when they have been publicly kept, and the entries have been made by a proper officer, are admissible evidence of the facts witnessed in them." Starkie, Ev. 308; Grafton v. Reed, 34 W. Va. 172, 12 S. E. 767 (Syl., point 2). This settlement should have been admitted. It showed a balance due from Miller to the town at that date (September 21, 1895) of \$963.92. Of the items of debit in this settlement on account, among others, was one item of \$827.39, tax receipts for 1895.

The third assignment is the refusal of the court to allow witness Rightmire to answer the following question touching the balance found due the town, on settlement, of \$963.92: "At that time what was it Mr. Miller brought in to represent the \$963.92?" As the answer could only concern, and probably prove, offsets of the defendant Miller, the ruling could not be prejudicial to plaintiff, and is no cause of complaint on its part.

Plaintiff introduced in evidence the official bond of M. V. Miller, with S. A. Miller and L.

Austin as his sureties, in the penalty of \$100, dated September 23, 1895, filed and approved September 23, 1895, and the notice, and the evidence of service thereof upon said V. Miller, requiring him to pay over to his successor all money due from him, as late as he was, to the town, under which order it was his duty to pay it over to his successor, as he had legal grounds for refusing to so do. *Board v. Parsons*, 22 W. Va. 308 (Syl., 2). Plaintiff introduced as a witness Edward Shaffer, recorder of said town in 1897, testified from the record that M. V. Miller resigned his office of sergeant September 18th, 1897, on the 21st the settlement was made which showed Miller due the town \$663.92, which balance was carried to his final settlement to the council January 30, 1898; that balance at that time was \$392.90; that amount was carried into another settlement of the council for 1898, had July 10, 1898, which last settlement Miller was erroneously charged with \$68.28 taxes. "Q. What is error? A. Taxes in settlement of September, '95. He was charged with them, and balance was credited afterwards in this settlement. Mr. Miller owed a balance of \$35, and by taking balance of \$68.25 would be still owing the town \$249.50. Q. State that you were recorder of the town at the time this suit was instituted. A. I was. Q. What amount the amount the town brought against him for? A. I think the suit was brought for \$300, but we only claimed \$249.

This evidence of witness Shaffer is without objection on the part of defendants, as is the introduction of the record book of the town, upon which he testifies, and the bond, and the notice to pay the money. There is nothing in the record to show what the contention of defendants is,—whether they claim only that the principal defendant is not indebted to the town, or whether they would waive the liability on the sureties in a former suit, except that by implication the inference to be gathered from the cross-examination of witness Shaffer, where they prove the fact that a former bond was given. "Sureties on official bond are liable for moneys in the hands of their principal at the date of the suit, provided such money forms a part of the fund which the bond was intended to secure, and came to the hands of the principal obligor by the course of a precedent term of office or employment. If they make the defense that the money was collected, or otherwise came to the hands of their principal, before the execution of the bond, it is incumbent upon them to show also that it was misapplied before that time." *Murfree, Off. Bonds*, § 636; *Pen v. Lane*, 43 Tex. 279. While this evidence was admitted without objection, and is fully sufficient to support the verdict of a jury, the defendants' demurrer admits it to be correct. *Lee's Ex'rs v. Bridge Co.*, 18 W. Va. 299. *Heard v. Railroad Co.*, 26 W. Va. 455, it is held that, "If the evidence is such that the court ought not to set aside the verdict of a

jury in favor of the demurree, then upon a demurrer to that evidence the court should give judgment against the demurrant." For the reasons herein given the judgment of the circuit court is reversed, and judgment entered in this court upon the verdict of the jury for \$249.50 in favor of the plaintiff.

MORRIS et al. v. ROSEBERRY et al.
(Supreme Court of Appeals of West Virginia.
March 18, 1899.)

CO-TENANTS—PURCHASE OF ADVERSE INTEREST—
TAX TITLE—RIGHTS OF PARTIES—
LIMITATIONS.

1. As a general rule, a joint tenant or tenant in common is not to purchase in an outstanding adverse title to the common property for his own benefit, to the exclusion of his co-tenant. But the co-tenant must within a reasonable time make his election to claim the benefit, and to contribute to the expense incurred in the purchase of such title. If he unreasonably delays until there is a change in the condition of the property or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition.

2. Where a joint tenant or tenant in common has obtained the assignment of the sheriff's certificate of sale and purchase from a party who purchased the land so held in common at the sheriff's sale of delinquent land, and as such assignee has obtained a deed therefor, and a party claiming to be a joint tenant or tenant in common with the party obtaining such deed seeks by bill in equity to have said deed set aside as a cloud upon his title, he must tender with his bill a sufficient amount to reimburse the party who so obtained said deed the amount paid for him in redemption of the land, and all subsequent taxes paid by him thereon, with interest.

3. The statutory bar to a widow's remedies for the recovery of her dower is the lapse of 10 years from the death of her husband, when her right to sue accrues.

(Syllabus by the Court.)

Appeal from circuit court, Mason county;
F. A. Guthrie, Judge.

Bill by Mary J. Morris against Georgia A. Roseberry and others. From the decree rendered, the plaintiff and certain defendants appeal. Modified and affirmed.

John L. Whitten and George Poffenbarger, for appellants. Charles E. Hogg, for appellees.

ENGLISH, J. At the July rules for the circuit court of Mason county, in the year 1893, Mary J. Morris filed her bill of complaint against Georgia A. Roseberry and others, in which she alleged that she was the widow of Peter Roseberry, who died in August, 1873, seised of a valuable tract of land situated in said county, containing 139 acres, more or less, and left surviving him the plaintiff and the following named children, his only heirs at law, to wit, Georgia A. Roseberry, Hernando C. Roseberry, Peter F. Roseberry, and Francis Edward Roseberry; that said Peter F. Roseberry departed this life intestate about the 23d of May, 1892, leaving surviving him, as his only heirs at law, the plaintiff, his

death the owner in fee of the undivided one-fourth interest in said 139 acres, and the plaintiff, as one of his heirs at law, was entitled to have her share set off to her, if the same was susceptible of partition among the parties entitled thereto, but, if not, she desired the same to be sold, and the proceeds distributed among the parties according to their respective interests. The plaintiff further alleged that on December 10, 1883, the sheriff of Mason county sold said real estate for the nonpayment of taxes thereon for the year 1882, charged in the name of Peter Roseberry's heirs, when W. H. Garland became the purchaser for the sum of \$23.30; that shortly after said sale, and before the expiration of the year within which any of the heirs might lawfully redeem said land so sold, to wit, on the 24th of April, 1884, the defendant Georgia A. Roseberry, one of the heirs, redeemed said real estate so sold; that on December 17, 1887, said Georgia obtained a deed to the whole of said land from the clerk of the county court of Mason county, which deed was obtained by fraudulent assurances and representations made by said Georgia, who is seeking to defeat and defraud the plaintiff out of all of her rights and interest in said real estate; that it was agreed between plaintiff and said Georgia that said real estate should be redeemed for plaintiff's benefit, as well as the other heirs of said Peter Roseberry, and she frequently assured plaintiff, before the expiration of the redeemable year as allowed by law for the redemption of land so sold, that she had no intention of applying for a deed to said real estate; that after redeeming said land as aforesaid, and making said assurances, she, with the intention of defrauding plaintiff, procured said deed to be made to herself, and fraudulently induced said W. H. Garland to join in said deed; that under this deed said Georgia has had possession of the land since the date thereof; that at the time she took possession there was a valuable lot of timber on the land, worth at least \$300, and that she has been cutting and selling said timber, until not more than \$50 worth remains on the land; and that said Georgia executed a deed of trust to J. P. R. B. Smith, trustee, upon three-fourths of the land, to secure to S. W. Somerville the payment of \$300, which trust, she alleges, is illegal and void, as to plaintiff's interest in the land. And plaintiff prays that said deed to Georgia A. Roseberry be set aside, that said trust deed be set aside, that the dower of plaintiff in said lands be assigned to her, and that partition of the residue be made between the several parties entitled thereto, if it can be partitioned, and, if not, that it be sold, and the proceeds divided among those entitled to it; and she also prays that said Smith, trustee, and Somerville be enjoined from selling said land under

and Samuel Somerville interposed a demurrer to plaintiff's bill, which was overruled. They also answered plaintiff's bill, putting in issue the material allegations thereof; the defendant Georgia Roseberry also pleading the statute of limitations. Depositions were taken by both parties, and on the 7th of February, 1896, the cause was heard, and plaintiff's bill dismissed; the court holding that the trust debt in the bill mentioned might be properly enforced against the realty therein embraced. From this decree said Mary J. Morris, H. C. Roseberry, and Francis E. Roseberry obtained this appeal.

Did the circuit court err in not setting aside the tax deed made to the defendant Georgia Roseberry on December 17, 1887? Now, while it is true that this court has held in several cases that a purchase of lands at a sale for taxes by the owner, or by one whose duty it is to pay the taxes, merely operates as a payment of the taxes and a redemption of the land for the years for which it was sold, in *State v. Eddy*, 41 W. Va. 95, 23 S. E. 529, it was also held that "one who is under any legal or moral obligation to pay taxes on land cannot, by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title either by purchasing at the sale himself, or suffering a stranger to buy, and then purchasing from him." While it is true, as we have seen, that said land was purchased at the delinquent sale by W. H. Garland, and that several months afterwards the defendant Georgia Roseberry repaid to Garland the amount paid by him, with 12 per cent. interest added, and that some time afterwards Garland joined with the clerk of the county court in deedling the land to said Georgia, yet there is no evidence that she fraudulently induced Garland to join in the deed. He received his money and interest by the hands of the clerk, and subsequently joined in the deed. It appears that Georgia repaid to Garland \$24.25 in April, 1884, and that she has paid the taxes on the land since that time, although the deed was not made to her until December 17, 1887. The plaintiff in this case, Mary J. Morris, prays, in her bill filed at the July rules, 1893, that her dower may be assigned to her in the lands of her late husband, Peter Roseberry; but it seems that her husband died in August, 1873—nearly 20 years before the bill was filed. The statute of limitations was pleaded and relied on by the defendant Georgia Roseberry, and under the ruling of this court in the case of *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. 712, "the statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years from the death of her husband, when her right to sue accrues." Such being the case, the plaintiff could not recover the dower claimed in her bill.

Was the plaintiff entitled to the partition

prayed for in her bill? The only interest held in the land was such as she derived in heir at law of her son Peter F. Rosey, who died May 23, 1892, which, if the deed was set aside, would entitle her to sixteenth. The age of said Peter F. at the of his death does not exactly appear, but was between his brother Hernando, who 25 on March 7, 1893, and Francis E., who 21 on the 4th of June, 1893, so that said r must have been about 22 years of age at time of his death; yet he does not appear have taken any steps after he arrived at age of 21 to set aside said tax deed, and, ought that appears in the record, he may been satisfied to allow it to stand. So as appears, he acquiesced in the convey by the tax deed to his sister, and, if he in his lifetime waived his right to assail tax deed, his heirs at law could not ass such right successfully. Our statute e, c. 31, § 30) provides that: "Any infant, cled woman or insane person, whose real e may have been so sold during such disty, may redeem the same by paying to the baser, his heirs or assigns, within one year the removal of the disability, the amount which the same was sold, with the necessary charges incurred by the purchaser, his or assigns, in obtaining the title under sale, and such additional taxes on the es as may have been paid by the purchaser, heirs or assigns, and interest on the said s at the rate of six per centum per an from the time the same were paid. If such person own an undivided interest in real estate so sold, he may redeem such int in like manner, and within the same , by paying such proportion of the purchase money, charges, taxes and interest, as interest in the premises is to the whole or part sold; but he shall not have the to redeem more than his own undivided est." If a party would avail himself of benefits of this statute, he must do so with reasonable time. In the case of Buchanan ing's Heirs, 22 Gr. 414, fourth point of bus, we find it held that: "As a general a joint tenant or tenant in common is o purchase in an outstanding adverse tit the common property for his own ben to the exclusion of his co-tenant. But the nant must within a reasonable time make election to claim the benefit, and to conte to the expense incurred in the purchase of such title. If he unreasonably delays there is a change in the condition of the erty or in the circumstances of the par he will be held to have abandoned all fit arising from the new acquisition." In ase we are considering, more than nine ; elapsed between the date on which glia Roseberry became the owner of the est acquired by said Garland in said land he date of the institution of this suit, and the suit was brought no tender or offer made to reimburse Georgia for any por of the amount paid by her to Garland in

purchasing his rights acquired at the tax sale. In order to sustain such a bill, it is necessary that the plaintiff should offer to pay to the holder of the certificate of purchase a sufficient amount to reimburse him for the amount expended, and all subsequent taxes paid by him, with interest. It is held in the case of Miller v. Cook, 135 Ill. 191, 25 N. E. 761, that: "One who comes into a court of equity to have a tax sale set aside as a cloud upon his title must tender or offer to pay to the holder of the certificate of purchase the amount of the lawful and valid taxes embraced in the judgment, and all subsequent taxes paid by him, with six per cent. interest thereon." 2 Desty, Tax'n, p. 901, under the head of "Averting Cloud on Title," says, "Equity will generally require a tender of the taxes due, as a condition precedent to its entertaining jurisdiction;" citing numerous authorities. In Pritchard v. Madren, 24 Kan. 496, the law is thus stated: "Where lands were sold for taxes due thereon, a condition precedent to the right of action is payment or tender of the taxes due and paid by the holder of the tax deed." Again, it is held in Herzog v. Gregg, 23 Kan. 726, that "the action lies against the holder of a defective tax deed upon proof of tender of the amount of the legal taxes and charges." See, also, Knox v. Dunn, 22 Kan. 683; Lancaster v. Du Hadway, 97 Ind. 505. Again, in the case of Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136, it was held that: "In a proceeding in equity in a court of the United States to set aside a tax sale in Illinois as illegal, the claimant should offer to reimburse to the purchaser all taxes paid by him,—both those for which the property might have been legally sold, and those paid after the sale." Other authorities might be cited, showing the necessity of tendering the amount of taxes paid by the party acquiring a tax deed, with the accrued interest, before a bill could be sustained seeking to set aside the deed; but these are regarded as sufficient.

Now, in addition to the unreasonable delay of the appellants in making their election to claim the benefit of the purchase from Garland of this land, the evidence shows that a deed of trust was executed upon the property by Georgia Roseberry in order to borrow \$300 from the defendant Samuel Somerville. At the time this trust was executed, it appears from the testimony of Col. Smith, clerk of the county court, Hernando C. Roseberry came with Georgia Roseberry when she came to borrow the money from Somerville, and heard the conversation between his sister, Georgia, and Smith in reference to the loan of money, and, while he took no part in the conversation, he seemed perfectly willing, and knew all about the transaction talked over in his presence, although said Hernando denies being present on that occasion. Col. Smith appears to be a disinterested witness, and Georgia Roseberry, in her deposition, swears that her brother Hernando came to Point Pleasant in her company on May 24, 1892,

of the trust deed, which took place next day, the 25th of May. She says this loan was obtained on account of need of money caused by the sickness and death of her brother Peter F. Roseberry, and at the time she turned over \$70 of the sum to her brother Hernando C. to settle the expenses of her brother Peter's death, which was caused by smallpox; that the entire sum of \$300 was spent in caring for the family and furnishing medical assistance while they were suffering with smallpox. It further appears from Col. Smith's testimony that between the time when the tax receipt was assigned to Georgia and the time when the deed was made to her, on December 17, 1887, more than four years elapsed, and during that time he remembers hearing the plaintiff, Mary J. Morris, express herself on one or more occasions as wanting this land deeded to Georgia, as she thought she was entitled to it. The plaintiff then not only induced Georgia to take the deed for this land in her own name, but after consulting the other members of the family, after allowing her to hold the deed for nearly 10 years, and after the deed of trust had been executed at her instance, and the rights of Somerville had intervened by reason of his trust lien innocently acquired by reason of said Georgia appearing on the record as the owner, said Mary J. Morris brings her suit in 1893 to cancel the deed of trust executed to secure said loan; and we hold the delay was too great. Even if she had rights which at one time she could have successfully asserted, a court of equity will not allow her to have dower assigned in said land; nor will it, in the circumstances, allow her, as the heir at law of her infant son, to have partition of the same.

Having determined that the plaintiff, Mary J. Morris, is barred of her dower in this land, she is still before the court, claiming, as the heir of her deceased son, to be entitled to one-sixteenth of the land. As we have seen, this son lived for about 1 year after attaining the age of 21 years, and, so far as appears, acquiesced in allowing his sister, Georgia, to retain the title, or, at any rate, died without asserting an adverse claim. After his death the plaintiff makes no offer to reimburse Georgia for her outlay in obtaining said deed, either before, at the time of, or after the institution of this suit, but prays that the tax deed be canceled and the land partitioned. Hernando C., in his answer, by way of affirmative relief, after standing by and quietly allowing her, as the owner, to execute a deed of trust upon three-fourths of the land as the owner of same, prays also that the deed of trust may be canceled and the tax deed set aside, although he received a large portion of the proceeds of the loan. These circumstances would estop both the plaintiff and Hernando C. from asserting title to the land.

any been without prejudice to any proper suit; and the parties might see proper to institute; and the decree complained of, so modified, is affirmed.

KING v. JORDAN.

(Supreme Court of Appeals of West Virginia.
March 25, 1899.)

EJECTMENT—ORDER OF SURVEY—PLAT—APPEAL—REVIEW.

1. An order of survey and plat or diagram are not indispensable to the trial of an ejectment. It is not error to try it without them. He who wishes such order must ask it, and without delay.

2. A plat or diagram of land or premises shown to be approximately correct, may be used, on a trial of any kind before a court or jury, to illustrate and apply the evidence, or, in argument, to show the claim of a party, but is not of itself evidence. It is only so in connection with the evidence of witnesses.

3. Section 9, c. 131, Code 1891, does not prohibit the supreme court of appeals from considering a case where the facts proven on the trial, and not the evidence, are certified.

(Syllabus by the Court.)

Error to circuit court, Putnam county; F. A. Guthrie, Judge.

Action by James W. King against Calvary Jordan. Judgment for plaintiff. Defendant brings error. Affirmed.

W. R. Gunn, for plaintiff in error. Rankin Wiley, for defendant in error.

BRANNON, J. This is a writ of error taken by Calvary Jordan from a judgment of the circuit court of Putnam county in an action of ejectment brought by James W. King against Jordan. On the preliminary calling of the docket to ascertain what causes would be tried at the June term, 1897, the plaintiff announced that he would be ready to try the case, and then the defendant moved the court to enter an order of survey and grant him a continuance, and, to support his motion, filed an affidavit; and, the plaintiff resisting the motion, the court overruled it, and the case was tried by a jury, which found for the plaintiff the premises involved in the action and the court overruled a motion for a new trial, and gave the plaintiff judgment.

One point involved is upon the action of the court in refusing an order of survey and continuance. The action of the lower court is always presumed to be correct, until error appears. We do not see that the absence of a survey of the land prejudiced the defendant, and, unless it appears that a party is aggrieved by a court's action, he cannot complain. This defendant came into court with an affidavit saying simply that "he is advised by counsel, and believes, that it is necessary for his defense in said action to have an order of survey." Wherein was it necessary? He does not tell us, but gives simply the abstract opin-

show by a survey, or what claim as to lines, water courses, or relative locations he wanted to illustrate or represent by a survey and plat thereof. He requires us, as he did the circuit court, to say that in every trial of an action of ejectment, and as well in other suits involving title and possession to real estate, a survey and plat representing it are indispensable. This we cannot say. Such survey and plat are generally used, and are valuable, in the trial of land suits; but they are not indispensable, and often of very little value. The case of *Campbell v. Hughes*, 12 W. Va. 183, clearly shows that such trial may be had without such survey or plat. There is very little law upon the function performed by, or the use of, diagrams or plats in land trials, to be found in the decisions of this state or Virginia; and, as they are so commonly used, it may not be amiss to refer to the law of the subject elsewhere, which is applicable in this state. Where a murder or other occurrence is the subject of a trial, an understanding of the premises where it occurred conduces to a clearer understanding of the evidence. In many cases some description of the premises is indispensable. So, in land controversies, where the location or identity of a tract is in question, or the relative location of two tracts of land, or the invasion or impingement of one upon the other, or the boundary lines of coterminous owners are in question, some description of the premises is very important in the trial. Because of this necessity, in some instances the jury is taken to the premises to view them; but as this is expensive, or impracticable, or productive of delay, the law, as the next best thing, allows what we call "plats" or "diagrams" to be used on the trial, to represent the premises, and the relative points, lines, or other features of the premises, called the "locus in quo," of the transaction or controversy. This is necessary, because the premises cannot be brought into court. Whart. Ev. § 677. Witnesses cannot convey to the court and jury a clear understanding, in such cases, without a view of the premises, or some diagram by which to illustrate and apply their evidence. Hence, from the necessity of the case, it has been the practice for parties to procure plans or maps of such localities to be made by persons having more or less skill in such work, showing the relative positions of the lines, objects, etc., upon which they relied, and, when verified by the person making it as correctly made, to be allowed to be exhibited to the jury, and used in evidence in connection with the evidence of the person making it, and all the evidence in the case relative to the various objects shown upon it. "Plans and diagrams of premises which are the scenes of transactions under investigation may be referred to witnesses, and exhibited to a jury, for the purpose of explaining their testimony, and

they are shown to be correct, not as independent testimony, but, in connection with other evidence, to enable the jury to understand and apply such evidence." *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698. "In testifying as to a disputed boundary line, a surveyor may use a diagram to illustrate his evidence or make it intelligible to a jury, though the diagram was not made by himself, and is not shown to contain a perfectly accurate description of the lines. A witness may as well speak by a diagram or linear description, when the thing may be so described, as by words. It is a common and usual way of pointing out localities and lines." 1 *Thomp. Trials*, § 870; *Hoey v. Furman*, 1 Pa. St. 295. This is made clear by *Wood v. Willard*, 36 Vt. 82. "Allowing a witness to use a map, not verified by oath, to point out to the jury, of his own knowledge, the location of a way, is in the discretion of the judge, and affords no ground of exception." *Com. v. Inhabitants of Holliston*, 107 Mass. 232. "It seems to be a sound conclusion that it is the right of a party, in arguing to a jury, to use a map or plan, which is not strictly evidence in the case, for the purpose of illustrating his argument, and explaining to the jury the position which he assumes, just as the teacher makes use of the figures on the blackboard for illustration." 1 *Thomp. Trials*, § 992; *Hale v. Rich*, 48 Vt. 217. As the question whether a diagram represents truly is a jury question, I do not see that it is necessary to prove it correct; but the cases seem to show that it must be proven to be a correct representation, or approximately so. With us it is usual to have a court order for a survey, which is executed by the county surveyor; but this is not necessarily so, as any plat may be used, if proven to be correct. The authorities show, however, that such a plat is not of itself evidence, independent of the witnesses relating to it. It only serves the purpose of illustrating and applying their evidence. After writing the above, I see that *Poling v. Railroad Co.*, 38 W. Va. 645, 657, 18 S. E. 782, supports this view, and that *Bell's Heirs v. Snyder*, 10 Grat. 350, holds that a plat is not evidence; nor the report of the surveyor. The syllabus in *Harrison v. Middleton*, 11 Grat. 527, states that the plat is evidence, but the opinion is not to be so construed. From these principles it follows that the holding in *Campbell v. Hughes*, supra, that ejectment may be tried without such plat, is sound, and that the complaint of Jordan in this case that the trial went on without an order of survey cannot be sustained. Another reason why it cannot be sustained is that on 26th September, 1895, Jordan pleaded not guilty, and issue was joined, and he did not ask such order of survey then, or at any term thereafter, until June term, 1897, and then only when the case was called for trial. If his defense needed it, why

delay, not because the survey was essential,—especially as his affidavit does not indicate wherein it was essential.

Next, as to the motion for a new trial. Counsel for Jordan says we cannot consider this, because the bill of exceptions states the facts proven by the oral evidence, instead of the evidence, as required by section 9, c. 131, Code 1891. As shown in *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686, until that act the law required just the reverse,—that is, that the facts should be certified, not the evidence; but, as before the act, where the evidence was certified that would not preclude a consideration of the case in the supreme court, so now, where the facts, and not the evidence, are certified, this will not prevent the consideration of the case. The statute is directory, and not to be construed to abolish the old rule so far as to make utterly inoperative and void a certificate of the facts according to the law prior to that statute. Judgment affirmed.

NUZUM v. McELDOWNEY.

(Supreme Court of Appeals of West Virginia.
April 1, 1899.)

TAX DEED — IRREGULARITIES IN SHERIFF'S AFFIDAVIT.

A case in which the questions arising were discussed and adjudicated in *Winning v. Eakin*, 28 S. E. 757, 44 W. Va. 19.

(Syllabus by the Court.)

Appeal from circuit court, Wetzel county; T. P. Jacobs, Judge.

Suit by Cassie C. Nuzum against John C. McEldowney. Decree for plaintiff, and defendant appeals. Reversed.

Robert McEldowney, for appellant. Basil T. Bowers, for appellee.

McWHORTER, J. This is a suit brought in the circuit court of Wetzel county by Cassie C. Nuzum to set aside a tax deed made by the clerk of the county court of Wetzel county to John C. McEldowney for certain real estate sold by the sheriff of that county on December 11, 1893, for the taxes of the year 1891, which had been returned delinquent. A decree was entered in the cause on the 6th day of July, 1896, holding the deed null and void for alleged irregularities in the sale made by the sheriff, and setting aside the deed, as well as the sale under which it was made, and giving judgment against defendant for costs, from which decree defendant appealed to this court. The same questions arising in this cause were adjudicated in the case of *Winning v. Eakin*, 44 W. Va. 19, 28 S. E. 757, which was an appeal from a similar decree rendered on the same day by the same court, setting aside a deed under a sale made by the sheriff at the same time the sale was made

dered on the 17th day of November, 1897, where the points raised in the case are fully discussed, the appellee recognizing the fact of such adjudication, by her counsel, says: "My client declines to have a brief filed in her case, for the reasons that she is poor, and unable, without sacrifice, to pay for printing same, and the same questions arising in her case have already been passed upon by the court in the case of *Eakin v. Winning*. Adversely to her contention in her case." This being true, I deem it quite unnecessary in this case to discuss and pass upon questions that have been already adjudicated. For the reasons assigned in *Winning v. Eakin*, supra, the decree in this cause is reversed and set aside, and plaintiff's bill dismissed.

ARTHUR v. CITY OF CHARLESTON.

(Supreme Court of Appeals of West Virginia.
March 25, 1899.)

CITIES—OBSTRUCTIONS IN STREET—NEGLIGENCE—EVIDENCE.

1. In an action of trespass on the case against a city to recover damages for an injury claimed to have been sustained by tripping and falling over a rope stretched across one of its sidewalks, in which the testimony of the plaintiff shows that he was ignorant of the existence of such obstruction, and that, although there were electric lights in the immediate neighborhood of the rope, yet the shadow of the telegraph pole to which it was tied obscured the rope, the question of negligence on the part of the defendant was one for the jury.

2. Where a party is injured by an obstruction on a sidewalk in a town, the question as to whether said town has been negligent in allowing such obstruction to be and remain on the sidewalk depends upon the circumstances of the particular case.

(Syllabus by the Court.)

Error to circuit court, Kanawha county; James H. Couch, Jr., Special Judge.

Action by R. H. Arthur against the city of Charleston. Judgment for defendant, and plaintiff brings error. Reversed.

E. W. Wilson, for plaintiff in error. C. B. Couch, for defendant in error.

ENGLISH, J. An action of trespass on the case was brought on the 28th of July, 1897, by R. H. Arthur against the city of Charleston, in which he claimed \$10,000 damages for injuries alleged to have been received by him, and occasioned by the failure on the part of said defendant to keep one of its sidewalks free from obstruction and safe for travel, in this: that it negligently permitted the said sidewalk to become and remain obstructed by a strong, heavy rope or cable fastened on the opposite side of said walk, and tightly drawn across, and a short distance above, the same, which caused him, in passing along said sidewalk, to be thereby tripped, and to fall upon the sidewalk, greatly injuring himself.

issue, and on the 11th day of November, 1894, the cause was submitted to a jury, who heard the plaintiff's evidence; and, he having rested his case, the defendant, by its attorney, moved the court to exclude the evidence of the plaintiff from the consideration of the jury, which motion prevailed, and the jury was instructed to disregard the plaintiff's evidence, and thereupon the jury found the defendant not guilty. The plaintiff, by his counsel, moved the court to set aside the verdict as contrary to the law and the evidence, and award him a new trial, which motion was overruled, and the plaintiff excepted, and judgment was rendered for the defendant. Thereupon the plaintiff, by his counsel, moved the court to set aside said judgment, which motion was overruled, and the plaintiff, by counsel, excepted, and took a bill of exceptions, setting out the testimony, and applied for and obtained this writ of error. The only error assigned by the plaintiff claims that the court erred in striking out the evidence, and directing the jury to find a verdict in favor of the defendant.

The question presented for our consideration by this record is whether the circuit court erred in striking out the plaintiff's evidence, and directing the jury to find a verdict for the defendant. The testimony adduced does not tend in any manner to indicate that there was any inherent defect in the pavement at the point where the plaintiff was injured, and we cannot say, from the testimony, that the sidewalk was out of repair; but it is shown that there was an obstruction in the shape of a rope, the same being the stern line of the wharf boat; that the river was high, and the line was made fast to a telegraph pole on the top of the bank. Now, in order that the plaintiff should succeed in this case, it was not only necessary that he should convict the defendant of negligence, but if, in putting in his evidence, he also showed that he was guilty of contributory negligence, he could not recover. Both of these questions involved, to some extent, questions of fact. Elliott, in his valuable work on *Roads and Streets* (page 640), says: "The place where the injury occurred is sometimes an important matter for consideration. Especially is it so upon the question of notice, or what would be negligence respecting a street in a densely-populated and much-frequented part of a city or incorporated town might not be so in a remote and little-used street or alley;" citing *Reed v. Mayor, etc.*,

Hun, 311, which was an action brought to cover damages by one injured by falling on sidewalk covered with snow, and it was held that "the court should have instructed a jury that what was a reasonable time to move the snow, and what is a reasonably safe condition of the sidewalk, is for the jury to determine, and must be determined from

corporate records ought to have been acquired knowledge is dependent upon the locality and its surroundings, and is generally a question of fact for the jury." On the same page he also says: "The weight of authority is overwhelming in favor of the doctrine that contributory negligence will effectually defeat recovery. It is therefore competent in all cases for the corporation to introduce evidence tending to show that the fault of the plaintiff proximately contributed to his injury." The testimony in this case clearly indicates that the circumstances immediately surrounding and connected with the accident were thoroughly examined and inquired into. The condition of the lights at the point where the injury occurred was investigated, which was proper in order to determine whether beacon lights were necessary, or the street was so well lighted as to charge the plaintiff with negligence in not seeing and avoiding the obstruction. In the case of *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. 22, it was held that our statute (Code, c. 43, § 53) imposes an absolute liability upon cities, villages, and towns for injuries sustained by reason of the failure of the municipal authorities to keep in repair those streets, sidewalks, etc., within the corporate limits which its authorities have opened or controlled, and treated as public streets, sidewalks, etc.; and therefore, in an action against a town by a person injured by a defective sidewalk, he is not required to allege in his declaration, or prove on the trial, that the defendant had notice of defects or want of repair in such sidewalk. There seems, however, to be a distinction between a defect in the sidewalk itself and an obstruction across it, as in this case. In many instances obstructions are placed on the sidewalk as a matter of necessity; for instance, where buildings are in course of construction, or in case of fires or floods, or where merchants are receiving and discharging goods, etc., in all which cases the liability of the town is dependent upon the circumstances, and whether the authorities have been negligent by failing to act with sufficient promptness in removing the obstruction. So, in the case we are considering, the question whether it was the duty of the city of Charleston to know that this line was stretched across the sidewalk, and that the same was dangerous to pedestrians, and if the light at that point was insufficient, or the shadow of the telegraph pole fell in such a manner as to obscure the rope, and make beacon lights necessary to warn people passing that way of the danger, all bear upon, and are necessary facts to be ascertained and determined in reaching a proper solution of, the issue raised in this case, and in determining whether the defendant was guilty of negligence, or the plaintiff guilty of contributory negligence, as also were the facts dis-

or was a consequence of the old wound he had received, of which the physicians testify.

Counsel for the city claims that the plaintiff, in putting in his case, showed that he was guilty of contributory negligence. When we look for the definition of this, we find in Beach's valuable work on that subject the following: "Contributory negligence, in its legal signification, is such an act of omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence, there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury."

My conclusion is that the issue made by the pleadings in this cause presents so many questions of fact that the court erred in striking out the plaintiff's evidence, and taking the question of negligence, which was dependent upon so many facts, from the jury. The judgment complained of is reversed, the verdict set aside, and a new trial awarded.

DAVIS v. WESTERN UNION TEL. CO.

(Supreme Court of Appeals of West Virginia.
March 22, 1896.)

TELEGRAPH COMPANIES—REGULATIONS—DELIVERY OF MESSAGES—DAMAGES—MENTAL SUFFERING—PROXIMATE CAUSE.

1. A telegraph company has the right to provide reasonable regulations as to the hours during which its offices shall be open for the transmission and delivery of messages; the reasonableness of the regulation varying with character of the locality where the particular office is situated, and ordinarily being a question for the court.

2. Where there is no averment or proof that a telegraph company, in failing to deliver a message promptly, acted wantonly or oppressively, or with such malice as implied a spirit of mischief or criminal indifference to civil obligations, the jury is not warranted, in a suit against such company for damages for such failure, in awarding punitive or vindictive damages.

3. Mental suffering alone, and unaccompanied by other injury, cannot sustain an action for damages, or be considered as an element of damages. Anxiety of mind and mental torture are too refined and vague in their nature to be the subject of pecuniary compensation in damages, except where, in cases of personal injury, they are so inseparably connected with the physical pain that they cannot be distinguished from it, and are therefore considered a part of it.

4. Where a suit for damages against a telegraph company is predicated upon the alleged fact that the delay in the transmission and delivery of a message prevented plaintiff from attending the burial of his mother, and the proof shows that the message was received at 1 o'clock a. m., and was delivered promptly at the beginning of office hours in the morning, which message was so uncertain and vague as to fail to inform plaintiff of his mother's death,

damages in such action.
(Syllabus by the Court.)

Error to circuit court, Mingo county; Thomas H. Harvey, Judge.

Action by Claude R. Davis against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Simms & Enslow and Herbert Fitzpatrick, for plaintiff in error. H. K. Shumate, for defendant in error.

ENGLISH, J. On the 30th of September, 1895, at 7:45 in the evening, a message was delivered to the Western Union Telegraph Company, at Charlottesville, Va., in the following words, "Come at once," signed, "Wille Davis," to be sent to Claude Davis, Williamson, W. Va., which message was received by the operator at Williamson about 1 a. m. October 1st, but was not delivered until between 8 and 9 that morning. On March 21, 1896, said Claude Davis instituted an action of trespass on the case against said telegraph company, alleging in his declaration that by reason of the negligence of the defendant to promptly transmit said message to plaintiff over its line from Charlottesville, and in failing to deliver it promptly, he was not notified in sufficient time to be at the funeral of his mother; and he claimed \$1,500 damages. On September 22, 1896, the case was submitted to a jury, and resulted in a verdict for the plaintiff for \$500 damages. Thereupon defendant moved to set aside said verdict and grant it a new trial, which motion was overruled, and the defendant excepted and took a bill of exceptions; and the court rendered judgment upon the verdict. The defendant then applied for and obtained this writ of error.

During the trial the defendant asked the court to give the jury several instructions,—among them, the following, marked No. 2: "The court further instructs the jury that if they find from the evidence that the Western Union Telegraph office at Williamson, W. Va., had a rule that messages would not be received or delivered after 9 o'clock in the evening and before 8 in the morning, then that was a reasonable rule, and the plaintiff cannot recover any damages in this case for the failure of the defendant to deliver it before 8 o'clock in the morning of October 1, 1896, although it may have come to the Williamson office at 1 o'clock a. m. on October 1, 1896." The action of the court in refusing to give this instruction when asked for by the defendant is relied on as the first ground of error, and involves the question as to the right of a telegraph company to make reasonable rules and regulations for the transaction of its business. On this question, under the head of "Liability of Telegraphs and Telephones" (25 Am. &

which its offices shall be open for the transmission and delivery of messages; the reasonableness of the regulation varying with the character of the locality where the particular office is located, and ordinarily being a question for the court." Thompson, in his work on Corporations (volume 1, § 937), speaking of the distinction between by-laws and regulations, says: "It is believed that the only sound distinction is that the by-law is more usually established for the government of the internal affairs of the corporation, while the regulation is established for the government of those concerned with it in its business, or rather for the government of its business with the public. In either case the sound rule is believed to be that the reasonableness of the rule is a question for the court." *Morawetz* (Priv. Corp. § 501) says: "Companies which are engaged in enterprises of public character frequently adopt and publish rules for the government of those who enter into transactions with them. These rules or regulations are sometimes called 'by-laws,' but are obviously different from the ordinary by-laws passed by private corporations for the regulation of their own management. By-laws of the latter class are binding upon the members of a corporation by virtue of the implied terms of their contract. Those of the former class are merely terms or conditions made binding upon all persons who choose to deal with the corporation." In the case of *Telegraph Co. v. Harding*, 103 Ind. 505, 3 N. E. 172, it was held that: "Under section 4176, Rev. St. 1881, a telegraph company may regulate reasonably its office hours according to the requirements of the business at the various points where it holds itself out for public service. The penalty for failing to reasonably transmit a message is not incurred unless there is a failure to receive and transmit during the usual office hours, both at the point where the message is received and that to which it is transmitted." The court, after quoting the statute which provides, in substance, that companies engaged in telegraphing for the public shall, during the usual office hours, receive dispatches, and, on payment of the usual charges, transmit the same, with impartiality and good faith, in the order of time which they are received, under penalty, etc., uses the following language: "The statute recognizes the common-law right of the company to make reasonable regulations for the transaction of its business. * * * It cannot be implied that, because the public service may require that its office hours should include a given time at one point, all other offices or places at which it serves the public must be open and fully equipped for such service an equal length of time. No reasonable requirement would demand this." That the question as to the reasonableness of a regulation of this character is for the court, and not for the jury, see *Vedder v. Fellows*,

Yoakum to Cuevo, Tex., July 29, 1891, at 4 o'clock a. m. The message reached Cuevo at 4:50. The office hours at Cuevo were from 7 a. m. to 7 p. m. The carrier boy did not reach the office before 7 a. m., and the message was promptly delivered after the opening of the office. In a suit for damages for delay in delivering the message, in which recovery was had by the plaintiff, the court should have given the following requested charge: 'All messages to be sent by telegraphic wire are accepted subject to the delays ordinarily incurred during transmission, and if the jury believe from the evidence that the defendant company had reasonable office hours, during which it delivered telegraphic messages in the town of Cuevo, it was not by law compelled to deliver messages outside of said hours; and such reasonable office hours were implied in the contract between the plaintiff and the defendant company, if such contract has been proved, unless specially stated or understood by the parties to said contract that the service to be performed should be performed otherwise than in the usual manner, and subject to the usual rules under which the company does business.' See *Telegraph Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760. So, also, in *Birney v. Telegraph Co.*, 18 Md. 342, it was held that: "A telegraph company is not a common carrier, but a bailee, performing, through its agents, a work for its employer according to certain rules and regulations, which, under the law, it has a right to make for its government. A party sending messages by telegraph is supposed to know that the engagements of the company are controlled by such rules and regulations, and, in law, ingrafts them in his contract of bailment, and is bound by them." To the same effect, see *Telegraph Co. v. Gildersleeve*, 29 Md. 232, and *Given v. Telegraph Co.*, 24 Fed. 119, in which the court held: "It was not the duty of a telegraph company, with offices scattered all over the United States, to keep the employees of every one of its offices in the country, or in any one state, informed of the time when every other office closes for the night." Other authorities might be added to the same effect, recognizing the right of telegraph companies to make reasonable rules and regulations for the conduct of their business; but these are deemed sufficient to indicate the weight and tendency of the authorities on the question, in my opinion, justify us in holding the circuit court erred in refusing to give instruction No. 2 to the jury.

The second assignment of error of the court erred in refusing instruction No. 3 and 4 asked for by defendant, that there was no evidence whatever that any physical injury sustained by the plaintiff there can be no assessment of mental anguish. By instruction No. 2 the court asked to instruct the jury that

his mother's funeral. This instruction should have been given to the jury, and the court erred in refusing it. We find the law thus stated in Jaggard on Torts (volume 1, p. 363), under the head, "Mental Suffering": "While the general analogy from other actions in tort, and other potent considerations, justify such actions, the general trend of decisions denies, in the absence of statute, the right to recover for mental suffering, unaccompanied by other injury, resulting from failure to deliver a telegraph message. Where, however, one has established his cause of action for harm to his person, property, or reputation, he may then recover for injured feelings and mental suffering." (As to the first proposition, see *Summerfield v. Telegraph Co.*, 87 Wis. 1, 57 N. W. 973; *Chapman v. Telegraph Co.*, 88 Ga. 763, 15 S. E. 901; *Tyler v. Telegraph Co.*, 54 Fed. 634.) And that such is the law has been held in many of our states, and in the United States supreme court in the case of *Kenyon v. Gilmer*, 131 U. S. 26, 9 Sup. Ct. 696. In 1 Am. & Eng. Enc. Law, 862, we find the rule of law stated thus: "A rule that is more consistent with recognized legal principles, and that is supported by better authority, is that mental suffering alone, and unaccompanied by other injury, cannot sustain an action for damages, or be considered as an element of damages. Anxiety of mind and mental torture are too refined and too vague in their nature to be the subject of pecuniary compensation in damages, except where, as in case of personal injury, they are so inseparably connected with the physical pain that they cannot be distinguished from it, and are therefore considered a part of it;" citing many authorities. But, aside from this, the question is whether, from the facts proven, the plaintiff was prevented from being present at his mother's funeral by reason of the message not being delivered to him until 9 o'clock the next morning. The message, "Come at once," appears to have been so vague and unsatisfactory that, no matter when it was delivered, it failed to inform the plaintiff why he was wanted at once; and, from the exhibits filed with P. A. Walstrum's deposition, it appears that the plaintiff at 9:32 a. m., October 1st, telegraphed to M. T. Eddins, at Charlottesville: "Wire quick what is the matter at home. Am waiting answer." And again, at 4:22 in the afternoon, he wires to same: "Send this to Willie. Find out what is the matter, if I must come in haste." And at 3:15 p. m. a message was sent to plaintiff informing him of his mother's death. So it is perceived that the delayed message did not inform plaintiff of the death of his mother, and it was so vague and unsatisfactory that he was compelled to send repeated messages to Charlottesville before he received any information as to the urgency of his call to that place. It is therefore apparent that

ly delayed. The verdict of \$500, under the circumstances, was excessive and unwarranted. The testimony shows that, if the first message received by him had informed him of his mother's death, he could, by acting promptly, have reached Charlottesville, and attended her funeral, by using the Chesapeake & Ohio Railroad. Again, there is no allegation in the declaration that the defendant acted wantonly or oppressively, or with such malice as implied a spirit of mischief or criminal indifference to civil obligations; and, if it did, the proof does not sustain any such allegation, and without such averment and proof the jury could not award exemplary, punitive, or vindictive damages. Such is the rule laid down by this court in *Mayer v. Frobe*, 40 W. Va. 249, 22 S. E. 58. In *Railroad Co. v. Prentice*, 147 U. S. 107, 13 Sup. Ct. 263, Justice Gray says: "In this court the doctrine is well settled that in actions of tort, the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages;" citing numerous authorities. The jury, in the case we are considering, could not have found the verdict it did without giving punitive damages; and, under the law above quoted, they were not warranted in so doing.

My conclusion, therefore, is that the court erred in rejecting the instructions asked for by the defendant, and in overruling the motion to set aside the verdict and award the defendant a new trial, and in entering judgment upon the verdict. The judgment complained of is therefore reversed, the verdict set aside, and a new trial is awarded the defendant.

BURBRIDGE v. SADLER.

(Supreme Court of Appeals of West Virginia.
March 22, 1899.)

PAYMENT—PRESUMPTION—VENDOR'S LIEN—DISCHARGE—LIMITATIONS—DEFICIENCY IN LAND CONVEYED—COVENANTS IN DEED.

1. Lapse of 20 years affords a presumption of payment of a lien for purchase money reserved in a deed conveying the legal title to land.

2. Burbridge, owing Lee a lien reserved in the deed of land to her, conveys the land to Sadler, and, as part payment, Sadler conveys to Burbridge other land, and in the deed charges this land with a lien to indemnify Sadler against the lien of Lee. Burbridge pays to Sadler money, with the agreement that Sadler shall pay it on Lee's lien. Sadler fails to pay it. Such payment relieves Burbridge's land from the lien for Sadler's indemnity, and requires

Sadler's land to pay the lien of Lee; and the right to claim such money as a discharge of the lien for indemnity is not subject to the statute of limitations, up to the amount of the lien of Lee, but beyond that it is subject to the statute.

3. Money deposited by one person with another to be paid to a third, and not paid, does not create a trust cognizable only in equity, but is subject to the statute of limitations, but is only a legal demand, and subject to the statute.

4. A claim for compensation for deficiency in quantity of land conveyed by deed, where the purchase money has been paid, is a mere personal demand, not cognizable only in equity, but at law, and is subject to the statute of limitations.

5. Where a deed conveying land to a married woman as separate estate reserves a lien or charge upon it for money, the fee or corpus may be sold for its payment.

6. A covenant of general warranty in a deed of land relates to title, not quantity, and does not warrant quantity.

(Syllabus by the Court.)

Appeal from circuit court, Doddridge county; R. H. Freer, Judge.

Action by Melissa Burbridge against Rudolph Sadler, administrator, and others. Judgment for plaintiff. Defendants appeal. Reversed.

Charles W. Lynch and M. R. Crouse, for appellants. G. W. Farr, for appellee.

BRANNON, J. In 1869, Gore conveyed to Melissa Burbridge a tract of 269 acres of land in Doddridge county, and for deferred purchase money she and her husband, J. P. Burbridge, executed notes, which were assigned to Lee. Of this tract a parcel of 37½ acres was conveyed by the Burbridges to Roush, and later another parcel of 51 acres was conveyed by the Burbridges to Bonnell, and later the residue (180½ acres) was conveyed by the Burbridges to Rudolph Sadler. In the deed from Gore to Melissa Burbridge for the 269 acres, a lien was retained for the notes which came by assignment to Lee. Roush paid cash for the parcel conveyed to him. Bonnell executed four notes for unpaid purchase money on the 51 acres so conveyed by the Burbridges to him. Sadler executed to Melissa Burbridge two notes for unpaid purchase money on the tract conveyed by the Burbridges to him, for which a lien was retained on the land; and, as further payment for the land conveyed by the Burbridges to Sadler, Sadler conveyed to Melissa Burbridge three contiguous tracts of land, aggregating a tract of 175 acres, and in the deed Sadler reserved a lien on the 175 acres to indemnify him against any liens resting on the tract of 180½ acres conveyed by the Burbridges to Sadler. In 1873, Lee brought a chancery suit to sell under his said lien the 269 acres conveyed by Gore to Melissa Burbridge, and made said several sub-purchasers from the Burbridges parties. In 1874, Sadler brought a chancery suit against the Burbridges to compel them to pay the Lee debt, and to that end to sell the 175 acres conveyed by Sadler to Melissa Burbridge, under the clause in the conveyance retaining a

lien on the 175 acres to indemnify Sadler against the lien resting on his land for the Lee debt. The 37½ acres which had been conveyed by the Burbridges to Roush was later conveyed by Roush to Rudolph Sadler, he thus owning the 180½ acres and the 37½ acres. Hutson had a judgment against Rudolph Sadler, and in 1879 Hutson brought a chancery suit to sell the said 180½ acres and the 37½ acres to pay said judgment. In this suit there was a decree, and under it said land was sold, but as the sale was made by private sale, instead of a public sale, the court set it aside. Susan Sadler, wife of Rudolph Sadler, was the purchaser at said sale, and she paid off the debt of Hutson. One Smith had a judgment against Rudolph Sadler, and he filed a petition in the Hutson suit to enforce his judgment against Sadler's land, and charged that the money with which Susan Sadler had paid off the Hutson judgment was really money of her husband, and that she was not entitled to subrogation to the lien of the Hutson judgment. The court, as stated, set aside the sale, and held that Susan Sadler was not entitled to subrogation, and referred the cause to a commissioner to convene the liens on Rudolph Sadler's land. As will be seen from 31 W. Va. 358, 6 S. E. 920, Susan Sadler applied to this court for relief from said decree; and this court, though it affirmed the circuit court in setting aside the sale to Susan Sadler, held that the money which she paid under the sale, and which went to satisfy the Hutson debt, was her separate estate, and that she was entitled to be substituted to Hutson's lien. Afterwards Rudolph Sadler died, and after his death Melissa Burbridge brought a suit in the circuit court of Doddridge county against the personal and real representatives of Rudolph Sadler and others interested, including his creditors, alleging that she had conveyed to Rudolph Sadler said 180½ acres, and that Sadler had conveyed, in part payment therefor, said 175 acres, and had executed, in further payment, the two notes of \$300 and \$150, and that they remained unpaid; and alleging the sale of the 269 acres by Gore to her, and the assignment of her and her husband's notes to Lee, and that Susan Sadler and others claimed debts against Rudolph Sadler's estate, and that he had died owning said two tracts of 180½ and 37½ acres; and alleging that Rudolph Sadler was indebted to her for some notes given to her by Bonnell, and assigned by her to Rudolph Sadler, which Sadler took to pay their proceeds on the Lee debt; and further alleging that said Sadler was indebted to J. P. Burbridge for cattle in an amount not stated in the bill, but stated, in the answer of Burbridge and wife in the Sadler suit, to amount to \$100, and also in their amended answer in the Lee suit. She also alleged in her bill that there was a deficiency in quantity of the 175 acres amounting to 18 acres, for which she claimed compensation. All these causes were heard together, and

1887, a decree was pronounced giving Lee's estate a first lien for \$1,355.15, and giving to Melissa Burbridge a second lien for \$1,524.64, on the two tracts owned by Rudolph Sadler's estate, and giving Susan Sadler a third lien for \$1,431.07, and giving said Smith a fourth lien for \$941.07, and providing that out of the sum decreed to Melissa Burbridge there should be applied an amount sufficient to pay the Lee debt, and leaving the balance as a lien in favor of Melissa Burbridge. From this decree Sadler's administrator and his heirs and Susan Sadler appeal.

These cases present considerable complication, growing out of the fact that they have been so long sleeping, and involve matters dating back so far. As to some of these matters, no court can act with entire confidence, owing to the uncertainty of evidence, and the death of Sadler, disabling his side from fully representing their case. The Sadlers complain that the decree allows against them the \$150 note given by Sadler to Melissa Burbridge for purchase money of the 180% acres conveyed by Melissa Burbridge to Sadler. It is made clear that Sadler paid the \$300 note given for that land, thus affording a likelihood that he paid the \$150 note also. The latter note is not produced by Melissa Burbridge, who seeks to make it the basis of a debt against a dead man's estate. Her husband says it was filed in the original papers in these causes, but it does not appear. It is somewhat strange that it is lost when no other papers are wanting. I do not see that it is made an exhibit in any of those original papers, and therefore why should it be filed? What papers was it filed with? Its nonproduction by the person asking it to be used as evidence of a debt is a circumstance in favor of the theory of its payment. True, the deed speaks of it, but the grantor should be able to produce it. J. P. Burbridge, being a party to this suit, cannot be heard to prove its continued existence as a debt, and thus show its nonpayment, because that would be allowing him to negative payment by Sadler, and thus allow the living man to give evidence upon a transaction occurring between him and a dead man, or between the dead man and his wife, when the dead man is not here to speak of that transaction. Burbridge cannot give evidence of nonpayment by Sadler. The payment of the other note and the absence of the \$150 note lend additional force to the rule of law laid down in *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623, and *Criss v. Criss*, 28 W. Va. 388, that the lapse of 20 years affords a presumption of payment. That note fell due on the 1st day of May, 1873. It was never mentioned in any pleading until 1894, by Melissa Burbridge, as a demand against Sadler, and then he was dead. This laches of nearly 22 years counts strongly against the demand, under

Trader v. Jarvis, 23 W. Va. 100. Why did not Melissa Burbridge sooner present this note in the Lee suit, and more especially why did she not file an answer in the Sadler suit against her to compel her to relieve Sadler's land from the Lee debt? For 20 years that suit stood without any answer from her mentioning any demand on this note as still existing, and the same is true of the other demands set up in 1894 for the first time. This \$150 note was improperly charged by the decree against Sadler's estate to the credit of Melissa Burbridge.

The Sadlers also complain of the charge against them in favor of Melissa Burbridge of two \$100 items,—one of cash, in 1873; the other of cattle, in 1875. They say these items are barred by the statute of limitations, as they were never claimed till 1894. Now, as to the item for \$100 in cattle. Viewing it as an offset in favor of J. P. Burbridge, as it is set up in the Burbridge bill, it would be not allowable, because not in favor of Melissa Burbridge, but in favor of her husband, and it is blank in amount in that bill, and it is not there charged that these cattle were furnished to Sadler, to be paid by him on the Lee debt, and therefore it would be barred. But answers of Burbridge and wife in the suits of Lee and Sadler do set up that cattle item as \$100, and allege that the cattle were furnished by Burbridge and wife to Sadler with the understanding that he was to pay their proceeds on the Lee debt, and, this being so, I do not think the statute of limitations applies. The commissioner thought that the statute did not apply, because this item had been involved in the long-sleeping suits; but it was not involved, because never set up until in 1894. And just here I remark that the reference in the lifetime of Sadler, in the Hutson suit, to convene lienors, could not keep alive a mere open account. But, going back to the fact that the cattle were furnished to Sadler to be applied by him on the Lee debt, I do not regard the demand barred. Under this head, the question is, which land shall pay that Lee debt,—Sadler's land, or the 175 acres of Melissa Burbridge? In the first instance, it was Burbridge's debt; but, when she furnished Sadler cattle to pay on it, clearly that would relieve the 175 acres pro tanto, because it would do what the charge upon that land in Sadler's deed to Burbridge bound the land to do,—that is, indemnify Sadler against the Lee debt. It would be furnishing money to Sadler to his indemnity, and he could not then say that Burbridge had failed to discharge the lien. With money in his pocket to pay Lee, furnished by Burbridge, Sadler would be estopped from calling on Burbridge's land to relieve Sadler's land, and Sadler's land would have to shoulder the lien to the relief of Burbridge's land to the extent

money furnished by Burbridge to Sadler to pay on the Lee debt. So, the charge of \$100 for cattle furnished in 1875 was properly credited to Melissa Burbridge against Sadler's estate. But, as to the \$100 for cash paid Sadler in 1873, it was improperly allowed against the Sadlers, for the reason that it is nowhere in bill or answers set up as a payment or set-off, or as money deposited with Sadler to go on the Lee debt, and in the latter case it is more essential to set it up than as a mere payment or set-off. It is hardly material to say that the theory against the statute of limitations applying, namely, that the deposit of money to pay on the Lee debt constituted a trust, is not tenable. They could be mere personal demands. Where one lends another money to be paid to a third party, and he fails to do it, the depositor sues at law to recover the money, in assumpsit for money had and received. It is cognizable only at law, and not a trust cognizable only in equity. If it were the latter, the statute would not apply; but, as it is the former, it does apply. *Woods v. Stevenson*, 43 W. Va. 149, 7 S. E. 309; *Thompson v. Iron Co.*, 41 W. Va. 581, 23 S. E. 795. The decree in this case credits Melissa Burbridge with a sum larger than the amount of the unpaid Lee debt, and decrees the surplus against Sadler's land. This is error, because, beyond the amount of the Lee debt, the demand of Melissa Burbridge for cattle or money, or the Bonnell notes, would be barred by limitations; but, as there is less going to Melissa Burbridge than the Lee debt under the abatements made by us, the question is not very material.

The Sadlers complain that the decree charges against them the four Bonnell notes. For reasons stated above as to the cattle, I think they were properly charged to the credit of Melissa Burbridge, and not barred. Nobody questions that said notes were assigned by Melissa Burbridge to Rudolph Sadler, and the only question is as to the purpose for which they were assigned. Were they assigned to be paid on the Lee debt? Burbridge and Leever say so, but parties to the suit, they cannot speak of this personal transaction with Sadler, since dead. But Roush clearly proves that they were assigned to Sadler to pay on the Lee debt. Certainly they were paid to Sadler. They are chargeable to his estate. However, Bonnell says the first of these notes was at least half paid before they were assigned to Sadler. The commissioner charges their full amount,—in fact more, as I see it. Only that first note after the deduction of the credits on it should be charged. Bonnell says it was half paid, but he merely approximates, and I think that the proper course is to apply the credits appearing on it as more certain.

Susan Sadler complains that her lien was not made a second lien on her husband's land instead of being made subordinate to the amount decreed Melissa Burbridge. Of course, that is error as to any surplus given Melissa

Burbridge over the amount of the Lee debt; for such surplus was no lien, as Melissa Burbridge's demand beyond the Lee debt would only make her a general creditor, even if she was not barred, and Susan Sadler's debt was a fixed lien by subrogation to the Hutson lien. Susan Sadler also complains that her debt as allowed is too small. The date from which interest was computed on this debt and the amount on which interest was computed by the commissioner do not appear. The amount is clearly too small. I find a decree in the Hutson Case, made after the decision of this court, which finds the debt of Susan Sadler to be \$1,178.66, with interest from the date of that decree, and so adjudicates it against Sadler's estate. The date of that decree does not appear. That is res judicata, and that decree fixes the amount of her debt. It is binding on the estate, and binding on Smith, who was a party to that suit, and whose debt was also adjudicated in that decree.

This appeal does not involve the question of the allowance to Melissa Burbridge of any sum for deficiency in quantity of the 175-acre tract, unless we interpret the brief of counsel for appellees as a cross-assignment of error, as I interpret it. Therefore, I pass on it. That demand is barred by limitation. It was cause of action at once on the execution of the deed from Sadler to Melissa Burbridge. Five years would bar it. It is not like the case of a demand for compensation for excess in quantity where lien for purchase money exists. There, I think, the lien extends to the amount due for surplus land; but, if there is no lien in the deed of conveyance, compensation for the surplus must be recovered in an action at law. So, where there is a deficiency. In either case, like the sale of other property. In case of deficiency, compensation would be by action of trespass on the case, or, waiving the tort, in assumpsit, the liability being based on the theory of fraud and deceit in misrepresenting quantity. 8 Enc. Pl. & Prac. 887; *Kreiter v. Bomberger*, 22 Am. Rep. 750; *Hoyt v. City of Saginaw*, 2 Am. Rep. 80; *Crislip v. Cain*, 19 W. Va. 438,—bases the liability on fraud and deceit; therefore it is subject to limitation. Clearly, recovery or liability is not based on breach of the covenant of general warranty, as it only guarantees title, not quantity; quantity merely pertaining to description of the land. *Rawle, Cov.* §§ 289, 297; 2 *Devil. Deeds*, § 1044; *Roat v. Puff*, 3 Barb. 353; *Rickets v. Dickens*, 4 Am. Dec. 555. For such amount as the Lee debt may exceed the amount to be credited to Melissa Burbridge, the 175 acres conveyed to her by Sadler must be sold to indemnify Sadler's estate. The proposition of counsel that, as she is a married woman, her land can only be rented, cannot be sustained. The very deed vesting estate in her created a fixed lien on the land, and it binds the fee just as a vendor's lien binds the fee retained in a deed creating separate estate. See Man-

These principles reverse the decree, and remand the cause for further decree in accordance therewith. Melissa Burbridge should be given leave, if she asks it, to amend her bill as to said \$100 cash item, and retake her proof touching it.

NORFOLK & W. R. CO. v. NIGHBERT et al.
(Supreme Court of Appeals of West Virginia.
April 1, 1899.)

EMINENT DOMAIN—EXCESSIVE DAMAGES.

A verdict finding an amount of compensation in a proceeding by a railroad company to condemn land that is so high that it must be attributed to prejudice, passion, bias, partiality, or mistake of law or judgment, will be set aside.

(Syllabus by the Court.)

Error to circuit court, Logan county; Thomas H. Harvey, Judge.

Action by the Norfolk & Western Railroad Company against Stuart Wood and James A. Nighbert. From a judgment for defendants, plaintiff brings error. Reversed.

Jas. I. Doran and Campbell, Holt & Campbell, for plaintiff in error. John B. Wilkinson and John S. Marcum, for defendants in error.

BRANNON, J. The Norfolk & Western Railroad Company, by its writ of error, complains of the judgment of the circuit court of Logan county in refusing to set aside a verdict assessing compensation to Stuart Wood and James A. Nighbert for land of theirs which said company proposed to take, for its use, through a condemnation proceeding instituted by it in that court. The complaint of the company is that the amount of \$3,495 compensation fixed by the jury is grossly hard and excessive. The finding of a jury is seldom disturbed on account of amount, especially where the law sets up no measure or standard of value. But the finding of a jury is in no case, under the law of this state, beyond the healthful and salutary control of the courts. Strong as is the function of a jury as to damages, whether in cases purely sounding in damages for tort, or where the law fixes a standard, its power is not arbitrary and unlimited, and cannot be allowed to work injustice and oppression. Our Code, in chapter 131, § 15, enforces this principle, by broadly enacting that "a new trial may be granted, as well where the damages are too small as where they are excessive." The general law is such. This court said in *Vinal v. Core*, 18 W. Va. 1, that "where the proper amount of damages cannot be fixed by the court by the application of settled rules of law to the evidence, but where it necessarily depends in a great degree on the discretion of the jury, if the damages are so enormous as to justify the court in setting aside the verdict, this

Unified v. Railroad Co., 34 W. Va. 260, 12 S. W. 512, "that in an action for damages, where the verdict is so enormous [erroneous] as to clearly indicate prejudice, partiality, passion, or corruption in arriving at their conclusions, the defendant is entitled to a new trial." That was an action for personal injury, where the law set up no measure of damages. The authorities will show generally that if the verdict is so disproportionate to the injury as to suggest the inference that it is not the result of fair, calm, unbiased judgment of the jury, the verdict ought to be set aside as excessive. *Ogg v. Murdoch*, 25 W. Va. 139. That is the law in any character of case. This is more particularly the case, and the court sees its way more clearly to set aside a verdict, where the case is governed by a legal rule fixing a standard of damages. There, if the jury has departed from that standard or measure, by finding either less or more than the plaintiff is entitled to by a preponderance of the evidence or the circumstances of the case, the court will grant a new trial. *Suth. Dam. § 459*; *3 Sedg. Meas. Dam. § 1320*. This is a proceeding for condemnation of land for public use, and the law fixes a standard or measure of damages by the provision in Code, c. 42, § 14, that the commissioners "shall ascertain what will be a just compensation to the person entitled thereto for so much thereof as is proposed to be taken, and for damage to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue, from the work to be constructed, or the purpose to which the land is to be appropriated." Therefore the measure is "just compensation," and, whenever the assessment is greater or less than that, the law is violated.

The amount found in this case is excessive. The tract is one of 2,000 acres of wild mountain land in Logan county, distant from town or market, with no improvement save about 35 acres of bottom, and that worn and poor from cultivation for 50 or 60 years, lying practically out to the common, save a small garden spot, with a log house upon it, 40 by 20 feet, weather-boarded, celled with plank, with one chimney, two stories, four rooms, old, worn, and dilapidated. The railroad takes a strip 60 feet wide and $1\frac{1}{2}$ miles long, containing 10.6 acres, half of it rough bluff land, not capable of cultivation or apparent use, leaving 5 acres of bottom land taken by the railroad. The strip had no timber or mineral upon it. The assessment taken by the acre averages about \$315. The railroad takes the porch of the worn, decayed house. But say it takes the house. The proof shows that a better house could be built for \$600, and that the present one could be handily moved back from the railroad to a good site for \$125. The owner of the land did not reside in this house. Worn with long service, can we fairly say it is worth \$1,000? Is not that estimate put upon it by

capable of being used for cultivation. How is it injured? Does not our knowledge of our state tell us, without proof, that, if timber or coal land, situated as it is in that remote, inaccessible section, the railroad, which is already built and operating, is a blessing, vastly increasing the value of the land? The only damage to the residue that is suggested is that a small stream comes into Pigeon creek, and, the railroad having a culvert over that stream only 15 feet wide, it prevents logs coming down and getting out to Pigeon creek, which is right at hand at the culvert. Evidence, however, shows that there is no banking ground there on Pigeon creek for such timber. Before the railroad came, timber coming down that stream did not go to Pigeon creek, but was stopped before it got to where the railroad is, and was hauled by the county road to a point, up or down Pigeon creek, where suitable banking ground could be had. But the fact is that, if this land teemed with timber, the evidence does not show it, except by inference from witnesses talking about timber coming down that stream. We do not know that there ever was any merchantable timber on it. Is there any left there? What is its kind or value, as a basis for any estimate of damage on its account? The evidence does not say. In 1887 this whole tract was purchased by Nighbert at a public court sale at \$2,000. He had debts on it, and wants to say that they should be taken into consideration in counting its cost to him; but it is probable that he would not have given what he did for it, but for that indebtedness. He says it cost him \$3,000 to remove a dower right from it. How could a dower right in that land approximate that sum? He thinks the property cost him \$11,000; but he counts purchase money, all his debts against the land, the dower charge, and some indefinite sum paid for taxes and cost of partition. What if it did cost him \$11,000? Is he to put in his insolvent debts in an estimate or valuation against the company? Ought the company to pay one-third of the whole cost of the tract, even if its actual cost were \$11,000, when the company gets but a morsel of this wild, remote tract? Add to the cost at the court sale the utterly excessive valuation for dower, making \$5,000, and this verdict makes the company pay nearly four-fifths of it. Some witnesses fix the value of the bottom land taken at from \$200 to \$300 per acre. There must be some fabulous virtue in that land, but, if so, the evidence does not pretend to specify it. Where in the state is so favored a locality, judged by this evidence? This whole state has no lands which, in the market, will bring anything like that price, unless it be a few choice acres at the edge of our best cities. It is beyond question that the bottom land that is left is damaged. So is the house. We may say it is taken, though it surely could be moved

to make up this large verdict. Compensation should be given for the land actually taken. That must be paid for. Compensation, fair and just, should be accorded for damages to the residue, if there is any real damage, but it should not be unjust and oppressive to the other side. The owners allowed the company to build its road near that house without agreeing on compensation, and thus it did not wrongfully invade the curtilage of the house, as the owners consented. No doubt, they considered the railroad a great benefit. I do not see that the balance of the tract—the wild mountain rising right from the railroad—is damaged. If so, it is not shown,—that is, except as mere opinion, not based on facts given, as it is not shown that there is any timber of merchantable value on it, so as to be a basis of estimate; and if there is, as the public road is there, over which, before the railroad, it was usually hauled, and as the railroad affords a means of shipment, it cannot be a substantial damage to the land, even as regards timber, except in imagination. As the single question before us is whether the verdict is excessive, I am compelled to speak thus plainly in order to express reasons for the conclusion that it is excessive. Reversed and new trial.

McDONALD v. COLE et al.

(Supreme Court of Appeals of West Virginia.
April 1, 1899.)

ACTION BY ADMINISTRATOR—EVIDENCE OF AUTHORITY — CORPORATIONS — MISREPRESENTATIONS OF AGENT — NONJOINDER OF PARTIES — PLEA IN ABATEMENT—RECOURPMENT—INSTRUCTIONS.

1. Where one sues as executor or administrator, or in other representative character, there need be no proof of his appointment or authority, unless a plea denies it. A plea to the merits admits the right of the plaintiff to sue as he does.

2. The false statement of an agent of a corporation appointed to buy timber for it, in making the contract, that the company is a partnership, does not bind its members or the corporation to liability as partners. Agent's misrepresentations and wrongs, how far binding.

3. The nonjoinder, as defendants, of other persons, in an action against a partnership, must be pleaded in abatement filed at rules. The defendants sued cannot avail themselves of it after a plea to the merits.

4. Recoupment for delay in execution of a contract cannot be allowed where the delay is owing to the act or fault of the party himself.

5. It is not error to refuse an instruction which puts a legal proposition, though sound, if the evidence to present it as pertinent to the case is slight, and only colorable, and does not fairly present it for consideration, and where a verdict finding according to the instruction would be set aside as without sufficient evidence.

(Syllabus by the Court.)

Error to circuit court, Cabell county; E. S. Doolittle, Judge.

Action by Bilton McDonald, administrator, against J. O. Cole & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

BRANNON, J. McDonald, administrator of justice, brought an action of assumpsit in the circuit court of Cabell county against J. O. Cole and C. Crane, as late partners in the firm name of J. O. Cole & Co., to recover pay for some timber sold and delivered by the plaintiff's intestate to the defendants. The defendants pleaded non assumpsit, payment, and filed notice of recoupment, and by sworn plea denied that the defendants had been partners. The case resulted in a verdict for the plaintiff for \$1,800, and the court, refusing a new trial, rendered judgment, from which the defendants obtained a writ of error.

The defense makes the point that, under the plea of non assumpsit, it rested on the plaintiff to prove that he had been legally appointed administrator. This position cannot be sustained. There is a plea distinctively called, in the books on common-law pleading, a plea of "ne unques executor" (or "administrator"),—"never executor." It must be used where it is intended to deny the right of the person to sue as executor or administrator, else his capacity to sue as such is admitted. 1 Chit. Pl. 517; 2 Lomax, Ex'rs, 380. The cases of Brown v. Nourse, 55 Me. 230; Langdon v. Potter, 11 Mass. 313; Champlin v. Tilley, 3 Day, 303; and Collins v. Ayers, 13 Ill. 358,—show, on common-law authority, that, where an executor or administrator sues, there must be the plea of ne unques, else no proof of appointment is required. Generally, where one sues in a representative capacity, it need not be proven, unless there is a plea denying it. Chicago Legal News Co. v. Browne, 103 Ill. 817. Where there is a plea of general issue, or other plea to the merits, it admits the capacity of the plaintiff to sue. Alderman v. Finley, 52 Am. Dec. 244; Pullman v. Upton, 96 U. S. 328; 1 Bart. Law Prac. 501; Bank v. Curtis, 36 Am. Dec. 492. So it is where a corporation sues. Our statute was only necessary to require an oath to a plea denying incorporation. I regard the above-named plea as one in abatement, as it goes to the disability of the person suing or sued. But the Massachusetts case says it may be pleaded in bar or abatement.

The second assignment of error is based on an instruction that if Lewis Cole was the agent of the defendants to purchase timber, and, when he entered into the contract with the plaintiff's decedent, he represented that the defendants were partners, and that if the plaintiff's decedent knew no other, and acted on such representation, and sold the timber which came to the hands of the defendants, then they were liable on the contract. I do not consider this instruction good law. I cannot see that, if a corporation appoints an agent to buy timber, his false declaration that stockholders or officers of it are partners

contract, within the scope of his authority, bind the principal as to all the elements of the contract, though particular statements were unauthorized. Crump v. Mining Co., 7 Grat. 352. False and fraudulent statements of an agent, in the course of business within the scope of his authority, bind the principal. His torts done in the course of the principal's business, though unauthorized or forbidden, bind the principal. 1 Am. & Eng. Enc. Law (2d Ed.) 1143, 1151, 1159; Mechem, Ag. § 714. See discussion as to negligence and torts of agents in Bess v. Railway Co., 35 W. Va. 492, 14 S. E. 234; Gillingham v. Railroad Co., 35 W. Va. 588, 14 S. E. 243; Gregory's Adm'r v. Same, 37 W. Va. 606, 16 S. E. 819. From these principles it might seem that such statements by this agent would make the parties liable as partners. But I think they do not afford the test. They do not mean the agent of one man can make another liable by representing that he is the purchaser. The act must be within the scope of authority, and that authorizes him to make only his real employers liable, not others and in a different character. But, though the instruction is bad law, is it reversible error? True, where there is any evidence to sustain the theory of an instruction, it ought to be given, as I stated in Carrico v. Railway Co., 39 W. Va. 100, 19 S. E. 571; but Bloyd v. Pollock, 27 W. Va. 75, and other cases, hold that, if the evidence is so slight to sustain the theory propounded by an instruction, it ought not to be given; and Clay v. Robinson, 7 W. Va. 349, holds that an erroneous instruction does not reverse where it is manifest that the defendant could not have been prejudiced by it. In the application of these principles, regard must be had to the particular case. In this case there was not a syllable of written evidence of the incorporation of any company. Indefinite statements were made by a witness tending to show incorporation in Kentucky; but the parties themselves spoke so indefinitely, vaguely, and perhaps evasively, that it could not possibly justify a jury in finding the fact of incorporation, or justify the court in refusing to set it aside. The parties themselves on the stand frequently spoke of "the firm," referring to this company, thus indicating that they regarded it a partnership. For an appellate court to reverse for failure to give an instruction, the evidence should, at least, fairly present the theory on which it rests, not merely colorably. Industrial Co. v. Schultz, 43 W. Va. 471, 27 S. E. 255.

The third point of error assigned is that the court gave for the plaintiff an instruction to the effect that, before it could find for the defendants on the plea of no partnership, it must find that the defendants were not members of the firm known as J. O. Cole & Co.; and that, if J. O. Cole and C. Crane were, in fact, members of a firm doing business as J. O. Cole &

the fact there were other members of the firm, did not support the issue on the part of defendants; and that, if said defendants were members of the firm, then the jury must find for the plaintiff that Cole and Crane were partners. This point is answered by *Rutter v. Sullivan*, 25 W. Va. 427, holding that, in an appeal against a partnership, if defendants claim that other persons should have been partners, that could be raised only by a plea in amendment filed at rules. So, this matter cannot affect the case.

The fourth point of error is that the court instructed the defense an instruction to the effect that it was the duty of Justice to put the timber into the creeks as soon as possible after it was measured and branded, and deliver it to the Guyandotte river at all events by August 1, 1893; and that if he neglected to do so, and in consequence of his neglect, a portion of the timber was caused to lay over for one or two months, and thereby sap-rot, and deteriorate in value, and that Cole & Co. were put to expense by putting it into the river, then the jury should find in favor of the damage and expense, and allow it as credit on the unpaid purchase price. The court gave this instruction, but with the addition of the words, "unless the jury find that the delay was caused by the acts of the defendants themselves; and if the jury find that the defendants caused the delay, and afterwards took the timber and credited Alonzo Trump with it, then the plaintiff is not responsible for the loss occasioned by the delay."

The defense claimed that the plaintiff failed to deliver the logs by the time stipulated, and that a large number were left in the woods and not delivered, whereby they were compelled to bring them out at expense, and that the logs lay in the woods a long time and suffered injury from sap-rot, and for expense and injury the defendants claim large recoupment. In answer to this, the plaintiff claimed that, before delivery completed, the defendants financially failed, and a receiver was appointed for the firm, and that these receivers were attached as its property, and were to be paid by the receivers as such, and that such expense in delivery and injury from sap-rot was from the defendants' own fault. The plaintiff claimed that recoupment for failure to execute the contract cannot be claimed, if the failure is attributable to the fault of the other party. See *Trump v. Gatch*, 71 Am. Dec. 635; *Chapman v. Chase*, 34 Mich. 375; *Hill v. Sibley*, 56 Ga. Wat. Set-Off, 540.

On the 1st June, 1893, J. O. Cole & Co. had been so involved that they made an assignment for the benefit of creditors, and receivers were appointed for their property. Was Justice to find for the plaintiff without hope for payment?

The failure to deliver by August 1, 1893, was not the fault of Justice. If this amendment had not been made to the instruction, it would have been error against the plaintiff, as it excluded the evidence of defendants' inability to comply with their contract, and told the jury that if there was failure to deliver, and

the logs lay in the woods and sap-rotted, they must allow a recoupment therefor. *McCreech's Adm'x v. Railroad Co.*, 43 W. Va. 110, 27 S. E. 327.

The fifth assigned error is that the evidence showed that J. O. Cole & Co. was a corporation, not a partnership, yet judgment went against Cole & Crane as partners. As said above, there was no evidence at all adequate to show an incorporation, and, the finding of the jury covering this matter, we cannot reverse it. "The weight of the evidence is for the jury, and, unless it plainly preponderates against the verdict, it will not be disturbed." *Scott v. Railroad Co.*, 43 W. Va. 484, 27 S. E. 211.

The sixth assignment of error is that against plain evidence that a large part of the timber was not delivered in time, in fact not at all, but left in the woods and in branch streams of Guyan river, and deteriorated from sap-rot, and the defendants had to spend money to get it out, yet the jury wholly ignored recoupment under those facts. Now, the evidence was conflicting as to whether all the timber was delivered, and as to deterioration, and I might assign this as a reason for refusing to set aside the verdict. But on the merits of the case was a mass of evidence, and I see no reason for reversing the solution of the controverted case furnished by the verdict and judgment. I conclude from the record that the jury took the plaintiff's demand under the contract based on the number of logs credited to Justice on the company books when branded by the company, and which went to the hands of the company, and then abated an amount to cover getting out the logs as expense incurred by the company, and found the balance for the plaintiff, and refused any recoupment for sap-rot, because the jury attributed it to the fault of the defendants. The difference between the demand and the verdict, and the evidence as to cost, lead me to this conclusion. For these reasons we affirm the judgment.

TRUMP v. TIDEWATER COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
April 1, 1899.)

PLEADING — DEMURRER — MOTION TO EXCLUDE
PLAINTIFF'S EVIDENCE—WAIVER—APPEAL—
RECORD—REVIEW.

1. A declaration contains several good causes of action, some of which are defectively stated. The demurrer thereto is properly overruled.

2. Such technical defects to good causes of action may be cured by the evidence, unless proper objection to the admission of such evidence, or motion to exclude the same, is made in due time.

3. A motion to exclude the plaintiff's evidence for insufficiency is waived by the defendant after such motion is made introducing his evidence, as his evidence may cure the defects in the plaintiff's.

4. Instructions copied into the record, but not in some manner made a part thereof, will not be considered by this court.

decided preponderance or weight of the evidence. In cases of doubt, the benefit is given to the judgment of the lower court.

(Syllabus by the Court.)

Error to circuit court, McDowell county; R. C. McLaugherty, Judge.

Action by Fred Trump, by Lucy A. Dillon, his next friend, against the Tidewater Coal & Coke Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Rucker, Keller & Hamill, for plaintiff in error. I. C. Herndon and Chapman & Gillespie, for defendant in error.

DENT, P. In the case of Fred Trump, etc., against the Tidewater Coal & Coke Company, being a writ of error from a judgment of the circuit court of McDowell county in favor of the plaintiff for the sum of \$510, the defendant relies on the following assignment of errors: First, the overruling of the demurrer to the declaration; second, not sustaining the motion to strike out plaintiff's evidence; third, an erroneous instruction given; fourth, overruling the motion to set aside the verdict as contrary to the law and evidence.

The declaration, as set out, appears to be amply sufficient to satisfy the requirements of section 29, c. 125, Code, and the former decisions of this court. There is nothing omitted therefrom "so essential to the action that judgment according to law and the very right of the cause cannot be given." *Davidson v. Railway Co.*, 41 W. Va. 407, 23 S. E. 593; *Poling v. Railroad Co.*, 38 W. Va. 645, 18 S. E. 782; *Berns v. Coal Co.*, 27 W. Va. 289; *Hawker v. Railroad Co.*, 15 W. Va. 628. The objections urged are purely technical and fine spun, and certainly fail to show that the defendant was taken by surprise. The allegation that the defendant "negligently and wrongfully failed to provide a reasonably safe place to work" is stronger than if it used in lieu thereof, "failed to use ordinary care," as the former expression necessarily includes the latter. To negligently and wrongfully fail to do anything is to fail to use ordinary care in doing it. The declaration is undoubtedly good in so far as it charges failure to furnish a safe place to work and to furnish safe machinery, and the court did not err in overruling the demurrer. *Wheeling v. Black*, 25 W. Va. 266; *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. 827. Nor is it insufficient in that it fails to allege that the boy did not possess the necessary experience, knowledge, and skill to appreciate and guard himself against the increased danger; for it does allege that, after he was directed to do more dangerous work than that for which he had been employed, the defendant wrongfully and negligently "failed to instruct, caution, and direct the plaintiff in discharge of the said

defendant not to so caution and instruct plaintiff as to his new duties. Taking the allegations of the declaration as true, defendant is certainly liable thereunder. *Berns v. Coal Co.*, 27 W. Va. 289. A general demurrer to a declaration stating several causes of action, all of which are good, but some of which are stated defectively by mere technical omission, must be overruled. And, if the defendant desires to take advantage of such technical imperfections in the declaration, he must do so when the proof of such defective omissions is offered by objection to the admission thereof as unwarranted by the allegations or motion to exclude the same so as to afford the plaintiff opportunity to amend his allegations to correspond with his proof; otherwise, the defendant will be presumed to have waived all objection to such amendable defects in the declaration in so far as fully supplied by the proof. Code, c. 131, § 8.

The defendant moved to exclude the whole of plaintiff's evidence as insufficient to sustain the issue. This motion was waived by reason of the defendant afterwards introducing its evidence in defense. *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596.

The instructions objected to by defendant are not a part of the record, and cannot be considered. *Winters v. Null*, 31 W. Va. 450, 7 S. E. 443.

The motion to set aside the verdict cannot be sustained, unless the evidence as a whole is clearly insufficient, or plainly and decidedly preponderates against the same. The circuit court having overruled the motion, its judgment is entitled to peculiar respect, and will not be disturbed, unless manifestly erroneous. These principles have been so often repeated lately that it seems a matter of almost useless labor to again repeat them. When negligence is a matter of law merely, it is a question for the court; but when it is a mixed question of law and fact, or a mere question of fact, it is for the jury. In this case it comes under the second head. The facts are as follows: A boy, Trump, 14 years of age, is employed to take checks off of coal cars by the defendant. Somehow his duties are changed, and he undertakes to cut loose cars. One of the cars is defective, and the place where he works is dark, and by reason thereof, and by his inexperience and unskillfulness, he is crushed between the cars, and his legs broken. The gist of the action is placing this inexperienced boy without proper instructions, in a dangerous place, to work with defective machinery. To a boy with proper experience and instruction the danger and defects would have been avoided, and no accident would have occurred. Mr. Grantham, the mine boss, says he did not send the boy to cut the cars loose, on account of his inexperience in such work, but to go to Cicer Ross' door, and attend it, and let Cicero do the cutting loose. In this he appears to be correct.

loose, and he said he would rather cut loose, because it was so lonesome at the door." This evidence is apparently sufficient to overcome Trump's, but the jury saw the witnesses, and for some reason gave the weight and credibility to Trump. This was their province, with which this court is powerless to interfere, without disregarding the constitutional guaranty of right of jury trial. *Young v. Railroad Co.*, 44 W. Va. 218, 28 S. E. 932; *Sisler v. Shaffer*, 43 W. Va. 469, 28 S. E. 721; *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669. Granham testified that it was his duty to inspect the cars, but he did not know how long before it was that he inspected the defective car by which Trump was hurt. From the existence of the defect and this evidence the jury had the right to infer neglect in this respect, and the court cannot control such inferences. Trump's evidence may be false, and his recovery unjust, but it rests on the verdict of a jury, sustained by the judgment of the trial court, who saw the contradicting witnesses and heard their testimony; and there appears to be no error of law, or no such decided preponderance of evidence, as will justify the interference of this court. The judgment is therefore affirmed.

MEMORANDUM DECISIONS.

ARMWOOD v. BIRD. (Supreme Court of North Carolina. Nov. 15, 1898.) Appeal from superior court, Sampson county. No opinion. Affirmed.

BANDY v. WILSON. (Supreme Court of North Carolina. Dec. 6, 1898.) Appeal from superior court, Catawba county. No opinion. Affirmed.

BLACKNALL v. ROWLAND. (Supreme Court of North Carolina. Dec. 20, 1898.) Appeal from superior court, Durham county. No opinion. Affirmed.

BRANER CATTLE CO. v. RAILWAY CO. (Supreme Court of North Carolina. Dec. 20, 1898.) Appeal from superior court, Jackson county. No opinion. Affirmed.

BRYAN v. BILLUPS. (Supreme Court of North Carolina. Oct. 18, 1898.) Appeal from superior court, Halifax county. No opinion. Affirmed.

CURRAGE v. WHITE. (Supreme Court of North Carolina. Nov. 22, 1898.) Appeal from superior court, Cabarrus county. No opinion. Affirmed.

Affirmed.

CHEEK v. RAILROAD. (Supreme Court of North Carolina. Nov. 1, 1898.) Appeal from superior court, Alamance county. No opinion. Motion to docket and dismiss plaintiff's appeal under the seventeenth rule allowed.

COBB v. MORRIS. (Supreme Court of North Carolina. Sept. 30, 1898.) Appeal from superior court, Pasquotank county. No opinion. Affirmed.

COLLINS v. PETTITT. (Supreme Court of North Carolina. Oct. 25, 1898.) Appeal from superior court, Halifax county. No opinion. Reversed.

DOWD v. McDONALD. (Supreme Court of North Carolina. Nov. 15, 1898.) Appeal from superior court, Moore county. No opinion. Motion for new trial for newly-discovered evidence allowed.

DURHAM FERTILIZER CO. v. SANDERS. (Supreme Court of North Carolina. Oct. 28, 1898.) Appeal from superior court, Sanders county. No opinion. Motion to docket and dismiss defendant's appeal under the seventeenth rule allowed.

GATLING v. MITCHELL. (Supreme Court of North Carolina. Oct. 4, 1898.) Appeal from superior court, Northampton county. No opinion. Affirmed.

GRAY v. EVERETT. (Supreme Court of North Carolina. Nov. 15, 1898.) Appeal from superior court, Cumberland county. No opinion. Affirmed.

HALL v. CAIN. (Supreme Court of North Carolina. Nov. 11, 1898.) Appeal from superior court, Cumberland county. No opinion. Motion to docket and dismiss defendant's appeal under the seventeenth rule allowed.

HAMILTON v. WAUGH. (Supreme Court of North Carolina. Dec. 6, 1898.) Appeal from superior court, Ashe county. No opinion. Affirmed.

HOBBS v. HOBBS. (Supreme Court of North Carolina. Nov. 3, 1898.) Appeal from superior court, Sampson county. No opinion. Motion to docket and dismiss defendant's appeal under the seventeenth rule allowed.

JOHNSTON v. WILLIAMS. (Supreme Court of North Carolina. Oct. 10, 1898.) Appeal from superior court, Warren county. No opinion. Affirmed.

JORDAN v. GREENSBORO FURNACE CO. (Supreme Court of North Carolina. Nov. 9, 1898.) Appeal from superior court, Guilford county. No opinion. Affirmed.

Motion of defendant to reinstate appeal allowed.

KING v. MECHANICS' HOME ASS'N. (Supreme Court of North Carolina. Nov. 1, 1898.) Appeal from superior court, New Hanover county. No opinion. Motion to docket and dismiss defendant's appeal under the seventeenth rule allowed.

KLUTTZ v. BINGHAM. (Supreme Court of North Carolina. Nov. 22, 1898.) Appeal from superior court, Rowan county. No opinion. Affirmed. **FURCHES, J.**, not sitting.

LAMB v. HAND. (Supreme Court of North Carolina. Oct. 11, 1898.) Appeal from superior court, Pasquotank county. No opinion. Affirmed.

McMICHAEL v. HOSKINS. (Supreme Court of North Carolina. Nov. 1, 1898.) Appeal from superior court, Guilford county. No opinion. Motion to docket and dismiss defendant's appeal under the seventeenth rule allowed.

MALLARD v. CARR. (Supreme Court of North Carolina. Nov. 2, 1898.) Appeal from superior court, Duplin county. No opinion. Motion to docket and dismiss defendant's appeal under the seventeenth rule allowed.

MARTIN v. JONES. (Supreme Court of North Carolina. Oct. 12, 1898.) Appeal from superior court, Franklin county. No opinion. Motion to docket and dismiss plaintiff's appeal under the seventeenth rule allowed.

MORRIS v. JONES. (Supreme Court of North Carolina. Nov. 1, 1898.) Appeal from superior court, Greene county. No opinion. Motion to docket and dismiss defendant's appeal under the seventeenth rule allowed.

ROBERTS v. COCKE. (Supreme Court of North Carolina. Dec. 17, 1898.) Appeal from superior court, Buncombe county. Dismissed.

SHOEMAKER v. HAMBY. (Supreme Court of North Carolina. Nov. 23, 1898.) Appeal from superior court, Wilkes county. No opinion. Affirmed.

STANTON v. SPRUILL. (Supreme Court of North Carolina. Oct. 21, 1898.) Appeal from superior court, Wake county. No opinion. Motion to docket and dismiss plaintiff's appeal under the seventeenth rule allowed.

STATE v. ARRINGTON. (Supreme Court of North Carolina. Oct. 18, 1898.) Appeal from superior court, Nash county. No opinion. Affirmed.

STATE v. CRAFT. (Supreme Court of North Carolina. Oct. 18, 1898.) Appeal from superior court, Pitt county. No opinion. Affirmed.

STATE v. VENABLE. (Supreme Court of North Carolina. Nov. 23, 1898.) Appeal from superior court, Surry county. No opinion. Affirmed.

THOMPSON v. THOMPSON. (Supreme Court of North Carolina. Oct. 18, 1898.) Appeal from superior court, Wilson county. No opinion. Affirmed.

TREACY, MORRIS & CO. v. SMITH et al (Supreme Court of North Carolina. Sept. Term. 1898.) Appeal from superior court, Moore county. No opinion. This case is governed by *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417. Reversed.

TROLLINGER v. RAILROAD. (Supreme Court of North Carolina. Dec. 20, 1898.) Appeal from superior court, Alamance county. No opinion. Motion to docket and dismiss plaintiff's appeal under the seventeenth rule allowed November 1st. Motion of plaintiff to reinstate appeal filed.

WALKER v. MERCER. (Supreme Court of North Carolina. Nov. 9, 1898.) Appeal from superior court, New Hanover county. No opinion. Affirmed.

WILLIAMSON v. COCKE. (Supreme Court of North Carolina. Dec. 17, 1898.) Appeal from superior court, Buncombe county. No opinion. Motion of plaintiff for new trial on the ground that the trial judge died before making out the case on appeal allowed.

WILMINGTON IRON WORKS v. DARBY. (Supreme Court of North Carolina. Nov. 1, 1898.) Appeal from superior court, New Hanover county. No opinion. Motion to docket and dismiss plaintiff's appeal under the seventeenth rule allowed.

WINKLER v. WINKLER. (Supreme Court of North Carolina. Dec. 6, 1898.) Appeal from superior court, Burke county. No opinion. Affirmed.

BRYSON v. WHILDEN. (Supreme Court of South Carolina. April 19, 1899.)

McIVER, C. J. On hearing the motion herein for further time to perfect the appeal herein, and after argument of counsel for and against said motion, ordered that the appellant be, and he is hereby, allowed until the 30th day of April, 1899, to serve the case and exceptions herein on the respondent's counsel, and to do such other things as may be necessary to perfect the appeal, and that the case be set down for hearing at the present term of the court, at the call of the Eighth circuit, when it will be called peremptorily.

SMITH v. LOWERY. (Supreme Court of South Carolina. April 18, 1899.)

McIVER, C. J. The respondents on due notice having moved this court to recommit the above-stated case to his honor, Judge R. C. Watts, for a statement from the judge as to what occurred at the hearing before him on the application for the injunction set out in the

use," it is, on motion of W. P. Pollock and ward McIver, respondent's attorneys, ordered that the case be recommitted to the circuit court for a statement by his honor, Judge Watts, as to what occurred before him when he granted the order appointing a receiver, as set out in the "case," folios 23 to 27. That said statement may be attached to, and shall be considered as a part of, the "case" as printed.

TATE ex rel. GARRISON v. CITY OF LAURENS et al. (Supreme Court of South Carolina. April 25, 1899.)
McIVER, C. J. This cause having been heard upon the pleadings herein, and it appearing therefrom that certain allegations of relator's petition have been denied by the respondent Laurens Cotton Mill, which said denials raise issues of fact necessary to be determined in said cause, and this court having granted leave (32 S. E. 696) to the relator to apply for trial of the said issues of fact between him and the respondent Laurens Cotton Mill, one of the methods required by law, and it being appearing that notice of the motion

for this order has been duly served upon the attorneys of record for the said respondent Laurens Cotton Mill, now, therefore, upon motion of J. B. Park, relator's attorney, it is ordered that this case be, and the same hereby is, referred to John F. Bolt, to take the testimony herein upon those allegations of relator's petition denied by the said respondent Laurens Cotton Mill, and report the same, with his findings thereon, to this court within 30 days from the date of this order.

JOHNSON v. STATE BOARD OF AGRICULTURE. (Supreme Court of Appeals of West Virginia. April 1, 1899.) Application by John J. Johnson for writ of mandamus against the state board of agriculture. Denied.

BRANNON, J. John T. Johnson, having a contract with the state for furnishing stationery for state use, under chapter 18, Code 1891, seeks of this court a mandamus to compel the state board of agriculture to buy stationery of him. The principles involved in this case are the same as those stated in the case of Miller v. Board (this day decided) 32 S. E. 1007. Mandamus refused.

END OF CASES IN VOL. 32.

*

ABANDONMENT.

Of remedies or proceedings.

See "Appeal and Error," § 12.

ABATEMENT AND REVIVAL.

§ 1. Death of party and revival of action.

A court has power during the same term to amend an order of substitution by substituting a deceased party's heirs in place of his administrator.—*Shull v. Caughman* (S. C.) 301.

ACADEMIES.

See "Schools and School Districts," § 1.

ACCEPTANCE.

Of goods sold in general, see "Sales," § 4.

ACCOMMODATION PAPER.

See "Bills and Notes."

ACCORD AND SATISFACTION.

See "Compromise and Settlement."

A plea of accord and satisfaction may be supported by parol evidence that notes were accepted in settlement without producing the notes.—*A. P. Brantley Co. v. Lee* (Ga.) 101.

ACCOUNT.

See "Account, Action on."

§ 1. Operation and effect of accounting.

Receipt by servant of a statement of account and continuance of employment for a year without objection held to raise presumption of correctness.—*Goldsmith v. Latz* (Va.) 483.

ACCOUNT, ACTION ON.

A salaried officer of a corporation, whose yearly compensation is fixed, may sue the corporation in an action on an account.—*Talbotton R. Co. v. Gibson* (Ga.) 151; *Gibson v. Talbotton R. Co.*, *Id.*

Where defendant admits debt, but claims it had been paid by agreement to third person, record of judgment against plaintiff by such third person for a balance held admissible to establish fact of such balance due.—*Ray v. Fleetwood* (Ga.) 156.

ACCRUAL.

Of right of action, see "Limitation of Actions," § 2.

ACKNOWLEDGMENT.

Operation and effect of admissions as evidence, see "Evidence," § 5.

§ 1. Taking and certificate.

An acknowledgment by a husband, and a privy examination of his wife, are not invalidated because taken by an officer who was related

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to them.—*McAllister v. Purcell* (N. C.) 715; *Appeal of Worth*, *Id.*

Certificate of acknowledgment of deed by corporation failing to show that officer executing it was sworn as to the facts contained in the certificate, as required by Code, c. 73, § 5, is fatally defective.—*Abney v. Ohio Lumber & Mining Co.* (W. Va.) 256.

ACTION.

Abatement, see "Abatement and Revival."

Accrual, see "Limitation of Actions," § 2.

Jurisdiction of courts, see "Courts."

Laches, see "Equity," § 2.

Limitation by statutes, see "Limitation of Actions."

Actions between parties in particular relations.

See "Partnership," § 1.

Co-tenants, see "Partition," § 1.

Actions by or against particular classes of parties.

See "Carriers," §§ 1-9; "Corporations," § 2; "Counties," § 4; "Executors and Administrators," § 6; "Guardian and Ward," § 3; "Partnership," § 2; "States," § 2.

Particular causes or grounds of action.

See "Bills and Notes," § 5; "Bonds," § 1; "Death," § 1; "Forcible Entry and Detainer," § 1; "Insurance," §§ 15, 16; "Libel and Slander," § 1; "Negligence," §§ 1, 2; "Taxation," § 6; "Waste."

Breach of contract, see "Contracts," § 3; "Vendor and Purchaser," § 5.

— of covenant, see "Covenants," § 3.

— of warranty, see "Sales," § 7.

Personal injuries, see "Carriers," §§ 3-9; "Railroads," §§ 6-12.

Price of goods, see "Sales," § 6.

— of land, see "Vendor and Purchaser," § 4.

Recovery of goods delivered by seller, see "Sales," § 6.

— of payment, see "Payment," § 3.

Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 4.

Particular forms of action.

See "Account, Action on"; "Ejectment"; "Replevin."

Particular forms of special relief.

See "Account"; "Creditors' Suit"; "Divorce"; "Injunction"; "Partition," § 1; "Quieting Title."

Admeasurement or assignment of dower, see "Dower," § 2.

Alimony, see "Divorce," § 1.

Establishment and enforcement of right of exemption, see "Exemptions," § 1.

— and enforcement of trust, see "Trusts," § 5.

— of boundaries, see "Boundaries," § 1.

— of will, see "Wills," § 4.

Reformation of written instrument, see "Reformation of Instruments."

Removal of cloud on title, see "Quieting Title."

Setting aside assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 2.

— fraudulent conveyance, see "Fraudulent Conveyances," § 3.

Particular proceedings in actions.

See "Appearance"; "Continuance"; "Costs"; "Damages"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Reference"; "Trial"; "Venue."

Notice of action, see "Process," § 2.

Revival, see "Abatement and Revival," § 1.

Particular remedies in or incident to actions.

See "Attachment"; "Discovery"; "Garnishment."

Proceedings in exercise of special jurisdictions.

Criminal prosecutions, see "Criminal Law."

Suits in equity, see "Equity."

Review of proceedings.

See "Appeal and Error"; "Certiorari"; "Equity," § 7; "Exceptions, Bill of"; "Judgment," § 5; "New Trial."

§ 1. Grounds and conditions precedent.

An action is not maintainable for recovery of damages arising from alleged bad faith of defendant in refusing to pay more than a certain amount on an account alleged to be due.—*Atlanta Elevator Co. v. Fulton Bag & Cotton Mills* (Ga.) 541.

A taxpayer whose property is destroyed by fire, through neglect of a company with which the city has contracted for water for the extinguishment of fires, may, in his own name, sue the company for the damages sustained.—*Gorrell v. Greensboro Water-Supply Co.* (N. C.) 720.

§ 2. Nature and form.

A complaint held to declare on a note, and not for equitable relief, and hence properly brought on the law side.—*Bolt v. Gray* (S. C.) 148.

An action against a railroad company for negligence in failing to transport plaintiff to her destination held an action of tort.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

§ 3. Joinder, splitting, consolidation, and severance.

It was held proper to consolidate a claim in execution proceedings with a petition to enjoin prosecution of the claim.—*White v. Interstate Building & Loan Ass'n* (Ga.) 26.

A creditor cannot sue his debtor for an amount admitted to be due on an account resulting from a single transaction, and then bring second action for the balance.—*Atlanta Elevator Co. v. Fulton Bag & Cotton Mills* (Ga.) 541.

ADJOINING LANDOWNERS.

See "Boundaries."

ADJUDICATION.

Of courts in general, see "Courts," § 1.

ADJUSTMENT.

Of loss within insurance policy, see "Insurance," § 14.

ADMEASUREMENT.

Of dower, see "Dower," § 2.

ADMINISTRATION.

Of charity, see "Charities," § 2.

Of estate of decedent, see "Executors and Administrators."

Of trust property, see "Trusts," § 3.

ADMISSIONS.

As evidence, see "Evidence," § 5.

ADVERSE POSSESSION.**§ 1. Nature and requisites.**

Sole possession and enjoyment of land for statutory period is sufficient to constitute adverse possession.—*Brown v. Morris*, 3 687.

ADVERTISEMENT.

Publication of process, see "Process," § 2.

AFFIDAVITS.

Nonresident commissioner of deeds minister in another state a pauper.—*Baker v. Magrath* (Ga.) 370.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

AGRICULTURE.

Authority for payment out of the treasury of any salaries or expenses of the agriculture held repealed by Acts 1897-717.—*Marye v. Board of Agriculture* (Va.)

Acts 1897-98, p. 717, held to not permit of the salary of the commissioner of agriculture out of the treasury.—*Marye v. Bd. of Agriculture* (Va.) 44.

AIDER BY VERDICT.

In civil actions, see "Pleading," § 8.

ALIENATION.

Of affections, see "Husband and Wife," § 1.

ALIMONY.

See "Divorce," § 1.

ALLOWANCE.

To surviving wife, husband, or child of decedent, see "Executors and Administrators," § 2.

AMENDMENT.

On appeal or writ of error, see "Appeal or Error," §§ 14-23.

Of particular legal proceedings.

See "Judgment," § 4; "Pleading," § 5; "Process," § 3.

ANIMALS.

Carriage of live stock, see "Carriers," § 2. Injuries from operation of railroads on roads," §§ 6-12.

The owner of a dog has such a property therein as to entitle him to recover for a full injury thereto.—*Salley v. Manchester R. Co.* (S. C.) 526; *Zeigler v. Same*, id.

ANNULMENT.

Of will, see "Wills," § 4.

ANSWER.

In pleading, see "Equity," § 3; "Pleading," § 3.

APPEAL AND ERROR.

See "Certiorari"; "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 3.

Costs, see "Costs," § 3.

Review in particular civil actions.

See "Ejectment," § 2; "Negligence," § 2.

Review of criminal prosecutions.

See "Criminal Law," §§ 14-17; "Homicide," § 10.

Review of proceedings of justices of the peace.

See "Justices of the Peace," § 3.

§ 1. Decisions reviewable.

A fast writ of error will not lie on refusal to dissolve injunction.—Smith v. Willis (Ga.) 92.

Provision for fast bill of exceptions, under Civ. Code, § 5540, is confined to the cases mentioned therein.—Jones v. Martens-Turner Co. (Ga.) 137.

A writ of error does not lie to refusal to order a sale of the property levied on under attachment, because perishable, or because of expense in keeping the same.—Jones v. Martens-Turner Co. (Ga.) 137.

A writ of error does not lie except from a judgment final as to some material party.—Jones v. Martens-Turner Co. (Ga.) 137.

An action *held* to involve construction of a contract in which was a good-faith contention for more than \$200, and hence appealable to the supreme court.—Horner School v. Wescott (N. C.) 885.

Finding of the circuit judge that nonresident witnesses are material, and the granting of a change of venue on that ground, are not reviewable.—McFail v. Barnwell County (S. C.) 417; Neal v. Same, *Id.*

A writ of error lies to an order of the circuit court setting aside the verdict of a jury, on which judgment of a justice is founded, and directing a new trial.—Cleavenger v. Rohrbaugh (W. Va.) 1016.

§ 2. Right of review.

Plaintiff, who amends to meet objection, cannot thereafter say that amendment was unnecessary.—Glover v. Savannah, F. & W. Ry. Co. (Ga.) 876; Savannah, F. & W. Ry. Co. v. Glover, *Id.*

An administrator *held* entitled to prosecute an appeal from an adverse decree against his decedent, in a suit to set aside a fraudulent conveyance of land necessary to pay debts of the estate.—O'Connor v. O'Connor (W. Va.) 276.

§ 3. Presentation and reservation in lower court of grounds of review—Issues and questions in lower court.

An objection that a note sued on appeared to have been materially altered cannot be first urged on appeal.—Tate v. Bank of State of New York (Va.) 476.

§ 4. — Objections and motions and rulings thereon.

An order granting a temporary injunction will not be reversed because of error not urged in the lower court.—Baxter v. Mattox (Ga.) 94; Mattox v. Baxter, *Id.*

Grounds of exceptions to a refusal to nonsuit will not be considered which were not presented or passed on with the motion for nonsuit.—Shull v. Caughman (S. C.) 301.

(S. C.) 518.
The objection that a temporary injunction should not be dissolved on affidavits may be raised for the first time on appeal.—Cudd v. Calvert (S. C.) 503.

Where it does not appear that defendant, on his demurrer being overruled, applied for leave to answer over, error cannot be attributed to the trial court in failing to make provision therefor.—Stemmermann v. Lilienthal (S. C.) 535.

An objection that the court relied on a counsel's verbal statement of facts in support of a motion to amend a pleading cannot be made for the first time on appeal.—Millan v. Southern Ry. Co. (S. C.) 539.

Question of jurisdiction may be raised at any time by the parties or by the court of its own motion.—Whetstone v. Livingston (S. C.) 561.

§ 5. — Exceptions.

An exception "to the charge as given" is too general, under Code, § 550.—Pierce v. North Carolina R. Co. (N. C.) 399.

Exceptions to the submission of certain special issues to the jury, for which no grounds of objection are stated, cannot be reviewed.—Bank of Fayetteville v. Nimocks (N. C.) 717.

An appeal cannot be considered where no exception is taken on the ground complained of.—Kellar v. Pagan (S. C.) 353.

Exceptions to requested instructions by number, not showing what the instructions were, do not bring them before the court for consideration.—Sloan v. Pelzer (S. C.) 431.

An exception that the court erred in holding there was any competent evidence that a contract alleged in the complaint existed is too general.—Sloan v. Pelzer (S. C.) 431.

An exception that no testimony was offered by plaintiff to establish a certain issue *held* too general.—Hiers v. Risher (S. C.) 509.

Where exceptions to that part of a decree which is in favor of some of the defendants are withdrawn, they cannot be held liable on appeal.—Eldred v. Iredell (S. C.) 897.

§ 6. — Motions for new trial.

Assignment of error in motion for new trial to ruling on evidence will not be considered, unless the evidence is set forth in the motion, so that the question can be decided without reference to other parts of record.—Hicks v. Mather (Ga.) 901.

Where defendant in action on policy assumes that there is evidence of waiver of forfeiture, he cannot object to a charge assuming such evidence. The proper remedy is by motion for new trial.—Kingman v. Lancashire Ins. Co. (S. C.) 702.

§ 7. Parties.

A bill of exceptions was *held* amendable by inserting the names of additional plaintiffs in error.—Bennett v. Trust Co. of Georgia (Ga.) 625.

Motion to make heirs parties to an action for damages to ancestor's land, where defendant asked assessment of permanent damages, *held* properly granted on appeal.—Hocutt v. Wilmington & W. R. Co. (N. C.) 681.

A defendant demanding assessment of permanent damages for injuries to a decedent's land cannot object that the administrators and heirs were joined as plaintiffs.—Hocutt v. Wilmington & W. R. Co. (N. C.) 681.

§ 8. Requisites and proceedings for transfer of cause.

Where case has been improperly docketed at the then term of court, it will be transferred to

Act 1897, amending Civ. Code, § 4466, held insufficient, where it failed to state appellant's inability from poverty to pay costs.—*Josey v. Sheorn* (Ga.) 118.

Motion to amend affidavit on appeal in forma pauperis held properly denied, unless it appears omitted words were left out by accident or mistake.—*Josey v. Sheorn* (Ga.) 118.

Where bill of review is predicated on newly-discovered evidence, and more than two years had elapsed after decree sought to be reviewed, an appeal will not lie on dismissal of the bill of review.—*Wethered v. Elliott* (W. Va.) 209.

§ 9. Record and proceedings not in record.

When the record is insufficient to enable the court to pass generally on the questions involved, it will not direct the clerk to send up additional record, but will affirm the judgment.—*Barnett v. New South Building & Loan Ass'n* (Ga.) 608.

Bill of exceptions complaining of the overruling of certiorari sued out to review in the superior court a judgment of the circuit court denying a motion for new trial held sufficiently specific.—*Phoenix Ins. Co. v. Gray* (Ga.) 948.

When the transcript on appeal reaches the clerk of the supreme court, it becomes part of the record, and the parties have no further control over it.—*Brafford v. Reed* (N. C.) 726.

Under rule 18 of the circuit court, requiring the grounds for nonsuit to be stated in the motion, grounds not so stated will not be considered.—*Sloan v. Pelzer* (S. C.) 431.

Refusal to charge requests will not be reviewed where the "case" fails to show that they were submitted as set out in the exceptions.—*Sloan v. Pelzer* (S. C.) 431.

Exceptions assailing the reasons given by the court for a ruling will not be considered, the question being whether the ruling was correct.—*Sloan v. Pelzer* (S. C.) 431.

A bill of exceptions made a part of the record cannot be considered, where the law order book of circuit court does not show it executed and made part of the record.—*Adkins v. Globe Fire Ins. Co.* (W. Va.) 194.

Code 1891, c. 131, § 9, does not prohibit the supreme court from considering the case, where the facts and not the evidence are certified.—*King v. Jordan* (W. Va.) 1022.

Instructions copied into the record, but not made a part thereof, will not be considered.—*Trump v. Tidewater Coal & Coke Co.* (W. Va.) 1035.

§ 10. Assignment of errors.

An exception alleging that the court erred in holding that an answer was frivolous will not be considered where it fails to specify in what particulars the court erred.—*Badham v. Brabham* (S. C.) 444.

An exception alleging error in the refusal of a certain instruction will not be considered where it fails to point out any error in such refusal.—*Rawles v. Johns* (S. C.) 451; *Same v. Newman*, Id.

§ 11. Briefs.

Exceptions not mentioned in the brief or argument for plaintiff in error are abandoned.—*Holleman v. Bradley Fertilizer Co.* (Ga.) 83.

An exception which appellant does not refer to in his brief is presumed to be abandoned.—*Merrimon v. Lyman* (N. C.) 732.

omitting any error, where, from its recitals, it is manifest who was plaintiff in error.—*Joiner v. Singletary* (Ga.) 90.

Unless it affirmatively appears that bill of exceptions was served within 10 days, and filed with clerk of court within 15 days after certification by judge, the writ of error will be dismissed.—*Vickers v. Sanders* (Ga.) 102.

If a motion to dismiss is not in writing, as required, the appeal will not be dismissed, though the record was not printed when the case was reached.—*Brafford v. Reed* (N. C.) 726.

Failure to file all the transcript available at the first term after the trial below (Sup. Ct. Rule 5, 121 N. C. 694, 28 S. E. v.), and to ask for a certiorari to complete it, is ground for dismissal.—*Norwood v. Pratt* (N. C.) 979.

Under Code Civ. Proc. § 366, held not mandatory on the court to dismiss an appeal not called for trial at the second term.—*Manuel v. Loveless* (S. C.) 421.

§ 13. Hearing and rehearing.

Unless the error is manifest, a rehearing will be denied, and hence it is not sufficient that respectable authority may be found appearing to prove the decision erroneous.—*Capehart v. Burrus* (N. C.) 378.

A petition to rehear must contain a concise statement of the facts or law overlooked or erroneously decided.—*Weathers v. Borders* (N. C.) 881.

Statement of counsel in argument, that the opposing party appeared and was represented at the hearing below, will not be considered, where the "case" does not show it.—*Whetstone v. Livingston* (S. C.) 561.

Rehearing held unnecessary in order to give petitioners relief.—*Eldred v. Iredell* (S. C.) 897.

§ 14. Review—Scope and extent in general.

Where evidence is conflicting, but sufficient to support the judgment, it will not be disturbed.—*Paulk v. Tanner* (Ga.) 99.

In determining whether certiorari was properly granted, the court will consider statements in the answer; but allegations in petition, except as verified by the answer, cannot be considered.—*Heidt v. Canuet* (Ga.) 870.

Decision of trial court that contract set up by defendant was void held not to become the law of the case, where judgment was in favor of defendant.—*Johnson v. Charleston & S. Ry. Co.* (S. C.) 2.

The supreme court will not refuse to consider a question involved as not considered below, unless the record shows that it was not so considered.—*Cudd v. Calvert* (S. C.) 503.

On appeal from an order overruling a demurrer, the court will not consider facts not set out in the pleadings, though admitted.—*Brown v. Bank of Sumter* (S. C.) 816.

Where application by a telegraph company for ascertainment of damages for constructing its line is denied because it has no such right, and judgment is reversed, appellate court will not consider measure of damages.—*Postal Tel. Cable Co. v. Farmville & P. R. Co.* (Va.) 468.

§ 15. — Interlocutory, collateral, and supplementary proceedings and questions.

A grant of a first new trial will not be disturbed where an examination does not take the case out of the provisions of Civ. Code, § 5585.—*Solomon v. Carroll* (Ga.) 579.

take a cross appeal.—*Johnson v. Blake* (N. C.) 397.

Failure to apportion damages to heirs suing jointly *held* not an error of which defendant can complain.—*Hocutt v. Wilmington & W. R. Co.* (N. C.) 681.

Where a defendant, asking assessment of permanent damages resulting from the diversion of a water course, he cannot complain, after such assessment, on appeal, that it was error because there was no evidence that the injury would recur.—*Hocutt v. Wilmington & W. R. Co.* (N. C.) 681.

§ 17. — Amendments, additional proofs, and trial of cause anew.

Right of a nonappealing defendant to amend his plea in superior court after appeal by a co-defendant *held* not affected by the subsequent passage of the pleading act of 1893 and the practice act of 1895.—*Murray v. Marshall* (Ga.) 634.

Though one of two defendants does not join in an appeal to the superior court, he may there amend a plea already entered.—*Murray v. Marshall* (Ga.) 634.

Correction of a mere clerical error in the title of a notice of intention to appeal may be allowed.—*Moody v. Dickinson* (S. C.) 563.

Affidavits of jurors will not be received to show the manner in which they arrived at their verdict, it not being shown to be the result of a mistake.—*Street v. Broadus* (Va.) 466.

§ 18. — Presumptions.

Unless the contrary affirmatively appears, a notice of intention to appeal will be presumed given in time.—*Moody v. Dickinson* (S. C.) 563.

Where it does not appear from record whether process was served, except that the decree says "process duly served or order of publication duly executed," it will be presumed that it was served or executed.—*Styles v. Laurel Fork Oil & Coal Co.* (W. Va.) 227.

Where record shows process or order of publication, and that it was not served or executed as to a particular defendant, declaration in decree that it was served or executed will not raise presumption as to such defendant.—*Styles v. Laurel Fork Oil & Coal Co.* (W. Va.) 227.

§ 19. — Discretion of lower court.

Discretion of judge in granting application for temporary injunction for illegal use of trademark, on conflicting evidence, will not be disturbed.—*Whitley Grocery Co. v. McCaw Mfg. Co.* (Ga.) 113.

The supreme court will not interfere with discretion of trial judge in overruling certiorari on conflicting evidence.—*Hilton & Dodge Lumber Co. v. Browning* (Ga.) 125.

It is not error to dismiss a motion for new trial for failure to file brief of evidence in due time, where no reason for such failure is assigned.—*Berg v. New England Jewelry & Silverware Co.* (Ga.) 137.

Discretion of trial judge in overruling motion for new trial will not be controlled.—*Woodward Lumber Co. v. Tripod Paint Co.* (Ga.) 334.

A refusal of an injunction will not be reviewed, in the absence of abuse of discretion.—*Wright v. Herrington* (Ga.) 608.

Discretion in overruling motion for new trial will not be reviewed, where there was evidence to sustain the verdict.—*Putzel v. Rice* (Ga.) 855.

Discretion of court in refusing a new trial, where there is evidence to sustain the verdict, will not be disturbed.—*South Carolina & G. R. Co. v. Thurman* (Ga.) 863.

Where there is evidence to support the verdict, the discretion of the trial judge in overruling motion for new trial will not be disturbed.—*Newman v. H. B. Clafin Co.* (Ga.) 943.

Discretion of trial court in denying interlocutory injunction in petition to enjoin further progress of a dispossessionary warrant will not be interfered with where there was some evidence to sustain its action.—*Pollock v. National Building & Loan Ass'n* (Ga.) 950.

A ruling of the court under its discretionary authority, under Code, § 423, to set aside a nonsuit, will not be reviewed, unless the discretion was abused.—*Cummings v. Swepson* (N. C.) 966.

Permitting a witness to return and reiterate his former testimony after hearing it contradicted is within the court's discretion.—*Sloan v. Pelzer* (S. C.) 431.

Permitting a witness to be asked, to test his memory, whether he had not signed a bond in another suit and then denied it, *held* not an abuse of discretion.—*Sloan v. Pelzer* (S. C.) 431.

§ 20. — Questions of fact, verdicts, and findings.

Where the entire evidence shows the verdict strongly against the weight of evidence, a judgment granting a second new trial will not be reversed.—*Daniels v. Leonard* (Ga.) 122.

Where, in a close case, the court erred both in accepting and rejecting evidence, there should be a new trial.—*Armstrong v. High* (Ga.) 590.

Where evidence showed plaintiff entitled to recover some amount, a verdict for defendant will be set aside.—*Dwelle v. Blackwood* (Ga.) 593.

A judgment overruling exceptions of fact to the report of an auditor on conflicting evidence will not be disturbed, except for an abuse of discretion.—*Brown v. Georgia Min., Mfg. & Inv. Co.* (Ga.) 601.

There being evidence to authorize the verdict, a refusal of a new trial will not be reversed.—*Phillips v. Rosenheim* (Ga.) 664.

On filing evidence, the discretion of the trial judge in refusing to allow exceptions of fact on accounting by executor will not be disturbed.—*Davidson v. Story* (Ga.) 867; *Story v. Davidson*, *Id.*

In an action for personal injuries, where verdict was directed for defendant, a question whether there was sufficient evidence of negligence to go to the jury will be construed in the light most favorable to plaintiff.—*Dunn v. Wilmington & W. R. Co.* (N. C.) 711.

Finding of the trial court as to which of two trustees was intended, in a charitable devise, was binding on the heirs.—*Keith v. Scales* (N. C.) 809.

There being no testimony offered in support of a proposition of fact, a finding in favor of such proposition presents a reviewable error of law.—*Hiers v. Risher* (S. C.) 509.

A question of fact under a legal issue is not reviewable in the supreme court.—*Hiers v. Risher* (S. C.) 509.

The court will not disturb a verdict as excessive unless it has been influenced by passion, partiality, or prejudice.—*Bailey v. McCance* (Va.) 43.

A verdict on conflicting evidence will not be disturbed.—*Trump v. Tidewater Coal & Coke Co.* (W. Va.) 1035.

er measure had been laid down, where, in view of the large amount of the verdict, it cannot be said that the jury were not misled thereby.—*Central of Georgia Ry. Co. v. Johnston* (Ga.) 78.

Error in the charge of the court on the subject of the burden of proof *held* harmless, where the uncontradicted evidence required the verdict rendered.—*Brunswick Grocery Co. v. Brunswick & W. R. Co.* (Ga.) 92.

Error in instructions as to right of plaintiff to recover *held* harmless, where the jury found plaintiff had such right.—*Edgar v. Walker* (Ga.) 582.

Error in directing a verdict, when there was nothing for the jury to pass on, *held* immaterial.—*Brown v. Georgia Min., Mfg. & Inv. Co.* (Ga.) 601.

A master *held* not injured by an inapplicable instruction.—*Raleigh & G. R. Co. v. Allen* (Ga.) 622.

Error in estimating the value of insured property that was destroyed *held* harmless.—*Corporation of London Assurance v. Paterson* (Ga.) 650.

Error in admitting parol evidence *held* harmless.—*Corporation of London Assurance v. Paterson* (Ga.) 650.

It is not reversible error to admit evidence tending to prove a fact admitted to be true in the pleadings, though the objection may be good in law.—*Battle v. Braswell* (Ga.) 838.

Error in instructing that a conveyance fraudulent as to creditors is void, though for a valuable consideration, and where grantee had no knowledge of the fraud, *held* harmless, where the evidence admitted a finding that grantee in fact knew of the fraud.—*Ernest v. Merritt* (Ga.) 898.

Where the evidence was close and conflicting, the admission of illegal evidence tending to prejudice the jury is ground for reversal.—*Central of Georgia Ry. Co. v. Ross* (Ga.) 904.

Admitting illegal evidence *held* no cause for new trial, where the court charges the jury to disregard it, and where it was not prejudicial.—*Phoenix Ins. Co. v. Gray* (Ga.) 948.

Error in admitting liens to show an alleged cropper was a tenant was harmless, the lease itself showing he was a tenant.—*Rakestraw v. Floyd* (S. C.) 419.

Error in excluding a letter was harmless, where the witness testified to its contents.—*Sloan v. Pelzer* (S. C.) 431.

Verbal inaccuracies in the court's preliminary statement of the pleadings *held* harmless.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

A judgment will not be reversed for erroneous instructions, where a different verdict could not have been rendered under proper instructions.—*Wright v. Independence Nat. Bank* (Va.) 459.

Permitting a second examination of a witness *held* not reversible error, where plaintiff in error did not show that he was prejudiced.—*Tate v. Bank of State of New York* (Va.) 476.

§ 22. — Decisions of intermediate courts.

Discretion of the circuit court in granting certiorari in a civil case before a justice will not be reviewed unless plainly abused.—*Michaelson v. Cauley* (W. Va.) 170.

Where the evidence presents mixed questions of law and fact, about which reasonable men might differ, the circuit court commits no reviewable error in granting new trial.—*Michaelson v. Cauley* (W. Va.) 170.

Michaelson v. Cauley (W. Va.) 170.

§ 23. — Subsequent appeals.

On appeal on second trial, after first trial is set aside, the court must consider the proceedings on first trial, and, if it was error to set aside verdict, enter judgment thereon.—*Cohen v. Bellenot* (Va.) 455.

On error from verdict rendered on second trial where first verdict has been set aside, the court must not consider the evidence on the first trial as on a demurrer to evidence.—*Cohen v. Bellenot* (Va.) 455.

Questions decided on an appeal become the law of the case, and cannot be reviewed on a subsequent appeal in the same cause.—*Cottrell v. Watkins* (Va.) 470.

§ 24. Determination and disposition of cause.

Where plaintiff's action is based on a contract which is misconstrued by the court, judgment will be reversed.—*National Bank of Brunswick v. Lee* (Ga.) 20.

Where there is no appearance for plaintiff in error, and defendant prays for affirmance, and there is no merit in the exceptions of plaintiff in error, judgment will be affirmed as damages.—*Buchannon v. De Loach Mill Mfg. Co.* (Ga.) 121.

The grant of a new trial may be affirmed, though the lower court assigned the wrong reason.—*Morris v. Imperial Ins. Co.* (Ga.) 585; *Imperial Ins. Co. v. Morris*, Id.

Where evidence demanded finding for plaintiff for a certain amount, with interest, and, irrespective of errors alleged, he is entitled to a recovery, the judgment below in his favor will not be set aside, but amended to conform to his rights.—*McBride v. Mosley* (Ga.) 599.

Where plaintiff in error had no good reason for anticipating reversal of judgment below, damages will be awarded against him.—*Collins v. Mobile Fruit & Trading Co.* (Ga.) 687.

Where the question in the cross bill of exceptions is controlling, it will be first considered; and, where the judgment therein is reversed, the errors in the main bill will not be reviewed.—*Gay v. Gay* (Ga.) 846.

Where the court, on accounting by executor, improperly received a verdict of a jury, which he intended should be in accordance with the auditor's report, the judgment will be affirmed, with directions that the verdict and decree be amended to conform with such report.—*Davidson v. Story* (Ga.) 867; *Story v. Davidson*, Id.

Where the justices sitting are evenly divided, the judgment of the court below stands.—*Morehead Banking Co. v. City of Burlington* (N. C.) 558.

Where case is remanded for further proceedings, the pleadings may be amended below.—*Jennings v. Parr* (S. C.) 73.

Amendment after remand *held* subject only to Code Civ. Proc. § 194, providing that it be in furtherance of justice.—*Jennings v. Parr* (S. C.) 73.

Where neither the "case" nor exceptions show that a motion "non obstante veredicto" was made, such a judgment cannot be granted on appeal.—*Sloan v. Pelzer* (S. C.) 431.

The appellate court cannot at a subsequent term modify a final order of a previous term.—*Roanoke St. Ry. Co. v. Hicks* (Va.) 790.

Where an appeal is from both a decree for money and an order appointing a receiver, a reversal of the former is an implied reversal of the latter.—*Roanoke St. Ry. Co. v. Hicks* (Va.) 790.

An order of the circuit court reversing a justice's judgment, and setting aside the verdict founded thereon, will be affirmed, unless error plainly appears.—*Cleavenger v. Rohrbaugh* (W. Va.) 1011.

APPEARANCE.

General demurrer to petition is such an appearance as waives absence of process and service thereof.—*Southern Ry. Co. v. Cook* (Ga.) 585.

Appearance of counsel to object to the jurisdiction is not a waiver of proof of the notice on which the jurisdiction depends.—*Whetstone v. Livingston* (S. C.) 561.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 3.

APPOINTMENT.

Of guardian, see "Guardian and Ward," § 1.

APPRENTICES.

Rev. St. 1893, § 2206, impliedly requires the signature of the apprentice to an indenture of apprenticeship.—*Anderson v. Young* (S. C.) 448.

An indenture of apprenticeship that is void as against the apprentice for the want of his signature may bind the parent to permit the master to retain the child in his custody.—*Anderson v. Young* (S. C.) 448.

ARGUMENT OF COUNSEL.

In criminal prosecutions, see "Criminal Law," § 8.

ARSON.

It is not necessary that an indictment charging burning of an outhouse should allege whether the same was in a city, town, or village.—*Carter v. State* (Ga.) 345.

A freight car removed from the wheels, and used as a freight warehouse, may be characterized as an outhouse, though not appurtenant to any other building.—*Carter v. State* (Ga.) 345.

A freight car detached from wheels, and placed on permanent posts, and used as a freight warehouse, held a house, within Pen. Code, § 136.—*Carter v. State* (Ga.) 345.

ASSESSMENT.

Of damages, see "Damages," § 1.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 10.

ASSIGNMENTS.

For benefit of creditors, see "Assignment Benefit of Creditors."

Transfers of particular species of rights, or instruments.

See "Insurance," § 7.

§ 1. Operation and effect.

Where a debtor assigned to a co-insurance under a fire policy, in the debt, and to hold the balance

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1. Requisites and validity.

That an assignor for the benefit of creditors had, shortly before the assignment made promises to pay to other creditors, renders the assignment fraudulent.—*Stallings* (N. C.) 384.

That there was a race between the assignor for the benefit of preferred creditors and the deed of assignment, and levy execution for other creditors, renders the assignment fraudulent.—*Stallings* (N. C.) 384.

That an assignment is made for the benefit of some of the assignor's creditors, renders it fraudulent, unless there is no hindrance and delay to other creditors.—*Stallings* (N. C.) 384.

In scheduling a debt in a long account of first and last items or under Laws 1893, c. 45?—*Nimocks* (N. C.) 743.

A schedule of preferred items and the contract whether the items are under Laws 1893, c. 45?—*Nimocks* (N. C.) 743.

Failure to comply with the provisions of the act in scheduling destroys the preference.—*Brown*

If any of the provisions of the act in scheduling an assignment is not complied with, the assignment is void.—*Stallings* (N. C.) 384.

A preference given by an assignor is void.—*Hall v. Hall*

A preference given by an assignor is void.—*Cottrell*

The assignment is void.—*Stallings* (N. C.) 384.

Brown, Bradbury & Catlett Furniture Co. (Ga.) 835.

§ 3. Quashing, vacating, dissolution, or abandonment.

On motion to dissolve attachment, the merits of the cause cannot be considered.—Williamson v. Eastern Building & Loan Ass'n (S. C.) 765.

Whether subscriber to stock of building association waived his right to payment according to contract cannot be considered on a motion to dismiss an attachment in action by him against association.—Williamson v. Eastern Building & Loan Ass'n (S. C.) 765.

An attaching creditor and his trustees under a deed of trust conveying the attached property as security for a debt sued on *held* not entitled to intervene and claim the property under Code, § 2984, where the attachment is quashed on motion.—Littell v. Julius Lansburg Co. (Va.) 63.

ATTORNEY AND CLIENT.

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 8. Misconduct of counsel ground for new trial, see "New Trial," § 1.

§ 1. Retainer and authority.

Without special authority, an attorney cannot accept discharge of his client's claim for anything but the full amount thereof.—Kaiser v. Hancock (Ga.) 123.

Where attorneys exceed their authority in an action, verdict and judgment therein are valid, the remedy of the client being over against the attorney.—Taylor v. American Freehold Land-Mortgage Co. (Ga.) 153.

An unauthorized release of a mortgage by an attorney *held* ratified by the mortgagees.—Christian v. Yarrowborough (N. C.) 383.

AUTHORITY.

Of agent, see "Principal and Agent," §§ 2, 3. Of attorney, see "Attorney and Client," § 1.

BAIL.

§ 1. In criminal prosecutions.

A recognizance that does not require accused to answer the offense with which he is charged, as provided by Code, § 4003, is void.—Canon v. Commonwealth (Va.) 33.

BAILMENT.

See "Banks and Banking," § 2; "Carriers," § 1; "Pledges"; "Warehousemen."

BANKRUPTCY.

See "Assignments for Benefit of Creditors"; "Insolvency."

BANKS AND BANKING.

§ 1. Banking corporations and associations.

A petition against stockholders to enforce their statutory liability *held* sufficient on general demurrer.—Moore v. Ripley (Ga.) 647.

The bank is not a necessary party in an action to enforce the statutory liability of its stockholders.—Moore v. Ripley (Ga.) 647.

Statutory liability of stockholders *held* enforceable by a receiver, under Act 1894.—Moore v. Ripley (Ga.) 647.

All stockholders may be joined in an action to enforce their statutory liability.—Moore v. Ripley (Ga.) 647.

§ 2. Functions and dealings.

A bank may apply deposits to a matured debt of the depositor to it.—Hodgin v. People's Nat. Bank (N. C.) 887.

A bank may apply deposits to an unmatured debt of an insolvent depositor to it.—Hodgin v. People's Nat. Bank (N. C.) 887.

Individual deposits of a partner cannot be applied to firm debts to a bank.—Hodgin v. People's Nat. Bank (N. C.) 887.

Deposits by a surviving partner for an insolvent firm may be applied to a firm debt to the bank whether matured or not, where not a special deposit, and there is no agreement that it shall not be done.—Hodgin v. People's Nat. Bank (N. C.) 887.

A bank cannot apply deposits for a firm to an individual debt of a deceased partner on a note indorsed by the survivor.—Hodgin v. People's Nat. Bank (N. C.) 887.

An agreement to accept from the maker of a note in payment thereof a verbal assignment of another note, which the maker of the former had already assigned as collateral security, *held* to be beyond the scope of the authority of the cashier of the bank holding the note.—Piedmont Bank of Morganton v. Wilson (N. C.) 889.

§ 3. National banks.

A stockholder in a national bank in the process of liquidation cannot set off his distributive share in the assets against his liability on his stock.—First Nat. Bank v. Riggins (N. C.) 801.

BAR.

Of dower, see "Dower," § 1.

BASTARDS.

§ 1. Proceedings under bastardy laws.

Evidence tending to prove intercourse with another *held* admissible.—State v. Warren (N. C.) 552.

BENEFICIAL ASSOCIATIONS.

Complaint by several members of a beneficial society suing for themselves and other members need not allege authority to sue.—Stemmermann v. Lilienthal (S. C.) 535.

Under Code, § 140, several members of a beneficial society, the membership being over 200, may sue for benefit of all.—Stemmermann v. Lilienthal (S. C.) 535.

Members of a beneficial association are entitled to sue on bond of treasurer for a defalcation, though title to property is in association or officers.—Stemmermann v. Lilienthal (S. C.) 535.

Sureties on bond of treasurer of beneficial society *held* not released because the society accepted the treasurer's resignation before he had accounted for all the funds.—Stemmermann v. Lilienthal (S. C.) 535.

Conditions of bond of treasurer of a beneficial society *held* to be broken by refusal of treasurer to pay over funds after resignation.—Stemmermann v. Lilienthal (S. C.) 535.

BEQUESTS.

See "Wills."

ST AND SECONDARY EVIDENCE.

civil actions, see "Evidence," § 8.

BETTING.

"Gaming."

BILL OF DISCOVERY.

"Discovery," § 1.

BILL OF EXCEPTIONS.

"Exceptions, Bill of."

BILL OF EXCHANGE.

"Bills and Notes."

BILL OF REVIEW.

"Equity," § 7.

BILLS AND NOTES.**Construction and operation.**

Where two persons make a note, the payee treat them as principals, unless in some manner he is informed that payee is only a party.—*Parsons v. Harrold* (W. Va.) 1002.

Rights and liabilities on indorsement or transfer.

bona fide purchaser of a nonnegotiable bill, before maturity, takes the same subject to equities.—*Ryals v. Johnson County Sav. bk* (Ga.) 645.

Surrender of collateral deposited by the holder of a note to secure it, without the consent of an accommodation indorser, held to release such indorser's liability pro tanto.—*Bank of Fayetteville v. Nimocks* (N. C.) 717.

Indorsement of a note is not released from liability by an agreement of the holder with a subsequent indorser to extend the time of payment.—*Wright v. Independence Nat. Bank* (Va.) 459.

Dismissal of an action on a note held not to charge the indorser because it extended the time of payment.—*Tate v. Bank of State of New York* (Va.) 476.

Person who purchases a mortgage note after maturity takes it subject to the equities.—*Cusack v. Brandt* (Va.) 791.

Presentment, demand, notice, and protest.

Where an unaccepted sight draft, indorsed only for acceptance, was sought to be presented before maturity, held, the presentment was necessary for acceptance, and not payment.—*Burrus Life Ins. Co. of Virginia* (N. C.) 323.

Payment and discharge.

A transaction held a purchase of mortgage notes, and not a payment thereof.—*Cussen v. Bond* (Va.) 791.

Actions.

In an action on a purchase-money note, plea that defendant knew in making it that the goods were defective, and that it was understood that plaintiff would repair the defects; that, in consideration thereof, the note was executed; and, after obtaining it, plaintiff failed to repair; and that the consideration has failed,—is a good defense.—*Blount v. Edison General Electric Co.* (Ga.) 113.

In an action on note, evidence held insufficient to show failure of consideration.—*Graham v. Campbell* (Ga.) 118.

In action on promissory note, held not error to direct verdict for plaintiff, where there is no testimony to sustain defendant's plea.—*Baker v. Magrath* (Ga.) 370.

Evidence in action on duebill held insufficient to establish defense of failure of consideration.—*Eskridge v. Barnwell* (Ga.) 635.

Facts held to entitle a partner who had indorsed a partnership note to set off his co-partner's indebtedness to him.—*Commercial Bank v. Cabell* (Va.) 53.

Evidence held sufficient to preclude a recovery against one of the partners on a note executed by the partnership, and indorsed by such partner.—*Commercial Bank v. Cabell* (Va.) 53.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

Of land, see "Vendor and Purchaser," § 3.

BONDS.

See "Sequestration."

Municipal bonds, see "Municipal Corporations," § 6.

Sureties on bonds, see "Principal and Surety."

Bonds for performance of duties of trust or office.

See "Officers," § 2.

Bonds in legal proceedings.

See "Bail."

§ 1. Actions.

Breach of ordinary bond entitles obligee to sue for and recover only the damages actually sustained.—*Ripley v. Eady* (Ga.) 343.

A plea that land for which a bond was given "is worthless" is insufficient, not showing that it was not worth the price agreed on at the time defendant purchased it.—*Tyson v. Williamson* (Va.) 42.

Code, § 3299, authorizing a defense of fraud in an action at law on a bond, held not to permit such defense if based on equitable grounds requiring a rescission of the contract.—*Tyson v. Williamson* (Va.) 42.

Where one furnishing the consideration for a bond caused it to be executed to another, held, that the bond was subject to any defenses available as against the person furnishing the consideration.—*Tyson v. Williamson* (Va.) 42.

BOUNDARIES.**§ 1. Evidence, ascertainment, and establishment.**

Highways may, by agreement and acquiescence for seven years, become established dividing lines between landowners, though never marked for that purpose.—*Chewning v. Bryson* (Ga.) 542.

In a proceeding under Acts 1893, c. 22, to locate a boundary line, an instruction to the jury that, upon all the evidence, they should say where the line was, is proper.—*Williams v. Hughes* (N. C.) 325.

In a proceeding under Acts 1893, c. 22, to locate a boundary line, the judgment should leave out all reference to plaintiff's title.—*Williams v. Hughes* (N. C.) 325.

BREACH.

Of contract, see "Sales," § 4; "Vendor and Purchaser," § 2.

Of covenant, see "Covenants," § 2; "Insurance," § 10.

Of warranty, see "Insurance," § 9; "Sales," §§ 5, 7.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 11.

BROKERS.

See "Principal and Agent."

§ 1. Duties and liabilities to principal.

The agency of a real-estate agent, and his duty to his principal, cease on delivery of title and payment of the price.—Board of Trustees v. Blair (W. Va.) 203.

After termination of real-estate agency, the agents have the same right as any other person to deal in the property.—Board of Trustees v. Blair (W. Va.) 203.

BUILDING AND LOAN ASSOCIATIONS.

A loan association *held* not to have a right to restrict a borrower's profits and allow a non-borrower full profits on his shares.—Interstate Building & Loan Ass'n v. Ouzts (S. C.) 303.

A complaint of a loan association for a foreclosure of a mortgage *held* properly dismissed.—Interstate Building & Loan Ass'n v. Ouzts (S. C.) 303.

Building association knowingly entering into an ultra vires contract commits a tort, for which it is liable, when it induces another to part with his money thereunder.—Williamson v. Eastern Building & Loan Ass'n (S. C.) 765.

Where agreement between building association and member is in conflict with by-laws of association, the agreement will prevail.—Williamson v. Eastern Building & Loan Ass'n (S. C.) 765.

Circular of building association construed, and *held* to represent that the shares matured at a definite time.—Williamson v. Eastern Building & Loan Ass'n (S. C.) 765.

Construction of circular issued by building association is for the court.—Williamson v. Eastern Building & Loan Ass'n (S. C.) 765.

A stockholder in this state, in a foreign building association, cannot be held liable for assessments on his stock by receivers pursuant to an order of a court of such foreign state, to which he was not a party.—Meares v. Finlayson (S. C.) 986.

Evidence *held* insufficient to charge a stockholder in this state of a foreign loan association with assessments on his stock for losses.—Meares v. Finlayson (S. C.) 986.

The relation existing between a building and loan association and a borrower, who is a stockholder when the loan is made, is that of debtor and creditor.—Meares v. Finlayson (S. C.) 986.

BURGLARY.

§ 1. Prosecution and punishment.

On trial for burglary from a depot, testimony of witness as to goods missed *held* admissible, though amount of such goods was also shown by waybills in custody of witness.—Davis v. State (Ga.) 158.

Possession by defendant of goods taken from a burglarized house *held* insufficient to support verdict of guilty, unless the breaking and entering were clearly shown.—Lester v. State (Ga.) 335.

Evidence of ownership *held* sufficient to sustain conviction.—Andrews v. State (Ga.) 341.

CANCELLATION OF INSTRUMENTS.

Cancellation of insurance policy, see "Insurance," § 8.

CANVASS OF VOTES.

See "Elections," § 2.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

§ 1. Carriage of goods.

A railroad company, as warehouseman, *held* not liable for freight destroyed by negligence of an employé who was an independent contractor.—Brunswick Grocery Co. v. Brunswick & W. R. Co. (Ga.) 92.

§ 2. Carriage of live stock.

A shipper, agreeing to except damages not resulting from the carrier's negligence from the risk, *held* not to have the burden of showing that a loss occurred through the carrier's negligence.—Mitchell v. Carolina Cent. R. Co. (N. C.) 671.

A failure to charge that a carrier had the burden of proving that a loss was within an exception fixed by the bill of lading, *held* error.—Mitchell v. Carolina Cent. R. Co. (N. C.) 671.

§ 3. Carriage of passengers—Relation between carrier and passenger.

One coming to a railroad station to take the next train becomes a passenger, provided his coming is within a reasonable time before the departure of said train, whether or not he has purchased a ticket.—Phillips v. Southern Ry. Co. (N. C.) 388.

§ 4. — Fares, tickets, and special contracts.

Instructions as to sufficiency of identification of purchaser of excursion ticket to ticket agent as a condition precedent to having his return ticket signed and stamped considered, and *held* erroneous.—Central of Georgia Ry. Co. v. Cannon (Ga.) 874.

Where purchaser of excursion ticket intentionally signed his name in print, so as to render it impossible to identify himself by reproducing his signature, the burden was on him to find some other means, where ticket provided for such identification.—Central of Georgia Ry. Co. v. Cannon (Ga.) 874.

Condition of excursion ticket construed, and *held*, that it was incumbent on purchaser to identify himself before having the ticket signed and stamped for return trip.—Central of Georgia Ry. Co. v. Cannon (Ga.) 874.

§ 5. — Performance of contract of transportation.

Where passenger by negligence of conductor is carried beyond her destination, and without express authority the conductor procures for her lodgings in an hotel for the night, the railroad company is not liable for injuries received at the hotel through negligence on the part of the proprietor.—Central of Georgia Ry. Co. v. Price (Ga.) 77.

Instructions, where passenger was carried by flag station, not having called the attention of the conductor to the fact that he desired to stop there, *held* erroneous, as failing to instruct the jury concerning the duty of the passenger under such circumstances.—Central of Georgia Ry. Co. v. Dorsey (Ga.) 873.

A passenger who has purchased ticket for flag-tion, on discovering that he has been over-looked by the conductor, should call the latter's attention to the fact, and surrender ticket, in order that the conductor may stop the train for him at the proper station.—*Central of Georgia Co. v. Dorsey* (Ga.) 873.

In an action against a railroad company for willful failure to transport a passenger over leased line, evidence that the lease had expired, and that it was not in its power, was competent on the question of willfulness.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

Under a complaint alleging willful failure to carry plaintiff to her destination, and damages resulting from a storm after leaving defendant's depot, evidence held competent as to punitive damages.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

In an action for willful failure to transport a passenger, whether damages plaintiff received from a storm, after leaving defendant's depot, are proximate or too remote, held for the jury.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

Under a complaint alleging a willful failure to transport a passenger, and damages from a storm after plaintiff left defendant's depot, evidence held competent to show what caused her leave, though no injury from failure to provide suitable accommodations therein was claimed.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

Evidence held such that willful failure to transport a passenger over a leased railroad, or the lease had expired, was inferable.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

6. — Personal injuries.

In trial for injury to passenger caused by railroad company's negligence in running its cars at a switch at a dangerous rate of speed, an instruction that if the train ran upon the switch at an excessive or improper rate of speed, causing the injury, defendant would be liable, held erroneous in the use of the words "excessive or improper."—*Central of Georgia Ry. Co. v. Johnston* (Ga.) 78.

In action by passenger for personal injuries, it is not error to define the degree of care which the company should exercise as "an extra high degree of care."—*Central of Georgia Ry. Co. v. Johnston* (Ga.) 78.

Instruction as to contributory negligence, on evidence that passenger alighted from a rapidly moving train, held proper.—*Sanders v. Southern Ry. Co.* (Ga.) 840.

In action for injuries sustained in alighting from moving car, it was proper to read to the jury Civ. Code, § 2321, relating to liabilities of carriers, where the judge also instructs that the duty of carriers is that of ordinary diligence, and the burden is on the carrier to show diligence where injury is shown.—*Sanders v. Southern Ry. Co.* (Ga.) 840.

Instruction as to effect of knowledge which a passenger had of the locality where he attempted to alight from a moving train held proper.—*Sanders v. Southern Ry. Co.* (Ga.) 840.

Promise by conductor to passenger to stop at an unscheduled station held not to warrant passenger going on car platform, where in passed station at high rate of speed, and there was no evidence of intent to stop.—*Hicks v. Georgia S. & F. Ry. Co.* (Ga.) 880.

A railroad company has the right to establish reasonable rules providing when its waiting rooms shall be closed.—*Phillips v. Southern Ry. Co.* (N. C.) 388.

A rule of a railroad company requiring its waiting rooms to be closed after the departure

of its trains, and until 30 minutes before the departure of its next train, is reasonable.—*Phillips v. Southern Ry. Co.* (N. C.) 388.

In an action for the death of a passenger, his declarations made shortly before the accident held admissible as a part of the res gestæ.—*Means v. Carolina Cent. R. Co.* (N. C.) 960.

The absence of a conductor of a freight train having a passenger coach held negligence, where the coach was attached to establish a passenger business.—*Means v. Carolina Cent. R. Co.* (N. C.) 960.

In an action for the death of a passenger killed on a freight train while returning from the engineer, to whom he had given his tickets, to a passenger coach, evidence that the engineer would have stopped the train held immaterial.—*Means v. Carolina Cent. R. Co.* (N. C.) 960.

Plaintiff purchasing ticket to a connecting point, and misled by erroneous statement of ticket agent as to time when connections would be made at such point, held not entitled to recover for injuries resulting from ride in a storm from such connecting point to her place of destination.—*Fowles v. Southern Ry. Co.* (Va.) 464.

§ 7. — Contributory negligence of person injured.

Evidence held to show that passenger was injured by his own gross negligence.—*Hicks v. Georgia S. & F. Ry. Co.* (Ga.) 880.

§ 8. — Ejection of passengers and intruders.

The burden of showing expulsion of person lawful does not devolve on railway company until it is shown that he was rightfully in the car.—*Central of Georgia Ry. Co. v. Cannon* (Ga.) 874.

§ 9. — Palace cars and sleeping cars.

Evidence in action against sleeping-car company to recover for personal effects stolen from the car held to show reasonable care in protection of the property, so as not to render the company liable for its loss.—*Pullman's Palace-Car Co. v. Hall* (Ga.) 923.

A sleeping-car company held not liable where personal goods of a passenger are stolen by one not its employé, where reasonable care by the company was shown.—*Pullman's Palace-Car Co. v. Hall* (Ga.) 923.

CARRYING WEAPONS.

See "Weapons."

CASE ON APPEAL.

Necessity for purpose of review, see "Appeal and Error," § 9.

CAUSE OF ACTION.

See "Action."

CERTIFICATE.

As evidence, see "Evidence," § 7.
Certified copies, see "Evidence," § 7.
Of acknowledgment of written instrument, see "Acknowledgment," § 1.
Of record for purpose of review, see "Appeal and Error," § 9.

CERTIORARI.

Review of proceedings before justices of the peace, see "Justices of the Peace," § 3.

§ 1. Nature and grounds.

Certiorari cannot be resorted to for correction of errors which may be corrected by appeal or writ of error.—*State v. Moore* (S. C.) 700.

made, proceedings will be dismissed, where it is not shown party applying was not in fault.—*Zachery v. State* (Ga.) 22.

It is error to require plaintiff in certiorari to pay costs of the superior court where material error in judgment below is corrected.—*Paulk v. Tanner* (Ga.) 99.

Superior court cannot render final judgment on certiorari where there were disputed issues of fact.—*Johnson v. Coleman* (Ga.) 122.

Writ of certiorari *held* properly denied when not verified as required by Civ. Code, § 4638.—*Paulk v. Hawkins* (Ga.) 122.

It is a sufficient return to an application for a writ that respondent has in good faith parted with control of the record sought to be produced.—*State v. Moore* (S. C.) 700.

On proceedings removed to circuit court from inferior tribunal, a formal return should be made by the officer to whom the writ is directed.—*Cushwa v. Lamar* (W. Va.) 10.

Evidence heard by inferior tribunal is not made part of the record, except by order or bill of exceptions.—*Cushwa v. Lamar* (W. Va.) 10.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of civil action, see "Venue," § 1.

CHARGE.

Of legacies on property by will, see "Wills," § 6. To jury in civil actions, see "Trial," §§ 6-11. — in criminal prosecutions, see "Criminal Law," § 9.

CHARITIES.

§ 1. Creation, existence, and validity.

A devise in trust for the maintenance of a church and school *held* not void as authorizing the trustee to abolish the church and school.—*Keith v. Scales* (N. C.) 809.

A devise in trust for a charity *held* not void for indefiniteness.—*Keith v. Scales* (N. C.) 809.

A devise in trust for the maintenance of a church and school *held* a charity.—*Keith v. Scales* (N. C.) 809.

A devise in trust for the purchase of land and distribution to members of the church *held* to sufficiently describe the beneficiaries.—*Keith v. Scales* (N. C.) 809.

A devise to a religious society in trust to build a home for a minister and teacher is not void for indefiniteness as to who the teacher should be.—*Keith v. Scales* (N. C.) 809.

A devise in trust for the education of children of members of a church to whom land was given *held* sufficiently definite.—*Keith v. Scales* (N. C.) 809.

Where the ambiguity is as to the trustee, and not the beneficiaries, a court of equity will not allow the trust to fail for want of a trustee.—*Keith v. Scales* (N. C.) 809.

A devise in trust to build a church and school is not void because the church and school are not in esse.—*Keith v. Scales* (N. C.) 809.

§ 2. Construction, administration, and enforcement.

Where a trustee under a devise in trust for a charitable use is an organization not yet incorporated, the court will hold the fund until incor-

porated. The trustee cannot exceed a certain sum, *held* to place the discretion to be exercised in the trustee.—*Keith v. Scales* (N. C.) 809.

CHARTER.

Of municipal corporation, see "Municipal Corporations," § 1.

CHATTEL MORTGAGES.

§ 1. Rights and liabilities of parties.

Necessity of demand by mortgagee before suit for possession of the mortgaged chattels *held* obviated by the mortgagor's resistance.—*Moore v. Hurtt* (N. C.) 317.

CHECKS.

See "Bills and Notes."

CHILD.

See "Parent and Child."

CHOSE IN ACTION.

Assignment, see "Assignments."

CHURCH.

See "Religious Societies."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Equal protection of laws, see "Constitutional Law," § 4.

Privileges and immunities, see "Constitutional Law," § 3.

CIVIL RIGHTS.

See "Constitutional Law," §§ 3, 4.

CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 3.

— of insolvent, see "Insolvency," § 1.

To property levied on, see "Execution," § 1.

CLASS LEGISLATION.

See "Constitutional Law," § 3.

CLERKS OF COURTS.

One qualifying and in possession of office without any one claiming it *held* a de facto clerk, though he has accepted another office, and the constitution prohibits holding two offices at the same time, and the statutes provide that judge of probate shall act as clerk in case of vacancy.—*State v. Coleman* (S. C.) 406.

Whether the court is in session or vacation, the clerk's office is open to commence attachment proceedings under Code, c. 106.—*Abney v. Ohio Lumber & Mining Co.* (W. Va.) 236.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 7.

COLLATERAL SECURITY.

See "Pledges."

COMITY.

Between courts, see "Courts," § 4.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMISSIONS.

Of executor or administrator, see "Executors and Administrators," § 7.

COMMITMENT.

On conviction of crime, see "Criminal Law," § 13.

COMMON CARRIERS.

See "Carriers."

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.

Of executor or administrator, see "Executors and Administrators," § 7.

Of sheriff or constable, see "Sheriffs and Constables," § 2.

COMPETENCY.

Of evidence, see "Criminal Law," § 3.

— in civil actions, see "Evidence," § 2.

Of witness in general, see "Witnesses," § 2.

COMPLAINT.

In civil actions, see "Pleading," § 1.

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction."

Where defendant shows payment to plaintiff's attorney of record of a sum less than the amount claimed in settlement, the burden is on him to show the authority of plaintiff's attorney to make the settlement.—Kaiser v. Hancock (Ga.) 123.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCEALED WEAPONS.

See "Weapons."

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 4.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONFESSION.

Of judgment, see "Judgment," § 1.

CONSIDERATION.

Of contract, see "Contracts," § 1.

Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.

CONSIGNMENT.

See "Factors."

CONSOLIDATION.

Of actions, see "Action," § 3.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Taxation," § 2.

Special or local laws, see "Statutes," § 1.

§ 1. Vested rights.

An amendment of a city charter, so as to change its laws touching the advertisement for sales for taxes, does not impair the obligation of contracts in applying to taxes due at its passage.—Du Bignon v. City of Brunswick (Ga.) 102.

Where lien of material man has under statute become fixed, it is a vested right, which is not destroyed by subsequent repeal or modification of the law.—Waters v. Dixie Lumber & Manufacturing Co. (Ga.) 636.

Act 1894, authorizing the statutory liability of stockholders of a bank to be enforced by a receiver, does not affect any vested right of creditors of a pre-existing bank.—Moore v. Ripley (Ga.) 647.

Act 1883, forbidding the devise of an estate in remainder by deed of feoffment, is not unconstitutional as to a contingent remainder devised when the act was passed.—People's Loan & Exchange Bank v. Garlington (S. C.) 513.

The legislature cannot destroy or diminish the value of an existing judgment.—Merchants' Bank of Danville v. Ballou (Va.) 481.

The right to a judgment lien is a vested right.—Merchants' Bank of Danville v. Ballou (Va.) 481.

§ 2. Obligation of contracts.

The legislature cannot withdraw or limit the taxing power of a municipal corporation so as to impair the obligation of its contracts or destroy the remedies of its creditors.—Broadfoot v. City of Fayetteville (N. C.) 804.

Act providing that no estate in remainder shall be defeated by deed of feoffment with livery of seisin *held* not to impair the obligation of contracts.—People's Loan & Exchange Bank v. Garlington (S. C.) 513.

A statute giving the right to a judgment lien *held* part of the contract for the lien which cannot be impaired by retroactive laws.—Merchants' Bank of Danville v. Ballou (Va.) 481.

§ 3. Privileges or immunities, and class legislation.

The fourteenth amendment to the federal constitution does not prohibit states from new legis-

§ 4. **Equal protection of laws.**

Priv. Laws 1897, c. 56, making railroads liable for negligence of fellow servant, does not confer exclusive privileges, contrary to Const. art. 1, § 7.—*Hancock v. Norfolk & W. Ry. Co.* (N. C.) 679.

§ 5. **Due process of law.**

The office of the superintendent of the state's prison is created by the general assembly, and hence may be abolished by the legislature.—*State's Prison of North Carolina v. Day* (N. C.) 748.

Due process of law does not always require judicial hearing in matters of taxation or matters purely administrative.—*State v. Sponaugle* (W. Va.) 283.

It is for the supreme court of the United States to determine finally whether legislation under state authority is due process of law.—*State v. Sponaugle* (W. Va.) 283.

CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

CONTEMPT.

§ 1. **Acts or conduct constituting contempt of court.**

Conduct of a party falsely notifying his counsel, to obtain a continuance, that he was sick and could not come to court when his trial was called, *held* a contempt.—*Carter v. Commonwealth* (Va.) 780.

Action of respondent in habeas corpus over a child, in removing the child to a foreign state and leaving it there, *held* not a contempt.—*Trimble v. Commonwealth* (Va.) 786.

§ 2. **Power to punish and proceedings therefor.**

Attachment for contempt *held* improper to enforce payment of a judgment against an administrator on a citation to account instituted by the heirs, where there was no adjudication that he had in his hands the identical money derived from the estate.—*Everett v. Sparks* (Ga.) 878.

Acts 1897-98, p. 548, providing for punishment for contempt of court, is unconstitutional, in so far as it attempts to provide for jury trials for contempts of courts created by the constitution.—*Carter v. Commonwealth* (Va.) 780.

CONTEST.

Of election, see "Elections," § 3.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 5.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 4.

A party not present in court because relying on statement of judge when not presiding must take risk of opposing party objecting to continuance, and insisting on trial at the time fixed by law.—*Watkins v. Ellis* (Ga.) 131.

A party *held* not entitled to a continuance because of an amendment of the pleadings by the opposite party.—*Atlanta Land & Loan Co. v. Haile* (Ga.) 606.

Refusal of a continuance, on a defendant filing, on the day of trial, an answer substantially like that of other defendants, *held* not an abuse of discretion.—*Slingluff v. Hall* (N. C.) 739.

Fraud, Statute of.

Assignment, see "Assignments."

Impairing obligation, see "Constitutional Law."

§ 2.

Operation and effect of usury laws, see "Usury."

§ 1.

Parol or extrinsic evidence, see "Evidence," § 8.

Specific performance, see "Specific Performance."

Contracts of particular classes of parties

See "Carriers," §§ 3-9; "Corporations," § 2; "Municipal Corporations," § 4; "Warehousemen."

Contracts relating to particular subjects.

Traffic contracts between railroads, see "Railroads," § 5.

Transportation of passengers, see "Carriers," §§ 3-9.

Particular classes of express contracts.

See "Bills and Notes"; "Bonds"; "Covenants"; "Insurance"; "Liens"; "Partnership"; "Principal and Agent"; "Principal and Surety"; "Sales"; "Vendor and Purchaser." Marriage settlements, see "Husband and Wife," § 2.

Particular modes of discharging contracts.

See "Payment"; "Release."

§ 1. **Requisites and validity.**

An agreement to answer for debt of another *held* sustained by sufficient consideration when creditor is thereby induced to relinquish a lien.—*Bluthenthal v. Moore* (Ga.) 844.

Misrepresentations of a material fact, though made by mistake, if acted on by the other party to the contract, constitute legal fraud.—*Walters v. Eaves* (Ga.) 609.

Agreement by purchasers at judicial sale to pay a lienor if he would agree to their bid, *held* not without consideration.—*Sloan v. Pelzer* (S. C.) 431.

Where two or more jointly contract with another, a mistake of one of them does not relieve any of the joint contractors, as against the other party, from performance.—*Sloan v. Pelzer* (S. C.) 431.

One who accepts a conveyance in consideration of his promise to pay the grantor's debts becomes primarily liable therefor.—*Moore v. Triplett* (Va.) 50.

Forbearance of a judgment creditor to enforce the judgment against land on which it was a lien *held* a sufficient consideration for the promise of a subsequent purchaser of the land to pay it.—*Bradshaw v. Bratton* (Va.) 56.

A letter from a subsequent purchaser of land subject to a judgment to the creditor *held* sufficient to show a promise on his part to pay the judgment.—*Bradshaw v. Bratton* (Va.) 56.

A contract *held* founded on a sufficient consideration.—*Richmond Union Pass. Ry. Co. v. Richmond, F. & P. R. Co.* (Va.) 787.

§ 2. **Construction and operation.**

Contract between bank, manufacturer, and customer, whereunder the bank was to advance funds to the manufacturer, holding as collateral the legal title to goods manufactured by him, construed.—*National Bank of Brunswick v. Lee* (Ga.) 20.

A charge that the jury should determine, from the evidence showing the parol portion of a contract, what its additional terms were, *held* proper.—*Sloan v. Pelzer* (S. C.) 431.

Where construction of contract is doubtful by its language, interpretation by the parties should

e considered.—*Williamson v. Eastern Building & Loan Ass'n* (S. C.) 765.

A railroad company is not liable to a subcontractor for extra work in constructing its road.—*Richmond Railway & Electric Co. v. Harris* (Va.) 458.

3. Actions for breach.

An instruction that plaintiffs might recover for services rendered deceased at their instance *held* erroneous, it not appearing that deceased was a party to the understanding.—*Gomez v. Johnson* (Ga.) 600.

Where defendant contracted with a person acting independently for an advertisement in plaintiff's newspaper, and such third person was not the agent of the plaintiff, plaintiff could not recover, as against defendant, on the contract.—*Price Baking-Powder Co. v. Macon Telegraph Pub. Co.* (Ga.) 942.

Where the question whether parties to a contract bound themselves jointly or severally could be ascertained only from the parol part of the contract, it was for the jury.—*Sloan v. Pelzer* (S. C.) 431.

Subsequent conduct of a party to a contract, acknowledging himself bound thereby, *held* competent to show he knew its contents.—*Sloan v. Pelzer* (S. C.) 431.

Recoupment for delay in executing contract cannot be allowed where delay is owing to act of party himself.—*McDonald v. Cole* (W. Va.) 633.

CONTRIBUTORY NEGLIGENCE.

see "Negligence," § 1.

CONVEYANCES.

Contracts to convey, see "Vendor and Purchaser," § 2.

Fraud of creditors, see "Fraudulent Conveyances."

Conveyances by or to particular classes of parties.

see "Insane Persons," § 2.

Married women, see "Husband and Wife," § 3.

Conveyances of particular species of property.

Water rights, see "Waters and Water Courses," § 3.

Particular classes of conveyances.

see "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds."

CORPORATIONS.

Mandamus, see "Mandamus," § 1.

Particular classes of corporations.

see "Building and Loan Associations"; "Insurance," §§ 1, 2; "Municipal Corporations"; "Railroads," § 1; "Religious Societies." Banks, see "Banks and Banking," § 1.

1. Capital, stock, and dividends.

A stockholder of an incorporation organized under the general act of incorporation is not liable for unpaid subscriptions after a bona fide transfer of stock.—*Efrid v. Piedmont Land-Inv. Co.* (S. C.) 753.

Though a complaint did not name one of defendants as an original subscriber, *held*, that recovery could be had against him, the evidence showing that he was such.—*Efrid v. Iredell* (S. C.) 897.

2. Corporate powers and liabilities.

A corporation *held* not liable for slanderous statements of its agent, in the absence of evi-

dence that it expressly or impliedly authorized the statements or ratified them.—*Redditt v. Singer Mfg. Co.* (N. C.) 392.

Plea of ultra vires cannot be interposed by building association while it retains benefits of an ultra vires contract.—*Williamson v. Eastern Building & Loan Ass'n* (S. C.) 765.

A trust deed conveying all the property of a corporation for the benefit of certain stockholders of the corporation *held* not to create a trust fund for the benefit of creditors of the corporation.—*Roanoke St. Ry. Co. v. Hicks* (Va.) 295.

A corporation *held* to have ratified a contract made by its officer.—*Richmond Union Pass. Ry. Co. v. Richmond, F. & P. R. Co.* (Va.) 787.

Resolution of directors that corporation donated a certain sum and certain realty in aid of electric line, on conditions to be determined, *held* insufficient to show a complete contract.—*Newport News, H. & O. P. Development Co. v. Newport News St. Ry. Co.* (Va.) 789.

Where bill in equity is brought by stockholders against the officers, and they and all the stockholders are before the court, it is unnecessary to make the corporation a party by name.—*Kyle v. Wagner* (W. Va.) 213.

Directors have no power to assign entire property owned by corporation to trustee for creditors without consent of stockholders.—*Kyle v. Wagner* (W. Va.) 213.

§ 3. Insolvency and receivers.

A stockholder of an insolvent corporation cannot set off his claim against the corporation in extinguishment of the amount due from him on his original subscription.—*Efrid v. Piedmont Land-Inv. & Inv. Co.* (S. C.) 758.

In the exercise of its equitable jurisdiction, a court may compel the stockholders of an insolvent corporation to pay assessments on unpaid subscriptions.—*Efrid v. Piedmont Land-Inv. & Inv. Co.* (S. C.) 758.

In suit to wind up defunct corporations stockholders are necessary parties.—*Styles v. Laurel Fork Oil & Coal Co.* (W. Va.) 227.

§ 4. Foreign corporations.

21 St. at Large, p. 409, *held* not to give resident creditors the right to appropriate the assets in the state of a foreign corporation, to the exclusion of foreign creditors.—*Wilson v. Keels* (S. C.) 702.

Return of service of summons in action against foreign corporation must show that attorney served was appointed to accept service.—*Adkins v. Globe Fire Ins. Co.* (W. Va.) 194.

CORRECTION.

Of judgment, see "Judgment," § 4.

COSTS.

Traveling expenses taxed as costs or disbursements, see "Creditors' Suit."

§ 1. Nature, grounds, and extent of right in general.

Where, on dismissal by plaintiff of an equitable action, the court adjudged that defendant recover costs, *held* that, before recommending the action, plaintiff must pay the same, though defendant was insolvent at the time plaintiff filed the second petition.—*Sweeney v. Malloy* (Ga.) 858.

§ 2. Amount, rate, and items.

When a question of fact involves several single facts, *held*, that a party may be allowed two witnesses to prove each single fact, under Code, § 1370.—*Ex parte Beckwith* (N. C.) 393.

insufficient.—Dawson v. Dawson (Ga.) 29.

Pauper affidavit to relieve plaintiff in error from payment of costs *held* sufficient.—Davis v. Muscogee Mfg. Co. (Ga.) 30.

Evidence *held* not necessary on appeal, so that an appellee sending it up was liable for costs of transcript and printing, though he was successful.—Hancock v. Norfolk & W. Ry. Co. (N. C.) 679.

Instructions requested and given, together with full charge, *held* properly sent up on appeal, and appellee not liable for costs thereof, under rule 22 (22 S. E. vii.).—Hancock v. Norfolk & W. Ry. Co. (N. C.) 679.

Assignee of tax certificate issued to county suing to recover land *held* entitled to costs below, but not on appeal.—Collins v. Bryan (N. C.) 975.

§ 4. In criminal prosecutions.

On abandonment of prosecution before trial, officer issuing warrant should enter judgment against prosecutor for costs, and enforce it by execution in the name of the state.—Underwood v. Harvey (Ga.) 124.

Under Code, §§ 733, 747, it is discretionary with the court to order that witnesses for a defendant who was acquitted be paid by the county.—State v. Hicks (N. C.) 957.

CO-TENANCY.

See "Tenancy in Common."

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTIES.

§§ 1, 2. Government and officers.

Returns of vote on relocation of county seat must be canvassed and result declared by county court.—Brown v. Randolph County Court (W. Va.) 165.

Under 2 Code, § 2551, a judgment against a county based on a school order is void.—Bear v. Commissioners of Brunswick County (N. C.) 558.

The county government acts of January 4, 1894, and December 24, 1894, devolve the duty of enforcing the laws relative to cleaning running streams on the board of county commissioners.—State v. Tucker (S. C.) 361.

Under Code, § 854, inflicting penalty on deputy county treasurers for failure to account for taxes collected, *held*, a verdict would not be set aside for failure to include the penalty.—Street v. Broadus (Va.) 466.

§ 3. Property, contracts, and liabilities.

County is not liable to suit, unless made so by law, whether cause of action arises from negligent performance of statutory duties or negligent performance of duties voluntarily assumed.—Millwood v. DeKalb County (Ga.) 577.

Under Const. art. 6, § 6, and Acts 1896, p. 213, § 1, a county *held* liable in damages to the estate of one lynched therein, whether he was a prisoner or not.—Brown v. Orangeburg County (S. C.) 764.

§ 4. Actions.

A voter or taxpayer may contest before the county court a vote on relocation of county seat.—Brown v. Randolph County Court (W. Va.) 165.

COURTS.

Clerks, see "Clerks of Courts."

Contempt of court, see "Contempt."

Judges, see "Judges."

Province of court and jury, see "Trial," §§ 6-II.

Review of decisions, see "Appeal and Error."

§ 1. Establishment, organization, and procedure in general.

Decision *held* not binding as a precedent.—Postal Tel. Cable Co. v. Farmville & P. R. Co. (Va.) 468.

Removal of court from a place temporarily occupied pending rebuilding of destroyed court house requires no formal notice or ceremony.—State v. Staley (W. Va.) 198.

Where new court house in place of one destroyed is built, the courts are properly *held* in the new court house.—State v. Staley (W. Va.) 198.

A term of a circuit court can be prolonged beyond 4 o'clock of the third day of the time fixed for a term in another county.—First Nat. Bank v. Parsons (W. Va.) 271.

Circuit courts of different counties in the same circuit may sit at the same time.—First Nat. Bank v. Parsons (W. Va.) 271.

§ 2. Courts of general original jurisdiction.

The circuit court has jurisdiction of an action against a railroad brought under Act March 2, 1897, to recover past-due taxes.—State v. Cheraw & D. R. Co. (S. C.) 691.

The circuit court of the city of Richmond *held* to have jurisdiction of mandamus proceedings to compel the issuance of transfers by a street railway at a point within the city.—Richmond Railway & Electric Co. v. Brown (Va.) 775.

§ 3. Courts of appellate jurisdiction.

The supreme court cannot review a decision by a judge of a city court unless rendered in "a civil cause" or "criminal proceeding" pending in his court.—Banigan v. Nelms (Ga.) 337.

Acts 1897-98, p. 548, *held* constitutional, so far as it confers jurisdiction on the supreme court to review decisions in contempt proceedings.—Trimble v. Commonwealth (Va.) 786.

The supreme court of appeals has appellate jurisdiction of certiorari awarded by circuit court to review proceedings before municipal council.—Cushwa v. Lamar (W. Va.) 10.

§ 4. Concurrent and conflicting jurisdiction, and comity.

Judicial comity *held* to prevent a resident creditor from asserting a preferred claim to assets held in the state by a foreign receiver.—Wilson v. Keels (S. C.) 702.

A court in which a subcontractor sued to enforce his lien *held* to have priority of jurisdiction as against a court of concurrent jurisdiction, wherein the general contractor afterwards sued to enforce his lien.—Spiller v. Wells (Va.) 46.

COVENANTS.

In insurance policies, see "Insurance," § 10.

§ 1. Construction and operation.

In action for breach of warranty, a charge in substance of Civ. Code, §§ 3614, 3615, providing that general warranty shall include covenants of quiet enjoyment from incumbrances and defects in title, though known to purchaser at time of taking deed, *held* proper.—Godwin v. Maxwell (Ga.) 114.

Covenant of general warranty relates to title, and does not warrant quantity.—Burbridge v. Sadler (W. Va.) 1028.

§ 2. Performance or breach.

A covenant of seisin *held* not broken by an outstanding right of dower.—Building, Light & Water Co. v. Fray (Va.) 58.

§ 3. Actions for breach.

Nominal damages only may be recovered for breach of covenant of seisin, where, before injury sustained, the title is perfected in the grantee by inurement.—Building, Light & Water Co. v. Fray (Va.) 58.

COVERTURE.

See "Husband and Wife."

CREDITORS.

See "Assignments for Benefit of Creditors"; "Creditors' Suit"; "Fraudulent Conveyances"; "Insolvency."

Remedies against surety, see "Principal and Surety," § 4.

CREDITORS' SUIT.

Remedies in cases of assignments, see "Assignments for Benefit of Creditors," § 2.

Equitable petition by creditors against a husband and wife, alleging conspiracy to defeat his creditors by placing property of the husband in the wife, *held* to state a cause of action.—Ernest v. Merritt (Ga.) 898.

Traveling expenses incurred by plaintiffs in attending court cannot be taxed as costs.—Putney v. McDow (S. C.) 67.

Traveling expenses of plaintiffs cannot be taxed as necessary disbursements.—Putney v. McDow (S. C.) 67.

A decree providing for payment of the expenses of the action does not include traveling expenses incurred in attending court.—Putney v. McDow (S. C.) 67.

Where decree in creditors' suit is entered for sale of land, and other liens are suggested which are not audited, the sale should be suspended.—Harris v. Jones (Va.) 455.

CRIMINAL LAW.

Bail, see "Bail," § 1.

Conviction of offense included in that charged, see "Indictment and Information," § 5.

Costs in criminal prosecutions, see "Costs," § 4.

Fines, see "Fines."

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Particular offenses.

See "Arson"; "Burglary"; "Contempt"; "Disturbance of Public Assemblage"; "False Pretenses"; "Forgery"; "Gaming," § 1; "Homicide"; "Intoxicating Liquors," § 2; "Obstructing Justice"; "Rape"; "Robbery"; "Weapons."

Bastardy, see "Bastards," § 1.

§ 1. Venue.

Evidence *held* insufficient to prove venue.—Cooper v. State (Ga.) 23.

§ 2. Former jeopardy.

Former acquittal of charge of retailing liquor without license *held* not a good plea in bar of 32 S.E.—67

not guilty is void because not charging any offense, the accused was not in jeopardy.—Simmons v. State (Ga.) 339.

A trial which results in the dismissal of the jury for failure to agree is not a former jeopardy, where there was no abuse of discretion in dismissing the jury.—State v. Stephenson (S. C.) 305.

Where, after jury was impaneled, it was discovered that one juror was not sitting, and the jury was dismissed, *held* not to constitute former jeopardy.—State v. Coleman (S. C.) 406.

§ 3. Evidence.

On trial for murder, where the defense was insanity, a question to expert as to whether, in his opinion, from his examination of accused and what he knew of him, he was insane when he committed the crime, *held* erroneous.—Flannagan v. State (Ga.) 80.

Proof of the corpus delicti may be sufficient corroboration of a confession of guilt.—Davis v. State (Ga.) 158.

Acts and declarations of an accomplice, made and done during the pendency of a common purpose to conceal a crime, *held* admissible against another accomplice.—Carter v. State (Ga.) 345.

Where accused, while not under arrest, was compelled to surrender a pistol which was in his pocket, the fact was inadmissible on trial for the offense of carrying concealed weapons.—Evans v. State (Ga.) 659.

Statements of defendant, after commission of the crime, *held* inadmissible, when no part of the res gestae.—Williams v. State (Ga.) 680.

Evidence that accused had been in jail, and got out about a week before the alleged crime, when ruled out, did not put the general character of accused in issue.—Bowens v. State (Ga.) 660.

Instruction as to distinction between positive and negative evidence should not be questioned, where two witnesses, having equal facilities of knowledge, directly contradict each other, one testifying that the fact occurred, and the other that it did not.—Skinner v. State (Ga.) 844.

Evidence that one charged with crime has fled *held* admissible, but to be considered in connection with the motives prompting it.—Smith v. State (Ga.) 851.

Expert witnesses must not be so examined as to substitute their opinions for the verdict.—State v. Hull (W. Va.) 240.

Where an injury relates to a subject which does not require study to understand, opinion of skilled witness is incompetent.—State v. Hull (W. Va.) 240.

§ 4. Time of trial and continuance.

Benefit of demand for trial in superior court *held* not lost by transfer of indictment to city court.—Gordon v. State (Ga.) 32.

A continuance is addressed to the discretion of the court.—Stovall v. State (Ga.) 586.

Continuance for absent witnesses *held* improperly denied where the facts expected to be proven were material, and there was no other disinterested witness by whom they could be shown.—Compton v. State (Ga.) 843.

§ 5. Trial—Course and conduct of trial in general.

Under circumstances stated, *held* not error for the court to appoint counsel to defend an accused before indictment found, and at the same time to set a day for trial.—Charlon v. State (Ga.) 347.

Rule 3 of the superior court (89 N. C. 608, 22 S. E. xii.), granting defendant introducing no evidence the right of reply and conclusion

Remarks on trial judge as to the credibility of witness for the state *held* prejudicial error.—State v. Staley (W. Va.) 198.

§ 6. — Reception of evidence.

State cannot be compelled to examine all witnesses sworn.—State v. Lucas (N. C.) 962.

§ 7. — Objections to evidence.

It is not too late to object to the introduction of a witness after he has been offered, accepted by the court, sworn, and partially examined.—State v. Summer (S. C.) 771.

§ 8. — Argument and conduct of counsel.

Prompt condemnation by court of language of solicitor general, and instruction that jury should be controlled by the evidence only, *held* to counteract any injurious effect on the jury.—Battle v. State (Ga.) 160.

Error of the solicitor general, in reading an inapplicable section of the Criminal Code, *held* harmless, where the court instructed that it did not apply.—Dill v. State (Ga.) 660.

A new trial will not be granted because of improper remarks of counsel, where no request to charge on the subject was presented, and the remarks had no bearing on the merits of the case.—Bowens v. State (Ga.) 666.

§ 9. — Necessity, requisites, and sufficiency of instructions.

Where judge stated to jury, at time certain evidence was admitted, the purpose of its admission, that in his charge he omitted to again make the same statement is not ground for reversal.—Roark v. State (Ga.) 125.

Refusal of a written request to charge was not error where it was fully covered by the charge given.—Battle v. State (Ga.) 160.

Instruction as to the effect of statement by accused *held* not erroneous.—Teasley v. State (Ga.) 835.

Refusal to give a request which has already been substantially given is not error.—Carter v. State (Ga.) 845.

The court should charge as to the nature of the offense and the general principles of law essential to a conviction.—State v. Fulford (N. C.) 377.

It was *held* error to refuse to instruct that evidence of a like crime committed in another county could be considered only to prove the offense in the county where the venue was laid.—State v. Beard (N. C.) 804.

It was *held* a sufficient summing up of the case for the court merely to read the notes of the evidence, and charge the law in general terms.—State v. Beard (N. C.) 804.

Instructions of the judge as to confessions and admissions *held* unattended by any intimation of the judge that defendant had made any such confession, and not error.—State v. Taylor (S. C.) 149.

Instructions of judge *held* not a charge on the evidence.—State v. Taylor (S. C.) 149.

A charge that a reasonable doubt is a strong doubt based on the testimony is correct.—State v. Summer (S. C.) 771.

A charge *held* not erroneous as a reference to the testimony.—State v. Summer (S. C.) 771.

An instruction already substantially given is properly refused.—State v. Staley (W. Va.) 198.

§ 10. — Custody, conduct, and deliberations of jury.

Whether a jury should be discharged for inability to agree is within the sound discretion of the court.—State v. Stephenson (S. C.) 305.

§ 11. — Verdict.
Where one is indicted for two crimes involving different penalties, a general verdict of guilty is improper.—State v. Height (N. C.) 954.

A verdict, "We, the jury, find the prisoner guilty, and fix his punishment," etc., *held* not uncertain.—Hairston v. Commonwealth (Va.) 797.

§ 12. Motions for new trial and in arrest.

A new trial will be granted where leading counsel for accused was so ill that he was not in proper physical condition to give the case due care.—Flannagan v. State (Ga.) 80.

Material evidence as to new and important facts discovered after trial, where due diligence is shown, *held* ground for a new trial, where on another hearing a different verdict might be rendered.—Carr v. State (Ga.) 844.

§ 13. Judgment, sentence, and final commitment.

At a term where demand for trial is had, resulting in conviction and new trial granted, failure of accused to then move for discharge will not affect his rights under the demand.—Gordon v. State (Ga.) 32.

Where, on conviction, defendant is sentenced to fine and imprisonment, instead of fine or imprisonment, the case will be remanded for proper sentence.—State v. Taylor (N. C.) 548.

A person found guilty under a void count for burglary cannot be sentenced for housebreaking, though indictment charges such offense.—State v. Cottrell (W. Va.) 162.

§ 14. Appeal and error, and certiorari—Form of remedy, jurisdiction, and right of review.

Refusal to grant certiorari *held* proper.—Brown v. Town of Social Circle (Ga.) 141.

Code, § 1237, authorizing appeals by the state in certain cases, does not include a ruling of the superior court remanding a case for the imposition of a lesser sentence.—State v. Davidson (N. C.) 957.

An order overruling a motion to quash an indictment is not appealable.—State v. Mason (S. C.) 357.

§ 15. — Presentation and reservation in lower court of grounds of review.

An exception "to the instruction of the court as given" refers to the want of instruction, and is valid as presenting only one proposition of law.—State v. Fulford (N. C.) 377.

Failure to charge on a certain point will not be reviewed, in absence of a requested charge, the court having substantially charged the law applicable to the case.—State v. Kendall (S. C.) 300.

An exception to a portion of the charge alleged to be erroneous should point out wherein it is erroneous.—State v. Mason (S. C.) 357.

§ 16. — Record and proceedings not in record.

The supreme court cannot correct mistake in brief of evidence approved by trial judge and filed with clerk of trial court.—Minhinnett v. State (Ga.) 19.

Questions raised as to admissibility of evidence will not be considered, where the identification of the evidence objected to is uncertain.—Stovall v. State (Ga.) 586.

In passing on motion for new trial, the court may act on a written statement of facts prepared by the solicitor general, fully setting forth the occurrences at the trial.—Bowens v. State (Ga.) 666.

17. — Review.

Where brief of evidence in record shows offense, if any, committed after finding of prementiment, conviction will be set aside.—*Minhinatt v. State* (Ga.) 19.

A new trial will be granted where the record shows that a juror was not impartial.—*Flannan v. State* (Ga.) 80.

Where, on trial in October, 1898, under prementiment in September, 1897, the only evidence was that the offense was committed "on the night of the 9th of August," a conviction will be set aside.—*Givens v. State* (Ga.) 341.

Where, on writ of error sued out on conviction of murder, the supreme court adjudicated that the evidence did not authorize conviction, is the law of the case on second appeal, where practically the same evidence was adduced as on the first trial, and will cause reversal of conviction.—*Stephens v. State* (Ga.) 41.

Discretion of judge in determining whether error was impartial will not be disturbed.—*Arter v. State* (Ga.) 345.

Refusal to inquire whether any of the jurors were disqualified by relationship *held* not error when it is not shown that any juror was disqualified.—*Carter v. State* (Ga.) 345.

The time to be allowed counsel to prepare to defend accused is within the discretion of the trial judge, the exercise of which will not be disturbed on appeal unless abused.—*Charlon v. State* (Ga.) 347.

Where accused was properly found guilty of violating city ordinance, but the sentence was illegal in that it imposed imprisonment in addition to fine, the superior court will be directed to render judgment setting aside the sentence of recorder, and impose fine or imprisonment on default of payment.—*Papworth v. City of Fitzgerald* (Ga.) 363.

Failure to instruct as to the general principles of law essential to a conviction of larceny *held* prejudicial, where there was no direct evidence of asportation.—*State v. Fulford* (N. C.) 377.

Where no exception was taken to the charge, it will be presumed correct.—*State v. Sheppard* (S. C.) 146.

Defendants, convicted on only one count under indictment containing several, cannot complain because they were tried under all.—*State v. Sheppard* (S. C.) 146.

Where a jury is dismissed for a legal cause, and there is evidence tending to show the existence of the cause, the discretion of the trial court will not be disturbed.—*State v. Stephenson* (S. C.) 305.

Where the case for appeal contains no statement of facts on which to base the question presented, it cannot be considered.—*State v. Bullock* (S. C.) 424.

Illegal evidence will be presumed prejudicial and ground for reversal, unless it clearly appears that its exclusion would not have changed the result.—*State v. Hull* (W. Va.) 240.

18. Punishment and prevention of crime.

While a judge keeps within the limits prescribed for punishment, the amount imposed is purely discretionary.—*State v. Sheppard* (S. C.) 146.

In the absence of any evidence as to the facts attending the conduct of defendants, punished alike, though not in excess of the punishment prescribed by law, *held*, that it would not be assumed that the court abused its discretion.—*State v. Sheppard* (S. C.) 146.

CROSS BILL.

See "Equity," § 8.

CURTESY.

See "Dower."

Where a husband conveys land absolutely to a trustee for benefit of his wife, creating thereby an equitable separate estate, he has no curtesy.—*Jones v. Jones' Ex'r* (Va.) 463.

Acts 1876-77, pp. 333, 334, and Acts 1877-78, pp. 247, 248, creating statutory separate estates, do not affect a married woman's equitable separate estate, and the husband's right of curtesy is determined by equitable principles.—*Jones v. Jones' Ex'r* (Va.) 463.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.
Recovery for breach of covenant, see "Covenants," § 3.

Damages for particular injuries.

See "Nuisance," §§ 1, 2.

Breach by vendor of contract for sale of land, see "Vendor and Purchaser," § 5.

§ 1. Pleading, evidence, and assessment.

Instruction where there was evidence that plaintiff's earning capacity had not been totally destroyed as to the measure of damages *held* improper.—*Central of Georgia Ry. Co. v. Johnston* (Ga.) 78.

In action for personal injuries, after charging on physical and mental suffering, an instruction that jury could give plaintiff damages for the suffering from a consciousness that his earning capacity was injured for life *held* not error.—*Brush Electric Light & Power Co. v. Simonsohn* (Ga.) 902.

DEATH.

Of partner, see "Partnership," § 8.

Of party to action ground for abatement, see "Abatement and Revival," § 1.

Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

§ 1. Actions for causing death.

Allegation that deceased "left surviving him his father" is insufficient to show that he is only one entitled to benefit.—*Nohrden v. Northeastern R. Co.* (S. C.) 524.

Under 1 Rev. St. 1893, § 2316, providing that action may be brought for benefit of wife, husband, parent, and children, complaint, in action for benefit of father alone, must allege that he is only one entitled to benefit.—*Nohrden v. Northeastern R. Co.* (S. C.) 524.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Creditors' Suit"; "Fraudulent Conveyances"; "Insolvency."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 2.

DECLARATION.

In pleading, see "Pleading," § 1.

DECREE.

In equity, see "Equity," § 6.

DEEDS.

Acknowledgment of execution, see "Acknowledgment."

Covenants in deeds, see "Covenants."

In fraud of creditors, see "Fraudulent Conveyances."

Deeds by or to particular classes of parties.

See "Insane Persons," § 2.

Married women, see "Husband and Wife," § 3.

Deeds of particular species of property.

See "Homestead," § 2.

Water rights, see "Waters and Water Courses," § 3.

Particular classes of deeds.

Of trust, see "Assignments for Benefit of Creditors," § 1; "Mortgages."

§ 1. Requisites and validity.

It is immaterial upon what part of a deed the attestation clause is written and signed by a witness.—Gress Lumber Co. v. Georgia Pine Shingle Co. (Ga.) 632.

The presumption that a deed is executed at the place named in its caption is overcome, where the attestation clause recites another place of execution and delivery.—Gress Lumber Co. v. Georgia Pine Shingle Co. (Ga.) 632.

An instrument in form a deed conveying certain property on the grantor's death *held* a deed, and not a will.—Gay v. Gay (Ga.) 846.

Evidence *held* insufficient to rebut the presumption of the delivery raised by the due record of the instrument.—Allen v. Hughes (Ga.) 927.

A deed of part of property by a mortgagor to a mortgagee *held* based on a sufficient consideration.—Brown v. Bank of Sumter (S. C.) 816.

Where a mortgagee takes a deed absolute for a part of the property, the mortgage being extinguished in part, no new consideration is required for the validity of such deed.—Brown v. Bank of Sumter (S. C.) 816.

A deed procured by the grantee under false representations, before payment of the consideration as stipulated, *held* fraudulent and void.—O'Connor v. O'Connor (W. Va.) 276.

§ 2. Recording and registration.

Failure to record within a year from its date a deed executed in 1884 *held* to postpone the deed to one subsequently made and properly recorded.—White v. Interstate Building & Loan Ass'n (Ga.) 26.

A deed which has never been recorded prevails over a subsequent duly-recorded deed infected with usury.—White v. Interstate Building & Loan Ass'n (Ga.) 26.

Unrecorded deed is void as to creditors, whether they have notice or not.—Abney v. Ohio Lumber & Mining Co. (W. Va.) 256.

§ 3. Construction and operation.

Where owner of life estate and undivided one-seventh of fee conveys "the life interest and estate," *held* to pass only the life estate.—McDonald v. Taylor (Ga.) 879.

Deed construed, and *held* to vest in the trustee named title to the life estate only, and not to the estate in remainder.—Allen v. Hughes (Ga.) 927.

The word "issue" in a deed conveying property to an unmarried woman for life, and at her

man for life, and at her death to her living "child or children," construed.—Johnstone v. Taliaferro (Ga.) 931.

If two clauses in a deed are so repugnant to each other that they cannot stand, the first will be sustained, and the latter rejected.—Blackwell v. Blackwell (N. C.) 676.

Clauses in a deed giving a fee to a wife and a life estate to her husband *held* so repugnant as to necessitate a rejection of the first.—Blackwell v. Blackwell (N. C.) 676.

Deed conveying land in trust for G. and his children construed, and *held*, that on the birth of children the uses were vested, and G. *held* such land for life, and that remainder in fee simple vested in his children.—Rawles v. Johns (S. C.) 451; Same v. Newman. Id.

A deed *held* to convey title in present, and not in futuro.—Sumner v. Harrison (S. C.) 572.

Deed by husband to trustee for the benefit of wife and children, with power in the wife to sell or exchange, vests in her the entire interest, to the exclusion of the children.—Jones v. Jones' Ex'r (Va.) 463.

A conveyance *held* to create an equitable fee.—Davis v. Heppert (Va.) 467.

Where description consists of several parts, and some of them are incorrect, the incorrect parts will be rejected and the instrument be made to take effect.—Gibney v. Fitzsimmons (W. Va.) 189.

Where intent of deed is determined, effect will be given thereto, unless it violates some rule of property.—Gibney v. Fitzsimmons (W. Va.) 189.

Where language is ambiguous, the court may look to the acts of the parties and the use of the grant, to determine its construction.—Gibney v. Fitzsimmons (W. Va.) 189.

DE FACTO OFFICERS.

See "Officers," § 1.

DEFAULT.

Judgment by, see "Judgment," § 2.

DELAY.

Laches, see "Equity," § 2.

DELIVERY.

Of deed, see "Deeds," § 1.

Of goods sold, see "Sales," § 6.

DEMAND.

Before action, see "Limitation of Actions," § 2.

DEMONSTRATIVE EVIDENCE.

In civil actions, see "Evidence," § 4.

DEMURRER.

In pleading, see "Pleading," § 4.

To indictment, see "Indictment and Information," § 3.

DENIALS.

In pleading, see "Pleading," § 2.

DEPOSITIONS.

See "Affidavits."

DEPUTIES.

See "Sheriffs and Constables," § 1.

DESCENT AND DISTRIBUTION.

See "Curtesy"; "Dower"; "Executors and Administrators."

Property and interests undisposed of by will, see "Wills," § 6.

§ 1. Persons entitled and their respective shares.

Where a woman marries one of two brothers, and survives them both, and is not of blood kin to either, and her husband dies first, she is not an heir at law of the other.—*Green v. Grant* (Ga.) 846.

§ 2. Rights and liabilities of heirs and distributees.

Proof of the execution of a will is sufficient to overcome the presumption that heirs are entitled to testator's land.—*Cox v. Beaufort County Lumber Co.* (N. C.) 381.

Heirs are presumed to be entitled to their ancestors' land.—*Cox v. Beaufort County Lumber Co.* (N. C.) 381.

DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 5.
Of property conveyed, see "Deeds," § 3.

DEVISES.

See "Wills."

DIRECTING VERDICT.

In civil actions, see "Trial," §§ 3-5.

DISCHARGE.

From indebtedness, see "Release."

— liability as surety, see "Principal and Surety," § 3.

DISCOVERY.

§ 1. In equity.

A bill of discovery cannot be maintained against a corporation alone.—*Roanoke St. Ry. Co. v. Hicks* (Va.) 295.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," §§ 14-23.

DISMISSAL AND NONSUIT.

At trial, see "Trial," §§ 3-5.

Dismissal of appeal or writ of error, see "Appeal and Error," § 12.

— of suit in equity, see "Equity," § 5.

§ 1. Involuntary.

After demurrer overruled, it is too late to move to dismiss for defects in process.—*Paulk v. Tanner* (Ga.) 99.

Motion for nonsuit held properly overruled.—*Paulk v. Tanner* (Ga.) 99.

Failure to produce papers in conformity with a notice held not to warrant a dismissal of the case, in the absence of a peremptory order of the court requiring their production.—*Ray v. Home & Foreign Investment & Agency Co.* (Ga.) 603.

Ground for nonsuit held insufficient, being based on a written contract sued on, while the action was grounded in addition on a supplementary parol contract.—*Sloan v. Pelzer* (S. C.) 431.

DISORDERLY CONDUCT.

See "Disturbance of Public Assemblage."

DISQUALIFICATION.

Of judge, see "Judges," § 2.

DISSOLUTION.

Of injunction, see "Injunction," § 3.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

— of insolvent, see "Insolvency," § 1.

Of proceeds of property fraudulently conveyed, see "Fraudulent Conveyances," § 3.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

A punishment by fine and imprisonment of defendants convicted of disturbing religious worship held neither excessive, cruel, nor unusual.—*State v. Sheppard* (S. C.) 146.

DIVERSION.

Of water course, see "Waters and Water Courses," § 1.

DIVORCE.

§ 1. Alimony, allowances, and disposition of property.

On application by wife for temporary alimony in divorce, brought on the ground of cruel treatment by husband, testimony showing such cruel treatment is admissible.—*Ray v. Ray* (Ga.) 91.

Pending divorce, application for temporary alimony may be determined by judge in vacation.—*Ray v. Ray* (Ga.) 91.

DOCKETS.

Of causes on appeal, see "Appeal and Error," § 8.

DOMICILE.

Evidence held to justify the charge of the principles embodied in Civ. Code, § 1825, as to selection of domicile where persons resided differently at two or more places.—*Battle v. Braswell* (Ga.) 838.

DOWER.

See "Curtesy."

§ 1. Inchoate interest.

A grantee's wife acquires no right in land mortgaged to secure a purchase where the balance was not paid when reconveyed to the grantor & Water Co. v. Fray (Va.)

Under Code, § 2502, a title through a lost unrecorded dower of grantor & Water Co. v. Fray

band.—Brown v. Morrissey (N. C.) 687.

Statutory bar to widow's remedy to recover dower is the lapse of 10 years from the death of her husband.—*Morris v. Roseberry* (W. Va.) 1019.

DUE PROCESS OF LAW.

See "Constitutional Law," § 5.

DYING DECLARATIONS.

See "Homicide," § 4.

EJECTION.

Of passenger, see "Carriers," §§ 8-9.

EJECTMENT.

§ 1. Right of action and defenses.

Defects in defendant's title do not avail plaintiff.—*Beddard v. Harrington* (N. C.) 377.

§ 2. Trial, judgment, enforcement of judgment, and review.

Verdict in ejectment held too indefinite as to description of the property to support judgment.—*McCullough v. East Tennessee, V. & G. Ry. Co.* (Ga.) 97.

Failure to charge that plaintiff must prove the acquisition of title from the common source held not error, where a deed from the common source to plaintiff was construed to be valid.—*Rawles v. Johns* (S. C.) 451; *Same v. Newman*, Id.

An order of survey and plat are not indispensable to trial of ejectment.—*King v. Jordan* (W. Va.) 1022.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 2.

ELECTIONS.

§ 1. Registration of voters.

Under Const. art. 2, registration is an essential qualification of an elector.—*Mew v. Charleston & S. Ry. Co.* (S. C.) 828.

Custodian of registration books will be compelled to allow their inspection.—*Kellar v. Stone* (Va.) 454; *Walker v. Same*, Id.

§ 2. Count of votes, returns, and canvass.

Under 22 St. at Large, p. 55, an election to determine whether parts of a township of one county shall be cut off to form part of another is subject to Rev. St. 1893, §§ 174-180, and hence a decision by a county board of canvassers on a contest thereof is appealable to the state board.—*State v. Moore* (S. C.) 700.

The candidate asking a recount of ballots need not assign errors in the first count or give reasons for a recount.—*Hebb v. Cayton* (W. Va.) 187.

Where ballots once recounted, as between candidates for one office, are sealed up, it does not debar a candidate for another office from demanding a recount as to it.—*Hebb v. Cayton* (W. Va.) 187.

To render ballots cast controlling evidence, it must appear that they have been preserved in the manner and by the officers prescribed by statute, and have not been exposed to the reach of unauthorized persons.—*Dent v. Board of Com'rs* (W. Va.) 250.

§ 3. Contests.

Parties held to have waived notice of protest of an election.—*State v. Moore* (S. C.) 700.

EMINENT DOMAIN.

§ 1. Nature, extent, and delegation of power.

An appropriation by a municipality is for a private use, where the benefit to it is only incidental and prospective, and the substantial benefit is for a private person.—*Stratford v. City of Greensboro* (N. C.) 394.

Payment by an individual of the cost of appropriating property does not make the appropriation for a private use.—*Stratford v. City of Greensboro* (N. C.) 394.

Under Code, §§ 1287-1289, a telegraph company may construct its line on a railroad's right of way.—*Postal Tel. Cable Co. v. Farmville & P. R. Co.* (Va.) 468.

§ 2. Compensation.

Compensation so excessive that it must be attributed to prejudice or mistake of law will be set aside.—*Norfolk & W. R. Co. v. Nighbert* (W. Va.) 1032.

§ 3. Proceedings to take property and assess compensation.

Courts have no jurisdiction to review the necessity of the appropriation of property for a public use by a municipality.—*Stratford v. City of Greensboro* (N. C.) 394.

The question what constitutes a public use is judicial.—*Stratford v. City of Greensboro* (N. C.) 394.

§ 4. Remedies of owners of property.

A taxpayer of a municipality may question whether the appropriation of another's property by the municipality is for a public use.—*Stratford v. City of Greensboro* (N. C.) 394.

The appropriation of property for a private use, though without fraud, may be restrained.—*Stratford v. City of Greensboro* (N. C.) 394.

EMPLOYES.

See "Master and Servant."

ENTICEMENT.

Of husband or wife, see "Husband and Wife," § 5.

ENTRY.

Of appeal, see "Appeal and Error," § 8.

EQUITY.

Equitable estoppel, see "Estoppel," § 2.

—set-off, see "Set-Off and Counterclaim."

Relief against judgment, see "Judgment," § 6.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Creditors' Suit"; "Discovery," § 1; "Injunction"; "Partition," § 1; "Quieting Title"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

§ 1. Jurisdiction, principles, and maxims.

The fact that an indorser of a note deposited money with a bank after it had brought suit on a note, and that it subsequently became insolvent, affords no ground for equitable interference.—*Piedmont Bank of Morganton v. Wilson* (N. C.) 889.

To entitle plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established.—Board of Trustees Blair (W. Va.) 203.

2. Laches and stale demands.

Commissioner appointed to sell lands, and disburse purchase money on claims thereto, who permits the other commissioner to collect and disburse the money, and remains passive until 3 years after the death of the active commissioner, 27 years after the date of the appointment, and 31 years after decree fixing the amount of the claims, cannot, because of laches, maintain a bill to ascertain whether purchase money remains unpaid, and, if so, to sell the land.—Woods v. Campbell (W. Va.) 208.

3. Pleading.

Equitable petition considered, and *held* that striking name of one of the parties and all payers affecting his interest did not aid a new use of action.—Causey v. Causey (Ga.) 138.

Where petition was not verified other than by affidavit of truth so far as plaintiff had personal knowledge and belief in truth of allegations, so far as plaintiff's knowledge was derived from others it was error, where no other evidence was introduced to grant the relief sought, though, on proper proof, plaintiff might have been entitled to such relief.—Bigbee v.ATTERFIELD (Ga.) 139.

An answer in the nature of a cross bill, praying judgment on notes and setting up a lien on and securing them, *held* germane to an injunction suit to restrain defendant from foreclosing such security.—Ray v. Home & Foreign Investment & Agency Co. (Ga.) 603.

Prior to Civ. Code, § 5055, an answer to a petition in equity, waiving discovery, need not be verified, though the petition was verified.—Ray v. Home & Foreign Investment & Agency Co. (Ga.) 603.

4. Evidence.

Evidence *held* to support a judgment for defendant on notes demanded in a cross bill to plaintiff's suit to enjoin foreclosure of a mortgage.—Ray v. Home & Foreign Investment & Agency Co. (Ga.) 603.

5. Dismissal before hearing.

Dismissal of petition for injunction to restrain foreclosure of a mortgage *held* not to affect a dismissal of defendant's cross bill for judgment on the notes secured.—Ray v. Home & Foreign Investment & Agency Co. (Ga.) 603.

Under the facts, *held*, that a decree of dismissal should be without prejudice.—Beatty v. Barley (Va.) 794.

6. Decree, and enforcement thereof.

Parties to an ambiguous interlocutory decree *held* entitled to a rehearing after an acquiescence of 10 years.—Todd v. McFall (Va.) 472.

7. Bill of review.

In a bill of review, complainant cannot change his position he took in the original bill.—Beatty v. Barley (Va.) 794.

On a bill to review a decree for error in law, the error must appear on the face of the decree, orders, and proceedings.—Beatty v. Barley (Va.) 794.

Error in reaching wrong conclusion as to facts in the evidence cannot be corrected by bill of review.—Wethered v. Elliott (W. Va.) 209.

A bill of review for newly-discovered evidence will not lie, where it is simply cumulative.—Wethered v. Elliott (W. Va.) 209.

Finding of document since decree entered, where plaintiff knew of its existence, though he could not find it, *held* no ground for a bill of review.—Wethered v. Elliott (W. Va.) 209.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of highways, see "Highways," § 1.

Of railroads, see "Railroads," § 4.

Of trusts, see "Trusts," § 5.

ESTATES.

Created by deed, see "Deeds," § 3.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

Tenancy in common, see "Tenancy in Common."

Trusts, see "Trusts," § 2.

Particular estates.

See "Curtesy"; "Dower"; "Life Estates"; "Remainders."

A base or qualified fee is not void.—Keith v. Scales (N. C.) 809.

ESTOPPEL.

By judgment, see "Judgment," § 8.

Of tenant to dispute title of landlord, see "Landlord and Tenant," § 1.

To avoid or forfeit insurance policy, see "Insurance," § 11.

To take appeal, see "Appeal and Error," § 2.

§ 1. By record.

Title of a purchaser on foreclosure cannot be impeached by a defendant who voluntarily withdrew.—Moody v. Dickinson (S. C.) 563.

§ 2. Equitable estoppel.

Security on appeal bond *held* estopped to question its validity on the ground that he was also surety on replevin bond, given by defendant when he filed his counter affidavit, in order to arrest proceedings on *fi. fa.* issued against him and defendant on the verdict of the jury in the appeal case.—Stewart v. Hall (Ga.) 14.

Where a mortgagor attempts to enjoin foreclosure, he cannot set up a sale thereunder as a defense to an action on notes secured, the grantee having abandoned his rights under the mortgage.—Ray v. Home & Foreign Investment & Agency Co. (Ga.) 603.

Evidence that a party to a contract assured the other party he would make good the claims secured therein *held* competent, in estoppel, against his disputing the claims.—Sloan v. Pelzer (S. C.) 431.

Where one negligently or inadvertently signed a contract without reading it, and the other party thereto released security on the strength of it, the former is estopped to avail himself of a mistake as to its terms.—Sloan v. Pelzer (S. C.) 431.

Actual notice of the truth of facts represented or concealed is not necessary to an equitable estoppel.—Mercantile Co-operative Bank v. Brown (Va.) 64.

A mortgagee *held* estopped, as against a subsequent mortgagee, to set up that his deed was recorded earlier than as shown by the record.—Mercantile Co-operative Bank v. Brown (Va.) 64.

EVIDENCE.

See "Affidavits"; "Discovery"; "Witnesses."

Applicability of instructions to evidence, see "Trial," §§ 6-11.

Reception at trial, see "Criminal Law," § 6; "Trial," § 2.

Review on appeal or writ of error, see "Appeal and Error," §§ 14-23.

Verdict or findings contrary to evidence, see "New Trial," § 1.

Defence of statute of limitations, see "Limitation of Actions," § 4.

In particular civil actions or proceedings.

See "Fraud," § 1; "Rape," § 1; "Replevin," § 2. Equity, see "Equity," § 4. Probate proceedings, see "Wills," § 4.

In particular criminal prosecutions.

See "Criminal Law," § 3; "Homicide," § 4.

§ 1. Judicial notice.

The court judicially knows that maintaining gates and a flagman at a crossing of railroad tracks by a street railway lessens the danger of accidents.—*Richmond Union Pass. Ry. Co. v. Richmond, F. & P. R. Co. (Va.)* 787.

§ 2. Relevancy, materiality, and competency in general.

The valuation of land for taxation, although not objected to as too low by the owner at the time, is not admissible against him as evidence of value.—*Ridley v. Seaboard & R. R. Co. (N. C.)* 379.

Evidence of repute as to the title to certain lands is inadmissible to prove such title.—*Hiers v. Risher (S. C.)* 509.

Old deeds which are connecting links between transactions leading up to an alleged lost deed, on which plaintiff relies as her title, are admissible.—*Hiers v. Risher (S. C.)* 509.

Evidence of parties seeking to impose on court of equity by false statements and deceptive practices should be rejected.—*Atkinson v. Plumb (W. Va.)* 229.

§ 3. Best and secondary evidence.

Where original summons is lost, docket of justice court showing entry by the proper officer held admissible as secondary evidence.—*Battle v. Braswell (Ga.)* 838.

Parol evidence is admissible to prove the probate of a will, where the court records are burned.—*Cox v. Beaufort County Lumber Co. (N. C.)* 381.

§ 4. Demonstrative evidence.

Evidence which tends to aid in arriving at truth held admissible.—*Talbotton R. Co. v. Gibson (Ga.)* 151; *Gibson v. Talbotton R. Co., Id.*

§ 5. Admissions.

Where conspiracy between husband and wife to defraud creditors has been established, evidence of declarations while the conspiracy was pending, showing the intent, held admissible against the wife.—*Ernest v. Merritt (Ga.)* 898.

Where conspiracy between husband and wife to defraud creditors is shown, admissions of the wife establishing a fraud held admissible against her.—*Ernest v. Merritt (Ga.)* 898.

§ 6. Declarations.

Declarations made in the presence and hearing of a party, and not denied by him, are admissible against him.—*Webb v. Atkinson (N. C.)* 737.

§ 7. Documentary evidence.

Books of account are inadmissible without foundation laid.—*Talbotton R. Co. v. Gibson (Ga.)* 151; *Gibson v. Talbotton R. Co., Id.*

Decree in chancery, when offered to establish any particular fact, or as an adjudication on the subject-matter, held admissible only when accompanied by authenticated copy of the proceedings in which it was rendered.—*Kerchner v. Frazier (Ga.)* 351.

A certificate to the record of probate proceedings held to refer to the examination of wit-

nesses, held immaterial.—*Roscoe v. John L. Roper Lumber Co. (N. C.)* 389.

A will is inoperative and inadmissible in evidence unless proved in a probate court, and admitted to record.—*Grand Fountain of United Order of True Reformers v. Wilson (Va.)* 48.

The certificate of a recorder of an incorporated town, stating facts which appear on the records of the council, and not certifying copies from such records, is not admissible.—*Roe v. Town of Philippi (W. Va.)* 224.

Books of municipality publicly kept, and authenticated copies therefrom, held admissible evidence of the facts witnessed therein.—*Town of Parsons v. Miller (W. Va.)* 1017.

A plat shown to be approximately correct may be used to apply the evidence, but is not evidence of itself.—*King v. Jordan (W. Va.)* 1022.

§ 8. Parol or extrinsic evidence affecting writings.

Though note appears to have been given for a particular consideration, parol evidence is admissible to show different consideration.—*Burke v. Napier (Ga.)* 134.

Parol evidence held admissible to show that a note sued on was deposited as collateral, and that with it were also deposited certain rent notes to secure the collateral, and that from the rent notes enough had been received to discharge the collateral note.—*G. Ober & Sons Co. v. Drane (Ga.)* 371.

Parol evidence held admissible to show circumstances surrounding the execution of a note, to determine whether the transaction in which it was given was a cover for usury.—*Dwelle v. Blackwood (Ga.)* 593.

An acknowledgment in a policy of life insurance of the receipt of the premium cannot be contradicted by parol to invalidate the contract, in the absence of fraud.—*Kendrick v. Mutual Ben. Life Ins. Co. (N. C.)* 728.

It cannot be shown by parol that a contract was different from its written portion, except in a suit to rescind.—*Sloan v. Pelzer (S. C.)* 431.

A receipt, in so far as it is an admission of the payment of money, may be contradicted by parol evidence of fraud or mistake.—*Cushwa v. Improvement, Loan & Building Ass'n (W. Va.)* 259.

§ 9. Opinion evidence.

The speed of a passing train is not a question of science.—*McVey v. Chesapeake & O. Ry. Co. (W. Va.)* 1012.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 3.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," §§ 3-6, 9.

§ 1. Settlement, signing, and filing.

A bill of exceptions must be signed by the judge.—*Adkins v. Globe Fire Ins. Co. (W. Va.)* 194.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

"Homicide," § 2.

EXECUTION.

"Attachment."
 emptions, see "Exemptions."

1. Claims by third parties.

Where a widow claimed property seized on execution against the estate, *held*, that tax *fi. fas.* the return of appraisers on the estate including the property were not admissible against her. *White v. Interstate Building & Loan Ass'n* (I.) 26.

Failure to file claim will not prevent true owner from asserting title against purchaser at sheriff's sale. *McLennan v. Graham* (Ga.) 118.

In motion of mortgagee for rule for funds in hands of sheriff from sale made under mortgage *fa. and* by another for the same funds on execution on foreclosure of laborer's lien, *held* error to dismiss mortgagee's petition, and direct that the money be paid on the laborer's lien, where petition denied the existence of such lien. *Paris v. Citizens' Banking Co.* (Ga.) 141; *Citizens' Banking Co. v. Paris*, *Id.*

Presumption arising on showing the land in possession of defendant at time of levy is not rebutted by introduction of deed to claimant showing stranger to have been in possession. *Clements v. Stubbs* (Ga.) 584.

Where, at time of levy on land, defendant in execution is in possession, a *prima facie* case title in defendant is made, authorizing verdict subjecting property to sale, in absence of contrary proof by claimant. *Clements v. Stubbs* (Ga.) 584.

Rule against sheriff to distribute funds from sale of personal property, intervener, alleging priority, and averring that movant had no lien, the burden of showing the facts alleged in intervention. *Moore v. Brown, Bradbury & Lett Furniture Co.* (Ga.) 835.

EXECUTORS AND ADMINISTRATORS.

"Descent and Distribution."

Effect of administration on limitation, see "Limitation of Actions," § 2.

.. Collection and management of estate.

Administrator *de bonis non* with will annexed, under the will, to have power to bind the estate by contract for necessary supplies for surviving lands of estate. *Brannon v. G. Ober Sons Co.* (Ga.) 16.

An executor failing to pay a note due from himself personally *held* not guilty of fraudulent application of funds. *Culbreth v. Smith* (N.) 714.

2. Allowances to surviving wife, husband, or children.

Where a caveat is filed by an administrator on behalf of widow for an allowance for herself and children, and objection is made only as to the set apart for widow, on appeal to the superior court, where the widow settles with the administrator, the caveat cannot be amended so as to bring in issue of allowance to the children. *Jacobson v. Jacobson* (Ga.) 877.

Where a widow is allowed money the collection of which must exhaust the entire assets, neither she nor her children, as heirs, can recover anything from the administrator. *Josey Gordon* (Ga.) 951.

3. Allowance and payment of claims.

An attorney's claim against the administrator on his personal contract, for assisting him

in his duties, cannot be enforced against an intestate's estate. *Lindsay v. Darden* (N. C.) 678.

§ 4. Distribution of estate.

Private sale of land by executor, under powers in will, in good faith, to pay taxes and for distribution of realty, *held* to convey the land discharged of prior judgment lien against residuary legatees, no levy having been made before sale. *Penn v. Mutual Cotton-Oil Co.* (Ga.) 17.

A court of equity can interfere with an executor's improper exercise of a limited power. *Ashley v. Holman* (S. C.) 992.

§ 5. Sales and conveyances under order of court.

An instruction to find in the affirmative on an issue whether an intestate was seised and possessed of land *held* proper. *Straughan v. Tysor* (N. C.) 557.

§ 6. Actions.

Action against administrator *de bonis non* on note given by him for supplies furnished *held* not demurrable on ground that administrator could not bind estate by the note. *Brannon v. G. Ober & Sons Co.* (Ga.) 16.

Estate of testator *held* not liable for torts of executor. *Anderson v. Foster* (Ga.) 373.

Where money belonging to another in the hands of an executor was misapplied in part payment of a judgment against himself as an individual, and another, as executor of an estate which owned the judgment, received the money knowing of its misappropriation, it does not render such executor liable in his representative capacity. *Anderson v. Foster* (Ga.) 373.

Administrator may sue one not an heir, to recover land of the estate, without showing necessity to administer it to pay debts. *Green v. Grant* (Ga.) 846.

An administrator may sue the widow and children to reach property fraudulently conveyed to them by the intestate. *Webb v. Atkinson* (N. C.) 737.

Complaint by administrator appointed six days before action is brought need not allege that he is still qualified to act as such. *Nohrden v. Northeastern R. Co.* (S. C.) 524.

A purchaser of an estate subject to assessment under a will should be made a party to an action by executor to enforce such an assessment. *Ashley v. Holman* (S. C.) 992.

Plea to the merits admits right of plaintiff to sue as administrator. *McDonald v. Cole* (W. Va.) 1033.

Where one sues as administrator, there need be no proof of appointment, unless plea denies it. *McDonald v. Cole* (W. Va.) 1033.

§ 7. Accounting and settlement.

Refusal to relieve an executor from forfeiture of commissions because of failure to make returns *held* proper. *Davidson v. Story* (Ga.) 867; *Story v. Davidson*, *Id.*

Evidence *held* to show that executor was not entitled to credit for professional services rendered the estate. *Davidson v. Story* (Ga.) 867; *Story v. Davidson*, *Id.*

EXEMPLIFICATIONS.

As evidence, see "Evidence," § 7.

EXEMPTIONS.

See "Homestead."

§ 1. Protection and enforcement of rights.

The chattel exemption allowed the widow and surviving children out of a decedent's es-

ice on death or exceptions to return of appraisers appointed to appraise homestead is insufficient, as they must be filed.—*Ex parte Ransey* (S. C.) 522; *In re Chafee*, *Id.*

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 3.

FACTORS.

Keepers of a tobacco sales room who sold a consignment *held* the agents of consignor.—*White v. Boyd* (N. C.) 495.

Keepers of a tobacco sales room who sell mortgaged tobacco as agents of the mortgagor, without the mortgagee's consent, are liable in conversion.—*White v. Boyd* (N. C.) 495.

FALSE PRETENSES.

To constitute the crime of obtaining goods under false pretenses, there must be a false statement as to an existing fact.—*State v. Whidbee* (N. C.) 318.

To constitute the offense, there must be a false representation of a subsisting fact, breach of promise being insufficient.—*State v. Knott* (N. C.) 798.

FEEES.

Of particular classes of officers or other persons.
See "Witnesses," § 1.

FILING.

Record on appeal or writ of error, see "Appeal and Error," § 9.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," §§ 14-23.

FINES.

All fines imposed by the county court for violation of laws of the state must be paid over to the county treasurer, whether the conviction is had on an accusation in such court, or an indictment found in the superior court and transferred to the county court for trial.—*Overstreet v. Rawlings* (Ga.) 855.

FIRES.

See "Arson."

Caused by operation of railroad, see "Railroads," §§ 6-12.

FIXTURES.

Where mortgaged machinery was placed in a mortgaged mill, and the mill would not be damaged by its removal, *held*, that the mortgagee of the machinery might remove it.—*Hurxthal's Ex'x v. Hurxthal's Heirs* (W. Va.) 237.

FORCIBLE ENTRY AND DETAINER.

§ 1. Civil liability.

Where a warrant to eject an intruder is met by the prescribed counter affidavit, the bona

FORECLOSURE.

Of mortgage, see "Mortgages," § 4.

FOREIGN CORPORATIONS.

See "Corporations," § 4.

FOREIGN JUDGMENTS.

See "Judgment," § 10.

FORFEITURES.

For nonpayment of tax, see "Taxation," § 10.

Of devises or bequests, see "Wills," § 6.

Of insurance, see "Insurance," §§ 10, 16.

FORGERY.

Evidence *held* to justify verdict of guilty.—*Shope v. State* (Ga.) 140.

An indictment under Pen. Code, § 243, need not on its face show in what manner it was intended to consummate the fraud.—*Shope v. State* (Ga.) 140.

A forgery which can be used to defraud another *held* indictable under Pen. Code, § 243.—*Shope v. State* (Ga.) 140.

An objection to an indictment charging accused with forging a witness pay certificate *held* untenable.—*State v. Bullock* (S. C.) 424.

An indictment for forging a witness pay certificate *held* sufficient.—*State v. Bullock* (S. C.) 424.

2 Rev. St. 1893, § 295, *held* sufficiently broad to cover the forgery of a witness pay certificate.—*State v. Bullock* (S. C.) 424.

Where an accused was not indicted as a clerk or for forging the name of a clerk, the indictment *held* not invalid because it does not allege that he was a clerk.—*State v. Bullock* (S. C.) 424.

An indictment of forgery of a witness pay certificate *held* not invalid.—*State v. Bullock* (S. C.) 424.

FORMER ADJUDICATION.

See "Judgment," § 8.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 2.

FORMS OF ACTION.

See "Action," § 2; "Ejectment."

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

In particular classes of conveyances, contracts, or transactions.

See "Assignments for Benefit of Creditors," § 1.

§ 1. Actions.

The burden of proof is on him who alleges fraud.—*Board of Trustees v. Blair* (W. Va.) 203.

FRAUDS, STATUTE OF.

§ 1. Promises to answer for debt, default, or miscarriage of another.
Complaint on a guaranty *held* good, though it

§ 2. **Agreements not to be performed within one year.**

An oral contract between two carriers to jointly maintain gates and a flagman at a crossing of their respective tracks is not a contract not to be performed within a year, within Code 1887, § 2840, cl. 7.—Richmond Union Pass. Ry. Co. v. Richmond, F. & P. R. Co. (Va.) 787.

The statute of frauds *held* not to apply to a parol agreement as to the compensation a deputy sheriff should receive for services not to be performed within a year, he having bound himself in writing to perform such services faithfully.—Davis v. Baker (W. Va.) 239.

FRAUDULENT CONVEYANCES.

§ 1. **Transfers and transactions invalid.**

One taking a deed for valuable consideration *held* not affected by intent to defraud on the part of the grantor unknown to grantee.—Ernest v. Merritt (Ga.) 898.

Voluntary deed executed by grantor, though solvent, with intent to delay his creditors, *held* fraudulent, whether donee knew of the intent or not.—Ernest v. Merritt (Ga.) 898.

The law raises a presumption of fraud in a conveyance to relatives without consideration, by one greatly embarrassed by debt.—Webb v. Atkinson (N. C.) 737.

Agreement of an insolvent grantee to remove incumbrances not incurred by the grantor is not a consideration for the conveyance.—Webb v. Atkinson (N. C.) 737.

Burden *held* on the wife to show that she paid for property with her own means, as against the husband's creditors.—Murdoch v. Baker (W. Va.) 1009.

Complicity of a purchaser in the debtor's fraud may be proved by circumstantial evidence.—Murdoch v. Baker (W. Va.) 1009.

A conveyance was set aside as to a purchaser for value who participated in the fraud.—Murdoch v. Baker (W. Va.) 1009.

A purchaser *held* a participant in the fraud of the debtor, though he did not intend to aid the debtor.—Murdoch v. Baker (W. Va.) 1009.

§ 2. **Rights and liabilities of parties and purchasers.**

A wife receiving a conveyance from her husband in fraud of his creditors *held* a trustee for them.—Webb v. Atkinson (N. C.) 737.

§ 3. **Remedies of creditors.**

A charge that a conveyance was fraudulent *held* not error.—Webb v. Atkinson (N. C.) 737.

Insolvency may be proved by general reputation.—Webb v. Atkinson (N. C.) 737.

The fact that a mortgage and bill of sale of the same property to the same creditor were filed on the same day does not establish that the bill was given as further security.—Slingluff v. Hall (N. C.) 739.

A grantor's voluntary deed to his wife and son *held* to have been executed without intention to defraud a subsequent creditor.—Gentry v. Lanneau (S. C.) 523.

There must be proof of actual fraud to invalidate a deed as to subsequent creditors.—Gentry v. Lanneau (S. C.) 523.

It cannot be conclusively presumed that, because a deed was without consideration and the grantor insolvent, it is fraudulent as to subsequent creditors having constructive notice thereof.—Gentry v. Lanneau (S. C.) 523.

Injunction bond payable on specified contingency, given before a deed of land which is a

GAMING.

§ 1. **Criminal responsibility.**

Where evidence does not show defendant guilty of playing and betting for money or other valuable things, a conviction cannot be sustained.—Simmons v. State (Ga.) 839.

GARNISHMENT.

See "Attachment."

§ 1. **Nature and grounds.**

The existence of a valid judgment against a debtor is essential to support a judgment in garnishment.—Phillips v. Wait (Ga.) 647.

§ 2. **Persons and property subject to garnishment.**

A creditor of an administrator of an estate in which the administrator is personally interested, where the debtor is insolvent, may garnishee such interest.—Brown v. Wiley (Ga.) 905.

Where a debtor is personally interested in an estate of which he is administrator, in garnishment the debtor as an individual and as an administrator are to be treated as distinct persons.—Brown v. Wiley (Ga.) 905.

Unless a nonresident garnishee have personality of the debtor with him, or his debt is payable in the state where garnished, the garnishment is a nullity.—Balk v. Harris (N. C.) 799.

§ 3. **Proceedings to support or enforce.**

The supreme court directed that the judgment, being in a garnishment case, should abide the final result of the issue over the judgment in the main case.—Phillips v. Wait (Ga.) 647.

§ 4. **Operation and effect of garnishment, judgment, or payment.**

Where the court acquires no jurisdiction to render judgment against principal defendant, garnishee cannot relieve himself of liability to defendant by paying the debt into court.—Southern Ry. Co. v. Newton (Ga.) 658.

Payment of a void judgment by default against a garnishee's creditor in a foreign jurisdiction will not protect the garnishee, where he made no defense or took no steps to notify the creditor of the attachment proceedings.—Stewart v. Northern Assur. Co. (W. Va.) 218.

GAS.

Where injury caused by natural gas furnished plaintiff by defendant is the natural consequence of negligence of defendant, such negligence is the proximate cause of the injury.—Barrickman v. Marion Oil Co. (W. Va.) 327.

Where defendant permits its appliances for furnishing natural gas to remain for an unreasonable time in an unsafe condition, it is liable for injuries proximately caused by such negligence.—Barrickman v. Marion Oil Co. (W. Va.) 327.

On trial for damages caused by destruction by fire by negligently permitting too great a pressure of gas furnished, evidence of what pressure the gauge of another gas company usually indicated is inadmissible.—Barrickman v. Marion Oil Co. (W. Va.) 327.

Where defendant, furnishing natural gas, negligently permits a greater amount of pressure to be furnished than is proper, by reason whereof the building so furnished is injured by fire, defendant is liable.—Barrickman v. Marion Oil Co. (W. Va.) 327.

GIFTS.

Charitable gifts, see "Charities." -

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 2.

GRAND JURY.

See "Indictment and Information."

One who has been bound over to superior court for trial cannot, after indictment, attack same on the ground that the grand jurors were disqualified by relationship.—*Shope v. State* (Ga.) 140.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

GUARDIAN AND WARD.**§ 1. Appointment, qualification, and tenure of guardian.**

Where a new guardian is not legally appointed, he has no power to cite the old guardian to a settlement of his accounts.—*Gilbert v. Stephens* (Ga.) 849.

A new guardian cannot be lawfully appointed until revocation of the former guardian's letters.—*Gilbert v. Stephens* (Ga.) 849.

§ 2. Custody and care of ward's person and estate.

Where a minor, by permission of a guardian, does business as an adult, and the guardian is discharged, and during the minority of the ward contracts with him as to such business, former relationship does not invalidate the contract.—*Ullmer v. Fitzgerald* (Ga.) 869.

§ 3. Actions.

On demurrer to a complaint alleging that the bond sued on had been assigned to the plaintiff as guardian, defendant cannot object that the complaint fails to allege plaintiff's appointment as guardian.—*Barnwell v. Marion* (S. C.) 313.

Under Code, § 134, a guardian who is assignee of a bond made payable to a certain trustee or his assigns may sue on it without joining his wards.—*Barnwell v. Marion* (S. C.) 313.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," §§ 14-23.

HAWKERS AND PEDDLERS.

One who delivers an article already sold, and collects the price, or who sells articles without traveling about, is not a "peddler or itinerant merchant."—*City of Greensboro v. Williams* (N. C.) 492.

HEARING.

In probate proceedings, see "Wills," § 4.

On appeal or writ of error, see "Appeal and Error," § 13.

HIGHWAYS.

Accidents at railroad crossings, see "Railroads," §§ 6-12.

§ 1. Establishment, alteration, and discontinuance.

A way used as a neighborhood road for 40 years, and not maintained at public expense, held not a public highway for the obstruction of which an indictment will lie.—*State v. Lucas* (N. C.) 553.

The proceedings of county commissioners in laying out a highway are quasi judicial, and hence cannot be collaterally attacked for mere irregularities.—*State v. Kendall* (S. C.) 300.

A charge, in prosecution for obstructing highway, that it must be "substantially" the same as used by the public for 20 years, instead of "precisely" the same, held harmless.—*State v. Tyler* (S. C.) 422.

A charge held not faulty as failing to state that a highway by prescription must be acquired by "adverse" user.—*State v. Tyler* (S. C.) 422.

§ 2. Highway districts and officers.

Failure of the town commissioners to keep streets in repair, as required by Code, § 3843, is an indictable offense.—*State v. Dixon* (N. C.) 961.

An indictment charging town commissioners with neglecting to keep a street in repair held sufficient, under Code, § 3803.—*State v. Dixon* (N. C.) 961.

§ 3. Regulation and use for travel.

An indictment held to sufficiently charge a public offense within Code, § 2055, making it a misdemeanor to willfully obstruct any road leading from or to a church.—*State v. Lucas* (N. C.) 553.

A requested charge, in action for collision on highway, held properly modified.—*Crampton v. Ivie* (N. C.) 968.

Evidence in action for collision on highway held insufficient to justify a charge based thereon.—*Crampton v. Ivie* (N. C.) 968.

One sued for injury resulting from his driving rapidly along a highway at night cannot confine his liability for negligence to his conduct after he discovered, or could reasonably have discovered, the danger.—*Crampton v. Ivie* (N. C.) 968.

Injury received by one imperiled by negligence of another meeting him in the road, acting as a prudent man, held direct consequence of other's negligence.—*Crampton v. Ivie* (N. C.) 968.

A highway can be laid out by the consent of the landowner, in which case there is no need to comply with statutory requirements by commissioners.—*State v. Kendall* (S. C.) 300.

In a prosecution for obstructing a highway, the opening of the highway to the public can be proved by any competent witness having knowledge of the fact.—*State v. Kendall* (S. C.) 300.

HOMESTEAD.

See "Exemptions."

§ 1. Nature, acquisition, and extent.

(One not the head of a family, but who has the care and support of independent females, is not entitled to a homestead, under Civ. Code, § 2863 et seq.—*Bennett v. Trust Co. of Georgia* (Ga.) 625.

2300 e seq.—Bennett v. Trust Co. of Georgia (Ga.) 625.

Right of wife to have homestead set apart is based on husband's absolute refusal so to do.—Davis v. Lumpkin (Ga.) 626.

The homestead exemption allowed by Rev. St. § 2129, to a decedent's widow and children, includes children of age, living apart from their parents as the heads of families.—Ex parte Worley (S. C.) 307.

One who devotes his entire earnings and rents from real estate to the support of himself and widowed mother is the head of a family.—Scott v. Mosely (S. C.) 450.

Under Const. art. 3, § 28, and Act March 9, 1896 (22 St. at Large, p. 190), amending Rev. St. § 2128, *held*, that appraisers properly assigned to a judgment debtor a house and lot appraised at \$5,000, in which she owned a life estate only, valued at \$800, where she was entitled to a homestead therein.—Bank of Columbia v. Gibbes (S. C.) 690.

§ 2. Transfer or incumbrance.

Under Const. art. 10, § 8, providing that no deed by the owner of a homestead shall be valid without the wife's signature, such a conveyance passes no interest.—Wittkowsky v. Gidney (N. C.) 731.

HOMICIDE.

§ 1. Murder.

Where one voluntarily fires a loaded pistol at another, malice will be presumed, and the homicide will not be reduced to involuntary manslaughter, though intent of slayer was to wound, and not to kill.—Stovall v. State (Ga.) 586.

§ 2. Excusable or justifiable homicide.

Where an occupant of a house kills person attempting to enter the house in order to assault a person therein, *held*, the killing was justifiable, though the assault or personal violence intended was less than a felony.—Smith v. State (Ga.) 851.

Evidence *held* not to render portions of law relating to justifiable homicide contained in Pen. Code, § 73, applicable.—Smith v. State (Ga.) 851.

§ 3. Indictment and information.

It is not necessary to allege on what portion of the body of the deceased the mortal wound was inflicted.—Bowens v. State (Ga.) 666.

Where indictment charges homicide by beating deceased with a piece of iron, it is unnecessary to set forth the size of the same.—Bowens v. State (Ga.) 666.

§ 4. Evidence.

Evidence *held* to sustain verdict of guilty.—Roark v. State (Ga.) 125.

Evidence *held* to demand a verdict of guilty.—Battle v. State (Ga.) 160.

Evidence *held* to sustain verdict of guilty of murder.—Lewis v. State (Ga.) 842; Charlton v. State (Ga.) 347.

Evidence *held* to support conviction of murder.—Stovall v. State (Ga.) 586.

Appellant cannot complain of error in his favor.—Dill v. State (Ga.) 660.

Evidence identifying a rock as the one with which defendant struck deceased *held* sufficient to authorize the introduction of the rock.—Dill v. State (Ga.) 660.

Where the evidence shows deceased conscious of his condition at the time he made dying declarations, they are admissible in evidence.—Handy v. State (Ga.) 665.

Evidence *held* to sustain verdict of guilty of murder.—Bowens v. State (Ga.) 666.

Evidence *held* to sustain verdict of guilty of murder.—Bowens v. State (Ga.) 666.

Evidence *held* to exclude submission of any question as to manslaughter to jury.—State v. Lucas (N. C.) 962.

§ 5. Trial—Conduct in general.

Exclusion of a witness offered by defendant to impeach the general character of state's witnesses who testified for the first time in reply *held* not an abuse of discretion.—State v. Summer (S. C.) 771.

§ 6. — Questions for jury.

Where killing with pistol is admitted, and no extenuating circumstances are proved, the only question for jury is as to degree.—State v. Lucas (N. C.) 962.

§ 7. — Instructions.

Instruction on subject of voluntary manslaughter and justifiable homicide *held* not prejudicial to defendant.—Roark v. State (Ga.) 125.

Evidence reviewed, and *held* to warrant a charge on the subject of mutual combat.—Roark v. State (Ga.) 125.

Where accused shot at K., but killed M., a charge defining voluntary manslaughter in the terms of Pen. Code, §§ 64, 65, *held* not misleading.—Charlton v. State (Ga.) 347.

Where evidence authorizes either a conviction of murder or the acquittal of accused, a verdict finding him guilty of voluntary manslaughter will be set aside.—Morgan v. State (Ga.) 854.

A charge *held* to state the evidence and to explain the law, as required by Code, § 413.—State v. Kale (N. C.) 892.

An instruction not to find defendant guilty of murder in the first degree, if his commission of the homicide was a rash act caused by his being intoxicated, is erroneous.—State v. Kale (N. C.) 892.

Instruction on a trial for murder *held* not objectionable as precluding the jury from rendering any verdict except for murder or manslaughter.—State v. Mason (S. C.) 357.

A charge on a trial for murder that malice is implied from an intentional killing without justification or excuse is not subject to exception.—State v. Mason (S. C.) 357.

A charge, in regard to manslaughter, that "some people don't cool, and some don't want to cool," *held* not prejudicial.—State v. Summer (S. C.) 771.

A charge that if there is a reasonably safe way to escape, one ought to do so, rather than take life, *held* proper.—State v. Summer (S. C.) 771.

A charge that one cannot create an opportunity to kill another under circumstances that might appear sudden *held* proper.—State v. Summer (S. C.) 771.

An instruction that if there be a substantial conflict as to whether the killing was done in self-defense, and evidence preponderates in favor of self-defense, or is equally balanced, the jury ought not to convict of murder or manslaughter, is properly refused.—State v. Staley (W. Va.) 198.

§ 8. — Verdict.

Verdict of murder in the first degree *held* properly delivered and entered.—State v. Lucas (N. C.) 962.

A verdict of guilty of voluntary manslaughter *held* sufficient in form.—State v. Staley (W. Va.) 198.

A new trial because of newly-discovered evidence that witnesses had known accused for a long time, and believed him to be insane, *held* properly denied, it not appearing that affiants were experts, and the facts on which their opinions were based not being shown.—*Lewis v. State* (Ga.) 342.

A new trial for newly-discovered evidence was denied for lack of diligence.—*Dill v. State* (Ga.) 660.

Where defendant has been found guilty of stabbing, on indictment for assault with intent to kill, omission to charge on voluntary manslaughter *held* not ground for new trial.—*Williams v. State* (Ga.) 660.

§ 10. Appeal and error.

Error in instruction on trial for assault with intent to murder *held* not prejudicial when the guilt of the accused was thoroughly established, and there was nothing to authorize any inference that there was not an intent to kill, under circumstances that made it an aggravated case.—*Lanier v. State* (Ga.) 335.

Overruling continuance for want of time to prepare for trial and for public excitement *held* not error where no intricate questions of law or fact appeared, and there was no showing as to public excitement.—*Charlon v. State* (Ga.) 347.

Error in admitting a statement of deceased *held* harmless, where accused testified to the same effect.—*Dill v. State* (Ga.) 660.

Where the jury were instructed to consider all of the evidence in determining whether a homicide was the outgrowth of premeditation, it will be presumed that evidence of defendant's intoxication was considered by the jury.—*State v. Kale* (N. C.) 892.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE

See "Curtesy"; "Divorce"; "Dower"; "Marriage."

Rights of survivor, see "Descent and Distribution," § 1; "Executors and Administrators," § 2.

§ 1. Mutual rights, duties, and liabilities.

A seller entering charges on his books against a wife for goods purchased by her as her husband's agent *held* not to thereby make the contract to pay for the goods that of the wife.—*Sibley v. Gilmer* (N. C.) 964.

A husband may impliedly make his wife his agent to buy goods by paying for what she had purchased without objection.—*Sibley v. Gilmer* (N. C.) 964.

One authorized by a husband to sell goods to the wife *held* not notified of their separation by the fact that it was generally known in the city where the husband resided.—*Sibley v. Gilmer* (N. C.) 964.

A wife's authority to purchase goods of a certain person as her husband's agent is not revoked by their separation, in the absence of notice to such person of the separation.—*Sibley v. Gilmer* (N. C.) 964.

In contest between wife and creditors of her husband, the husband is presumed to be the owner of everything the wife has during coverture.—*Hoge v. Turner* (Va.) 291.

§ 2. Marriage settlements.

An antenuptial contract *held* to create a vested remainder, after death of husband, in his heirs.—*Harris v. Russell* (N. C.) 958.

§ 3. Wife's separate estate.

Where husband conveys land to wife, on which he had executed a mortgage, and the wife borrows money to pay off the incumbrance, she cannot defeat recovery by the lender on ground that it was given for her husband's debt.—*Taylor v. American Freehold Land-Mortgage Co.* (Ga.) 153.

Under Code, § 1826, a married woman cannot, without the written consent of her husband, make a valid contract for the erection of a house on her lands.—*Weathers v. Borders* (N. C.) 881.

Married Women's Act 1887 (19 St. at Large, p. 819), providing that conveyances of separate estate shall express intent, *held* to apply to mortgages and not to absolute deeds.—*Carroll v. Thomas* (S. C.) 497.

Deed by married woman *held* to convey her separate estate, though no such intent is expressed in the conveyance.—*Carroll v. Thomas* (S. C.) 497.

Deed by husband to trustee for benefit of wife, with power to sell or exchange, *held* to vest in her an equitable, and not a statutory, separate estate.—*Jones v. Jones' Ex'r* (Va.) 453.

Where debt of husband was secured by the property of the husband and wife, equity will require the husband's portion to be exhausted before selling the wife's property.—*Jones v. Thorn* (W. Va.) 173.

Where a contract charging a wife's estate was modified, *held* that it was duly recorded, though the certificate of recordation referred to it as of the date of the modification.—*Fouse v. Gillan* (W. Va.) 178.

Where deed conveying land to married woman as separate estate reserves a lien, the fee may be sold for its payment.—*Burbridge v. Sadler* (W. Va.) 1028.

§ 4. Actions.

The defense of coverture is not waived by failure to plead it.—*Weathers v. Borders* (N. C.) 881.

§ 5. Enticing and alienating.

To make a parent liable for inducing his married child to abandon his wife, he must have acted maliciously.—*Brown v. Brown* (N. C.) 320.

Malice is presumed from a parent's inducing his married child to abandon his wife without proper investigation, or through dishonesty or recklessness.—*Brown v. Brown* (N. C.) 320.

A parent's willfully inducing his married child to abandon his spouse is not necessarily malicious.—*Brown v. Brown* (N. C.) 320.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 2.

IMPEACHMENT.

Of witness, see "Witnesses," § 4.

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INDICTMENT AND INFORMATION.

See "Grand Jury."

For particular offenses.

See "Homicide," § 3.

1. Formal requisites of indictment.

An indictment which omits the words "conary to the laws of said state, the good will, peace and dignity thereof," as provided by Pen. Code, § 929, is defective.—Hardin v. State Ga.) 365.

An indictment should not be quashed for concluding with the words "against the peace and dignity of the same state aforesaid," instead of the words "against the peace and dignity of the state," as required by Const. art. 5, § 1.—State v. Mason (S. C.) 357.

2. Joinder of parties, offenses, and counts, duplicity, and election.

Unless the offenses charged in separate counts of an indictment accrue from different transactions, the state should not be required to elect in which one it will proceed.—State v. Sheppard (S. C.) 146.

A motion to compel the state to elect on which one of several counts in an indictment it will proceed is addressed to the sound discretion of the court.—State v. Sheppard (S. C.) 146.

3. Motion to quash or dismiss, and demurrer.

Demurrer is not proper method of attacking indictment for disqualification of juror.—Cooper v. State (Ga.) 23.

A motion to quash an indictment because three misdemeanors were charged in separate counts is addressed to the sound discretion of the court.—State v. Sheppard (S. C.) 146.

4. Issues, proof, and variance.

Where indictment charged breaking depot of the C. S. "Railroad" Company, evidence of a breaking of depot of C. S. "Railway" Company did not constitute a variance.—Davis v. State (Ga.) 158.

5. Conviction of offense included in charge.

A conviction of larceny may be had under an indictment for robbery.—State v. Nicholson (N. C.) 813.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Parent and Child."

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

See "Trade-Marks and Trade-Names."

1. Nature and grounds in general.

Injunction does not lie to restrain the cutting of timber by a solvent person.—Sharpe v. Loane (N. C.) 318.

An injunction restraining defendant from trespassing is not authorized in a special proceeding to have lands processioned.—Wilson v. Alleghany Co. (N. C.) 326.

In an action to remove a cloud, it is error to restrain defendants pendente lite from executing conveyances of the premises.—Purvey v. Sanford (N. C.) 685.

In an action to remove a cloud, defendants will not be restrained pendente lite from trespassing, because there is an adequate legal remedy.—Purvey v. Sanford (N. C.) 685.

If the lease of a railroad provide that the lessee shall continue its operation, the lessor may restrain the lessee from abandoning the road.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

§ 2. Subjects of protection and relief.

Equity will not restrain seller of land from entering thereon or committing other acts of trespass, where he is solvent, and the injury is reparable in damages.—Putney v. Bright (Ga.) 107.

Agent of insurance association, after termination of agency, will not be enjoined from using legitimate means to influence policy holders to forfeit their policies, and transfer their insurance to another association, where no violation of trust is shown.—Stein v. National Life Ass'n (Ga.) 615.

A trespass will not be restrained unless the injury is irreparable or the trespasser is insolvent.—Waters v. Lewis (Ga.) 854.

Where a trespass is repeated and defendant threatens to continue it, injunction will lie.—McClellan v. Taylor (S. C.) 527.

A partner who had indorsed a partnership note which had been pledged as security to a bank by the other partner for his individual indebtedness held entitled to an injunction restraining the action against him on the note until the partnership accounts were settled.—Commercial Bank v. Cabell (Va.) 53.

The lessee of a railroad may be enjoined from abandoning its operation in violation of the lease, though the injunction enforces the performance of continuous acts involving the exercise of skill and judgment.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

§ 3. Preliminary and interlocutory injunctions.

A temporary injunction should not be dissolved on affidavits, where the complaint entitles plaintiff to the relief and the injury may be accomplished before final hearing.—Cudd v. Calvert (S. C.) 503.

§ 4. Permanent injunction and other relief.

On ordering the lessee of a railroad to continue its operation, the cause should not be dismissed from the docket, but should be retained for further necessary orders.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

§ 5. Liabilities on bonds or undertakings.

One of several judgment debtors who does not apply with the others in procuring an injunction against execution should not be charged with damages and costs on dissolution of the injunction.—Graham v. Citizens' Nat. Bank (W. Va.) 245.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INSANE PERSONS.**§ 1. Custody and support.**

A motion in an action by a committee of a lunatic held not subject to dismissal because

ratified by the heirs of such person.—Hotchkiss v. Middlekauf (Va.) 36.

A deed executed by committee of lunatic residing in New York by order of a New York court held not to convey lands in Virginia.—Hotchkiss v. Middlekauf (Va.) 36.

INSOLVENCY.

See "Assignments for Benefit of Creditors."

Of corporation, see "Corporations," § 3.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

§ 1. Assignment, administration, and distribution of insolvent's estate.

Resident creditors of an insolvent foreign bank, for which a receiver was appointed in a foreign proceeding, in which they appeared, held estopped to assert a preferred claim to proceeds of a mortgage on which the receiver had obtained judgment in South Carolina.—Wilson v. Keels (S. C.) 702.

INSTRUCTIONS.

In civil actions, see "New Trial," § 1; "Trial," §§ 6-11.

In criminal prosecutions, see "Criminal Law," § 9; "Homicide," § 7.

INSURANCE

§§ 1, 2. Insurance companies.

A receiver of a foreign insurance company held entitled to recover assessments properly levied to meet obligations while defendant's policy was in force.—Commonwealth Mut. Fire Ins. Co. v. Edwards (N. C.) 404.

§ 3. Insurance agents and brokers.

Instructions to an agent of a life insurance company of which insured had no knowledge are not binding on the latter.—Kendrick v. Mutual Ben. Life Ins. Co. (N. C.) 728.

Statement by an agent that defendant would not have trouble in getting the surrender value of a policy held no defense to a note given on the strength of such statement.—Garber v. Breesee (Va.) 39.

§ 4. Insurable interest.

The assignee of a life policy having no insurable interest in the life of assured beyond premiums advanced can recover thereon only the premiums.—New York Life Ins. Co. v. Davis (Va.) 475.

§ 5. The contract in general.

A contract held to contemplate additional insurance which should cover the entire interest of insured.—Corporation of London Assurance v. Paterson (Ga.) 650.

Stipulations in a memorandum of a contract for additional insurance held the basis of a new contract.—Corporation of London Assurance v. Paterson (Ga.) 650.

Under Code, § 3062, and Laws 1893, c. 299, § 8, an insurance policy held a North Carolina contract and void.—Commonwealth Mut. Fire Ins. Co. v. Edwards (N. C.) 404.

Under Laws 1893, c. 299, § 6, a policy providing for assessments is not void.—Commonwealth Mut. Fire Ins. Co. v. Edwards (N. C.) 404.

Where a policy is reasonably susceptible of two constructions, the one most favorable to insured will be adopted.—Kendrick v. Mutual Ben. Life Ins. Co. (N. C.) 728.

Code, § 3252, providing that no condition of a policy shall be operative unless in writing or in type of a certain size, held to apply to an application.—Burruss v. National Life Ass'n (Va.) 49.

Evidence held not to show that a life policy was void at its inception for fraud.—New York Life Ins. Co. v. Davis (Va.) 475.

§ 6. Premiums, dues, and assessments.

Payment of premium on a delivered policy of life insurance a few hours before the death of insured, who was then very ill, held a compliance with a condition that the first premium must be paid during the lifetime of insured.—Kendrick v. Mutual Ben. Life Ins. Co. (N. C.) 728.

The time of mailing a check in payment of a premium held the time of payment.—Kendrick v. Mutual Ben. Life Ins. Co. (N. C.) 728.

§ 7. Assignment or other transfer of policy.

To transfer legal title to policy, the assignment must be in writing.—National Fire Ins. Co. v. Grace (Ga.) 100.

§ 8. Cancellation, surrender, abandonment, or rescission of policy.

The measure of recovery for wrongful cancellation of a policy, assured electing to take his money back, held to be the amount of premiums theretofore paid and interest.—Burruss v. Life Ins. Co. of Virginia (N. C.) 323.

§ 9. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

The company has the burden of proving in defense that, at the time the policy was issued, insured did not own the property.—Morris v. Imperial Ins. Co. (Ga.) 595; Imperial Ins. Co. v. Morris, Id.

Misrepresentations of insured held to vitiate the policy as to the beneficiary, though he was ignorant thereof.—Burruss v. National Life Ass'n (Va.) 49.

An agent held not charged with knowledge of the falsity of the answers in an application for a life policy.—Burruss v. National Life Ass'n (Va.) 49.

§ 10. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

An absolute covenant of warranty is binding, irrespective of good faith.—Morris v. Imperial Ins. Co. (Ga.) 595; Imperial Ins. Co. v. Morris, Id.

Where policy covering house and furniture stipulates that it shall be void if additional insurance is obtained, it becomes void if the insured obtains another policy insuring the furniture only.—Phoenix Ins. Co. v. Gray (Ga.) 948.

A forfeiture does not make policy void ipso facto, but renders it voidable at option of insurer.—Kingman v. Lancashire Ins. Co. (S. C.) 762.

§ 11. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Local agent, through whom insurance was obtained, held not to have power to waive conditions of policy, the failure to comply with which had resulted in forfeiture of right of action.—Graham v. Niagara Fire Ins. Co. (Ga.) 579.

Knowledge of the agent regarding insured's method of keeping books before the policy was issued held not a waiver of the iron-safe clause.

strutions, and the agent gave it one, *held*, that the company could not claim a forfeiture because insured did not follow the other.—*Kendrick v. Mutual Ben. Life Ins. Co.* (N. C.) 728.

An insurer *held* not bound by the fraudulent falsification of assured's answers by agent.—*Sprinkle v. Knights Templar & Masons' Indemnity Co.* (N. C.) 734.

An adjustment of a loss *held* not a waiver of a condition, where insured had stipulated that insurer should not waive any rights by an adjustment.—*Joye v. South Carolina Mut. Ins. Co.* (S. C.) 446.

A promise by a mutual insurance company to pay a loss *held* not a waiver of a right to declare a forfeiture for nonpayment of assessments.—*Joye v. South Carolina Mut. Ins. Co.* (S. C.) 446.

Waiver of forfeiture does not require separate consideration.—*Kingman v. Lancashire Ins. Co.* (S. C.) 762.

Insurer can waive breach of condition by its acts after knowledge thereof.—*Kingman v. Lancashire Ins. Co.* (S. C.) 762.

Insurer *held* estopped to deny waiver of condition by conduct, after knowledge of breach, putting insured to expense under belief that insurer regards policy as valid.—*Kingman v. Lancashire Ins. Co.* (S. C.) 762.

§ 12. Extent of loss and liability of insurer—Marine insurance.

In adjusting the liability of companies, *held*, that the date to be looked to in determining whether insurance is prior is that on which the policy was issued.—*Corporation of London Assurance v. Paterson* (Ga.) 650.

§ 13. Notice and proof of loss.

Where policy provides that proof of loss shall be furnished in 60 days, and the loss shall be payable in 60 days thereafter, furnishing proofs is precedent to recovery if not waived.—*Adkins v. Globe Fire Ins. Co.* (W. Va.) 194.

§ 14. Adjustment of loss.

An insurer not interested in an adjustment between insured and a subsequent insurer cannot question the correctness thereof.—*Corporation of London Assurance v. Paterson* (Ga.) 650.

§ 15. Actions on policies.

One other than person to whom policy was issued cannot maintain action thereon in his own name without due assignment in writing.—*National Fire Ins. Co. v. Grace* (Ga.) 100.

Stipulations as to proof of loss, and action within 12 months, *held* conditions precedent to recovery on policy in suit.—*Graham v. Niagara Fire Ins. Co.* (Ga.) 579.

Defenses *held* not frivolous, so as to authorize an assessment of damages and attorney's fees against the company.—*Morris v. Imperial Ins. Co.* (Ga.) 595; *Imperial Ins. Co. v. Morris*, Id.

Testimony of an expert that he has never seen anything like insured's books *held* inadmissible on the question of breach of the iron-safe clause.—*Morris v. Imperial Ins. Co.* (Ga.) 595; *Imperial Ins. Co. v. Morris*, Id.

Memorandum of an expert bookkeeper *held* inadmissible as evidence on a question of breach of the iron-safe clause.—*Morris v. Imperial Ins. Co.* (Ga.) 595; *Imperial Ins. Co. v. Morris*, Id.

Testimony as to the "usualness" of a debtor keeping no books, and relying on a creditor to do so for him, *held* inadmissible on the question of breach of the iron-safe clause.—*Morris v. Imperial Ins. Co.* (Ga.) 595; *Imperial Ins. Co. v. Morris*, Id.

(Ga.) 595; *Imperial Ins. Co. v. Morris*, Id.

A finding that the health of insured had changed in the six days between his application and the delivery of the policy should be set aside, where the evidence as to his health at each date is the same.—*Temple v. Massachusetts Ben. Life Ass'n* (N. C.) 880.

A mortgagee cannot maintain an action on a policy payable to himself and the mortgagor, "as their interests may appear," without making the mortgagor a party.—*Procter v. Georgia Home Ins. Co.* (N. C.) 716.

A policy of life insurance is presumed to have been delivered at the time it bears date, where, on the death of insured, it is in possession of the beneficiary.—*Kendrick v. Mutual Ben. Life Ins. Co.* (N. C.) 728.

Evidence *held* sufficient to go to the jury on question of waiver of defense of removal of insured goods to another building.—*Montgomery v. Delaware Ins. Co. of Philadelphia* (S. C.) 723.

A charge that, if the minds of parties did not meet as to location of property, its location was immaterial, *held* error.—*Montgomery v. Delaware Ins. Co. of Philadelphia* (S. C.) 723.

Production of inventory of stock taken before issuance of policy *held* not a condition precedent to a recovery under the policy.—*Kingman v. Lancashire Ins. Co.* (S. C.) 762.

Waiver of forfeiture need not be pleaded in action to recover for loss.—*Kingman v. Lancashire Ins. Co.* (S. C.) 762.

Instruction in action on policy *held* defective in assuming that plaintiff had failed to perform the warranties under the iron-safe clause.—*Kingman v. Lancashire Ins. Co.* (S. C.) 762.

§ 16. Mutual benefit insurance.

In action on benefit certificate, minutes of another association, to which deceased had applied, *held* inadmissible against plaintiff, it not being shown that deceased had anything to do with the entry.—*Supreme Conclave Knights of Damon v. O'Connell* (Ga.) 946; *O'Connell v. Supreme Conclave Knights of Damon*, Id.

Admissions by holder of benefit certificate made before it was issued, and affecting its validity, *held* admissible against the beneficiaries.—*Supreme Conclave Knights of Damon v. O'Connell* (Ga.) 946; *O'Connell v. Supreme Conclave Knights of Damon*, Id.

Where benefit insurance provides for suspension of member on failure to pay an assessment that the collector of the association has entered on defaulting member's account, the word "suspended" *held* not an affirmative action, constituting such suspension.—*Warwick v. Supreme Conclave Knights of Damon* (Ga.) 951.

Where benefit certificate stipulates that insured will comply with the regulations governing the association, nonpayment of an assessment will not ipso facto amount to a forfeiture, there being no law of the association expressly so providing.—*Warwick v. Supreme Conclave Knights of Damon* (Ga.) 951.

Where rules of benefit association indicate that nonpayment of an assessment will forfeit the policy, there must be some affirmative act by the association declaring such forfeiture.—*Warwick v. Supreme Conclave Knights of Damon* (Ga.) 951.

Beneficiary may recover on certificate, though proceeds thereof were used to pay insured's doctor's bills, and for a tombstone.—*Grand Fountain of United Order of True Reformers v. Wilson* (Va.) 48.

Payment of proceeds of membership certificate to a third person with the consent of fa-

INTENT.

Fraudulent, see "Fraudulent Conveyances," § 1.

INTEREST.

See "Usury."

Pecuniary interest in particular subjects.

Insurable interest, see "Insurance," § 4.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 3.

INTERLOCUTORY JUDGMENT.

Review on appeal or writ of error, see "Appeal and Error," §§ 14-23.

INTERROGATORIES.

To jury, see "Trial," § 12.

INTOXICATING LIQUORS.

§ 1. Power to control traffic.

The town of Social Circle *held* to have authority, under general welfare clause in its charter, to prohibit sale of liquor within its limits.—Brown v. Town of Social Circle (Ga.) 141.

A city council *held* to have authority under a general welfare clause to pass ordinance prohibiting keeping liquors for purposes of illegal sale.—Papworth v. City of Fitzgerald (Ga.) 363.

§ 2. Criminal prosecutions.

Evidence, on trial for illegal sale, offered by accused, that purchaser paid for telegram sent by accused for liquor, *held* relevant on the question whether accused was agent of seller.—Silver v. State (Ga.) 22.

Evidence *held* to warrant conviction for selling liquors on Sunday.—Smith v. State (Ga.) 127.

On indictment for illegal sale, the state may prove such sale at any time within two years before finding of indictment.—Davis v. State (Ga.) 130.

Where state has shown more than one transaction touching illegal sale, defendant cannot prove by foreman of grand jury that investigation of that body did not embrace the particular sale relied on for conviction.—Davis v. State (Ga.) 130.

Manager and member of social club exercising general superintendence over the bar *held* subject to conviction for keeping open tippling house on the Sabbath day.—Mohrman v. State (Ga.) 143.

That only members of a social club are permitted in its rooms will not take such organization out of the statute prohibiting keeping open tippling house on the Sabbath day.—Mohrman v. State (Ga.) 143.

Sale and drinking of liquors, though only an incident of incorporation of a social club, *held* not to make the place where the liquors were sold the less a tippling house, within the meaning of the statute forbidding the keeping open of a tippling house on the Sabbath day.—Mohrman v. State (Ga.) 143.

On trial for illegal sale of liquor *held* error to charge, if while accused was taking it from the barrel he was prevented by an officer, and

evidence *held* insufficient to sustain conviction for illegal sale of liquors.—Fleming v. State (Ga.) 338.

A city council, under the general welfare clause, cannot prescribe, as penalty for violation of a liquor ordinance, fine and imprisonment.—Papworth v. City of Fitzgerald (Ga.) 363.

An accusation charging an illegal sale of liquors, within the language of Pen. Code, § 474, is sufficient, without negating an exception in section 435, providing that the former section shall not apply to an incorporated town or city.—Hicks v. State (Ga.) 685.

Act March 6, 1896, § 43 (22 St. at Large, p. 148), authorizing an indictment for selling intoxicating liquors to charge sales to different persons, naming one and stating the others to be unknown, is repugnant to Const. 1895, art. 1, § 18.—State v. Jeffcoat (S. C.) 293.

An indictment for selling intoxicating liquor is not invalid because, in addition to charging a complete offense, it charges sales to divers unknown persons.—State v. Jeffcoat (S. C.) 296.

An indictment charging illegal sales to certain persons cannot be sustained by evidence of sales to O., not named in the indictment, though the dispensary act permits indictment for sales to persons unknown.—State v. Couch (S. C.) 408.

ISSUES.

Presented for review on appeal, see "Appeal and Error," §§ 3-6.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 2.

JOINDER.

Of offenses in indictment, see "Indictment and Information," § 2.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Justices of the Peace."

§ 1. Rights, powers, duties, and Habilitations.

Where presiding officer of municipal court erroneously holds given ordinance valid, he is not liable in damages to a person convicted for an offense thereunder.—Calhoun v. Little (Ga.) 81.

Where judges of courts of general jurisdiction are exempt from liability for their judicial acts, officers of courts of limited jurisdiction are exempt.—Calhoun v. Little (Ga.) 86.

After striking an answer as being frivolous, on a motion made at chambers under Code, § 268, the judge cannot render a judgment by default.—Badham v. Brabham (S. C.) 444.

§ 2. Disqualification to act.

Disqualification of judge on account of relationship may be waived.—Shope v. State (Ga.) 140.

It is improper for a judge to try an indictment signed by him as prosecuting attorney.—State v. Cottrell (W. Va.) 162.

If the judge of a circuit court is interested, a circuit court of a county of an adjoining circuit has jurisdiction to enjoin a judgment rendered in

JUDGMENT.

Decisions of courts in general, see "Courts," § 1.
Enforcement by creditors' suit, see "Creditors' Suit."

Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

Validity of judgment against county, see "Counties," § 2.

In particular civil actions or proceedings.

See "Garnishment," § 4.

Decree in equity, see "Equity," § 6.

Foreclosure, see "Mortgages," § 5.

On appeal or writ of error, see "Appeal and Error," § 24.

In particular criminal prosecutions.

See "Criminal Law," § 13.

§ 1. By confession.

A statement in the confession of a judgment on a note that it was given for "goods sold and delivered" is sufficient.—*Ex parte Graham* (S. C.) 67; *Plyler v. Robertson*, Id.

A confession of judgment is not void, though not entered in the book called "Confessions of Judgment before Clerk," as required by Rev. St. § 783.—*Ex parte Graham* (S. C.) 67; *Plyler v. Robertson*, Id.

§ 2. By default.

A judgment will not be vacated because plaintiff verbally agreed to dismiss his suit, whereby defendant failed to appear, where plaintiff denies the agreement.—*Mathews v. Bishop* (Ga.) 631.

Civ. Code, § 5069 et seq., dealing with defaults, does not apply to final judgments.—*Mathews v. Bishop* (Ga.) 631.

An agreement between plaintiff and defendant, made pendente lite and not brought to the notice of the court when judgment was entered, held not to authorize vacation of a default judgment on the ground of excusable neglect.—*Le Duc v. Slocomb* (N. C.) 726.

The party aggrieved must move to vacate a judgment before the rights of innocent third persons have intervened.—*Le Duc v. Slocomb* (N. C.) 726.

A party moving to set aside a default judgment must show prima facie that he has a meritorious defense.—*Le Duc v. Slocomb* (N. C.) 726.

One sued as administrator and individually, who, when a summons is shown him, says he knows all about it, and walks away from the officer, and, supposing he is sued only as administrator, takes no further notice of the action, cannot have a default set aside.—*Williamson v. Cocke* (N. C.) 963.

§ 3. On trial of issues.

The fact that defendants are entitled to judgment on the evidence is no ground for a judgment non obstante veredicto in their favor.—*Christian v. Yarborough* (N. C.) 383.

A decree in a creditors' suit disposing of the cause on the merits cannot be entered in vacation without consent of parties, under Code, § 3427, as amended by Act Jan. 27, 1896.—*Harris v. Jones* (Va.) 455.

Under Code, § 3211, one cannot on motion obtain a judgment for a breach of contract in an action sounding in damages.—*Wilson v. Dawson* (Va.) 461.

§ 4. Amendment, correction, and review in same court.

A modification of a judgment during the term so as to strike out parts authorizing an issue

§ 5. Opening or vacating.

A judgment apparently regular and legal, after time for excepting has expired, can be set aside only by proper proceeding in the court where rendered.—*Dixon v. Baxter* (Ga.) 24.

A decree rendered on general accounting will not be reopened on petition unless it appears that plaintiff had no knowledge of the items before the decree, or could not have known of them by ordinary diligence.—*Gunn v. Byrom* (Ga.) 833.

Where defendant in a pending case seeks to avoid existing judgment on the ground that he was not duly served, and there is an entry of service, he must traverse the return, making the officer a party.—*Green v. Grant* (Ga.) 846.

§ 6. Equitable relief.

Equity will not grant a new trial because of prejudice in the community.—*Graham v. Citizens' Nat. Bank* (W. Va.) 245.

Chancery will not enjoin a judgment at law and grant a new trial merely for error in the law court.—*Graham v. Citizens' Nat. Bank* (W. Va.) 245.

§ 7. Collateral attack.

A judgment void on its face may be collaterally attacked in any court.—*Dixon v. Baxter* (Ga.) 24.

A judgment reserving from sale a mill on certain land ordered to be sold, though there is nothing to warrant the reservation, cannot be collaterally attacked.—*First Nat. Bank v. Hyer* (W. Va.) 1000.

§ 8. Merger and bar of causes of action and defenses.

Dismissal of an action held not a retraxit, precluding a subsequent action.—*Tate v. Bank of State of New York* (Va.) 476.

§ 9. Conclusiveness of adjudication.

A decree is conclusive on all questions raised, or which could have been raised.—*H. B. Clafin Co. v. De Vaughn* (Ga.) 108.

A judgment in favor of certain parties held conclusive against the rights of other parties thereto, though it did not expressly declare that such other parties were not entitled to relief.—*H. B. Clafin Co. v. De Vaughn* (Ga.) 108.

Where married woman acquires title to property from her husband, and executes mortgage thereon, a judgment finding property subject to execution against her husband where the mortgagors are not parties thereto held not conclusive against them.—*Patapsco Guano Co. v. Hurst* (Ga.) 136.

Where, in defense to an action as an individual, defendant files an answer in his character of administrator, and defends for intestate's estate, the estate is concluded by the judgment rendered.—*Braswell v. Hicks* (Ga.) 861.

A judgment holding that a debt on which proceeding was founded was one for which the homestead was liable held conclusive against beneficiaries as well as the head of the family.—*Wegman Piano Co. v. Irvine* (Ga.) 898.

A judgment rendered against the head of a family, subjecting his homestead to a debt, held binding on the beneficiaries of the homestead, though not parties to the action.—*Wegman Piano Co. v. Irvine* (Ga.) 898.

A judgment in garnishment against an administrator held conclusive on his sureties.—*Brown v. Wiley* (Ga.) 905.

Where debtor is interested in estate of which he is administrator, a judgment against him as an individual is conclusive in garnishment against him as administrator.—*Brown v. Wiley* (Ga.) 905.

the deed.—Wilkinson v. Brinn (N. C.) 966.

Where party entitled to benefit of decree as res judicata afterwards makes admission of record inconsistent therewith, and such admission is the truth, he cannot rely on such decree of res judicata.—Crumlish's Adm'r v. Shenandoah Val. R. Co. (W. Va.) 234; Fidelity Insurance, Trust & Safe-Deposit Co. v. Same, Id.

§ 10. Foreign judgments.

A court of another state has no power to render a judgment on a contract that is void under the statutes of the state where it was made, without acquiring jurisdiction of defendant's person.—Stewart v. Northern Assur. Co. (W. Va.) 218.

§ 10½. Assignments.

An agreement made between plaintiff and defendant pendente lite held not to create an equity in favor of defendant against a default judgment in the hands of a purchaser without notice.—Le Duc v. Slocomb (N. C.) 726.

§ 11. Suspension, enforcement, and revival.

A judgment purporting to revive an execution issued on a judgment sought to be revived is amendable, so as to make it recite that the judgment itself is revived.—Phillips v. Wait (Ga.) 647.

Where copy of petition to revive dormant judgment, but no copy of scire facias, is served on defendant, his knowledge of the existence of the order of revival held not inconsistent with ignorance of entry by the sheriff of service of scire facias.—Phillips v. Wait (Ga.) 842.

An order that a levy should continue in force pending an injunction renders unnecessary a revival of the judgment on the dissolution of the injunction, though the period of limitations has elapsed.—Ex parte Graham (S. C.) 67; Plyler v. Robertson, Id.

An order giving permission to issue execution on a judgment revives it.—Ex parte Graham (S. C.) 67; Plyler v. Robertson, Id.

§ 12. Payment, satisfaction, merger, and discharge.

Facts held to show that the satisfaction of a judgment was procured by fraud.—Bradshaw v. Bratton (Va.) 56.

§ 13. Pleading and evidence of judgment as estoppel or defense.

A decree constituting a link in a chain of title is competent evidence thereof against all the world.—Building, Light & Water Co. v. Fray (Va.) 56.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

Where purchaser's bid has been submitted to and accepted by the court, the bidder held liable, on noncompletion, for the difference between his bid and the amount the property brought at a resale.—Smith v. Roberts (Ga.) 375.

In order to render bidder liable for noncompletion, it must appear that the same property for which he bid was resold.—Smith v. Roberts (Ga.) 375.

Where the purchaser at judicial sale gets a good title, he cannot complain of the disposition of the proceeds.—Wilkinson v. Brinn (N. C.) 966.

Sale of lands in parcels should not be set aside on an upset bid for parts thereof, where

in general, one present at a judicial sale should not be permitted to file an upset bid.—Moore v. Triplett (Va.) 50.

Whether a judicial sale should not be confirmed because of an advance bid of 10 per cent. is within the legal discretion of the court.—Moore v. Triplett (Va.) 50.

Where a mill and its machinery are subject to separate mortgages, they should be offered for sale both separately and together, and then sold in whichever way they will bring the larger sum.—Hurxthal's Ex'r v. Hurxthal's Heirs (W. Va.) 237.

A sale under a decree of property not authorized to be sold passes no title.—First Nat. Bank v. Hyer (W. Va.) 1000.

Purchaser held to know contents of decree and what property he acquires.—First Nat. Bank v. Hyer (W. Va.) 1000.

Where decree in suit to sell land for purchase money provides that the sale shall not include a sawmill, the sale does not pass title to the mill to the purchaser.—First Nat Bank v. Hyer (W. Va.) 1000.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 1.

Effect of appearance, see "Appearance."

Jurisdiction of particular actions or proceedings.

See "Mandamus," § 2; "Prohibition," § 2.

Special jurisdictions.

Justices' courts in civil cases, see "Justices of the Peace," § 1.

Particular courts, see "Courts."

JURY.

See "Grand Jury."

Disqualification or misconduct ground for new trial, see "New Trial," § 1.

Instructions in civil actions, see "Trial," §§ 6-11.—in criminal prosecutions, see "Criminal Law," § 9.

Questions for jury in civil actions, see "Trial," §§ 3-5.

Verdict in criminal prosecutions, see "Criminal Law," § 11.

§ 1. Right to trial by jury.

Denial that the contract, as written, was the one entered into, held not to raise an equitable issue, to be tried by the court.—Sloan v. Pelzer (S. C.) 431.

JUSTICES OF THE PEACE.

§ 1. Civil jurisdiction and authority.

A justice held to have jurisdiction of an action by a mortgagee to recover the proceeds of a sale of the mortgaged goods by the mortgagor, with his permission.—Markham v. McCown (N. C.) 494.

Facts held no evidence of defendant's equitable title on which to dismiss a summary proceeding in ejectment in justice court, on the ground that a question of title was involved.—McDonald v. Ingram (N. C.) 677.

To give a justice jurisdiction of an action to establish a lien, the action must be brought as debt.—Weathers v. Borders (N. C.) 881.

§ 2. Procedure in civil cases.

Where the justice, in entering up verdict on the judgment of a jury, omits name of security on appeal bond, there is no error in entering up judgment nunc pro tunc at succeeding term against defendant and security, without notice.—Stewart v. Hall (Ga.) 14.

Irregularity of justice in issuing execution within four days after judgment may be taken advantage of by affidavit of illegality, under Code, § 4736.—Sheppard v. Roberson (Ga.) 15.

A judgment of a justice cannot be collateral-attacked for clerical omissions.—Fishburne Baldwin (W. Va.) 1007.

Statement in justice's docket that "defendant not appearing," etc., is a sufficient compliance with Code, c. 50, § 179.—Fishburne v. Baldwin (W. Va.) 1007.

Judgment of justice, plainly intended to be against defendants named in summons, held not valid because the word "defendant" is used instead of "defendants."—Fishburne v. Baldwin (W. Va.) 1007.

3. Review of proceedings.

Judgment of justice where there are no contested issues may be reviewed by certiorari, without appeal to jury, though amount claimed less than \$50.—Grimsley v. Alexander (Ga.) 24.

Certiorari lies to a justice to review a judgment, where there are no contested issues.—Grimsley v. Alexander (Ga.) 24.

Where determination depends on question of law, it is proper to render a judgment disposing the case.—Grimsley v. Alexander (Ga.) 24.

Where justice, without evidence to support findings, decides that a question of title really is involved, his decision is a question of law, and reviewable.—McDonald v. Ingram (S. C.) 677.

Return of magistrate, showing notice of appeal, does not show notice on respondent, as required by Code, § 300.—Whetstone v. Livingston (S. C.) 561.

JUSTIFICATION.

of homicide, see "Homicide," § 2.

KNOWLEDGE.

actual or constructive knowledge, see "Notice."

LACHES.

Effect in equity, see "Equity," § 2.

LANDLORD AND TENANT.

Railroad leases, see "Railroads," § 5.

1. Creation and existence of relation.
A contract held to show the relation of landlord and tenant, and not of employer and laborer.—Rakestraw v. Floyd (S. C.) 419.

1½. Landlord's title and reversion.
Where tenant purchases the reversion, he is not thereafter estopped from denying title in landlord.—Wade v. South Penn Oil Co. (W. Va.) 169.

2. Terms for years.
Where farming lands are rented for a term of years, the tenants to keep up repairs, fire and providential causes excepted, the whole rent could be recovered, notwithstanding destruction by fire of gin house.—Mayer v. Morehead (Ga.) 349.

Stipulation in lease that lessee could erect use on the premises, to be removed on expiration of lease or sale to lessor, held not sufficiently certain to support an action against the lessor for the cost of the house.—Anderson v. Swift (Ga.) 542.

Where there is a lease for years, and an option purchase, an election to purchase and a ten-

der of the price ends the lease.—Wade v. South Penn Oil Co. (W. Va.) 169.

The taking of a lease during the term of an option to purchase the fee will not surrender such option.—Wade v. South Penn Oil Co. (W. Va.) 169.

Where lessee takes a new lease of reversioner, for a longer or shorter term than before, it is a surrender of the first lease.—Wade v. South Penn Oil Co. (W. Va.) 169.

§ 3. Premises, and enjoyment and use thereof.

Where landlord agrees to try to remove nuisance from leased premises, action for damages for failure to use such effort will not lie unless petition alleges that such effort would have availed.—Anderson v. Swift (Ga.) 542.

In action for damages because of foul matter washed by rain from defendant's premises onto those of plaintiff, there could be no recovery if such matter was accumulated by defendant's tenants on premises rented from plaintiff, over which he had no control.—Edgar v. Walker (Ga.) 582.

§ 4. Rent and advances.

That landlord sued out distress warrant in his own name for use of another held no reason for dismissing the warrant.—Joiner v. Singletary (Ga.) 90.

§ 5. Re-entry and recovery of possession by landlord.

One holding under lease from grantor in security deed duly recorded can be dispossessed in a summary manner to place in possession purchaser at sale under a judgment in a suit on the debt secured by such deed.—Mattlage v. Mulherin (Ga.) 940.

A judgment ejecting a tenant is proper, though the testimony does not show that the landlord went on the premises to demand possession, where it is alleged that demand was made, and the allegation is not denied.—Kellar v. Pagan (S. C.) 353.

A landlord may proceed to eject a tenant of "lands" under either Rev. St. 1893, § 1937, vesting jurisdiction to eject a tenant of "lands and tenements" in two magistrates, or under section 1939, vesting a single magistrate with jurisdiction, where the lease is of "houses and tenements."—Kellar v. Pagan (S. C.) 353.

LANDS.

See "Public Lands."

LARCENY.

See "Robbery."

§ 1. Offenses, and responsibility therefor.

A henhouse held a house, within the meaning of the Code defining larceny from the house.—Williams v. State (Ga.) 129.

§ 2. Prosecution and punishment.

A sentence of more than a year's imprisonment for larceny of property worth less than \$20 held error, under Code, § 1187, though defendant admitted a former conviction, where the indictment did not charge a former conviction.—State v. Davidson (N. C.) 957.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," §§ 14-23.

LEGACIES.

See "Wills."

Liability of corporation for slanderous statements of agent, see "Corporations," § 2.

§ 1. Actions.

An innuendo is not capable of proof.—*Argabright v. Jones* (W. Va.) 995.

In action for libel, defamatory words must refer to plaintiff, and an innuendo cannot make the person certain who was before uncertain.—*Argabright v. Jones* (W. Va.) 995.

An innuendo may explain a meaning, where there is precedent matter expressed or necessarily understood, but cannot establish a new charge.—*Argabright v. Jones* (W. Va.) 995.

LICENSES.

Injuries to licensees, see "Railroads," §§ 6-12.

§ 1. For occupations and privileges.

It will not be presumed, in a complaint to recover a license tax paid under protest, that it was not gradual as required by the constitution.—*Florida Cent. & P. R. Co. v. City of Columbia* (S. C.) 408.

A license tax is not a tax on property, and is not affected by statutory provisions for ascertaining the value for purpose of taxation.—*Florida Cent. & P. R. Co. v. City of Columbia* (S. C.) 408.

Act 1871, § 8, empowering cities to license, authorizes the requiring of a license of a corporation doing business of a similar character outside of the city.—*Florida Cent. & P. R. Co. v. City of Columbia* (S. C.) 408.

§ 2. In respect of real property.

A grant of the use of a wharf site and a right of way to it held a mere license.—*McClellan v. Taylor* (S. C.) 527.

LIENS.

Particular classes of liens.

See "Mechanics' Liens."

Vendor's lien on goods sold, see "Sales," § 6.

—on lands sold, see "Vendor and Purchaser," § 4.

A teamster held to have no common-law or statutory lien on cross-ties for labor bestowed in hauling them.—*Tedder v. Wilmington & W. R. Co.* (N. C.) 714.

LIFE ESTATES.

See "Curtesy"; "Dower"; "Remainders."

Where shares are bequeathed to one for life, with remainder over, and life tenant dies between dividend days, the dividend declared next after his death belongs to those who own the stock at the time it is declared.—*Mann v. Anderson* (Ga.) 870.

A deed of feoffment by a life tenant with livery of seisin, executed after act of 1883 relating to such deeds, is governed thereby.—*People's Loan & Exchange Bank v. Garlington* (S. C.) 513.

A purchase of the reversion in fee by tenant for years ends the tenancy.—*Wade v. South Penn Oil Co.* (W. Va.) 169.

An injunction inhibiting life tenant from cutting any timber from land, or removing the buildings thereon, or injuring the same, held to interfere with the life tenant's enjoyment of his tenancy.—*Greathouse v. Greathouse* (W. Va.) 994.

LIMITATION OF ACTIONS.

Laches, see "Equity," § 2.

Recovery of dower, see "Dower," § 2.

§ 1. Statutes of limitation.

Acts 1895, c. 224, requiring actions for permanent damages to real property to be brought within five years, does not apply to action pending at its adoption, or brought within a reasonable time thereafter.—*Ridley v. Seaboard & R. R. Co.* (N. C.) 325.

An action for damages to crops by flooding lands may be brought within three years after the injury occurred.—*Ridley v. Seaboard & R. R. Co.* (N. C.) 325.

An action for permanent damages to land through the negligent construction of a railroad embankment is barred only by 20 years' continuous use of the road with the landowner's acquiescence.—*Ridley v. Seaboard & R. R. Co.* (N. C.) 325.

In action for continuing nuisance, plaintiff can only recover for its continuation any time within the statute.—*Cohen v. Bellenot* (Va.) 455.

To be a written contract, within the statute fixing time for suing thereon, resolution of directors of corporation must show a complete contract.—*Newport News, H. & O. P. Development Co. v. Newport News St. Ry. Co.* (Va.) 789.

Limitations now run against the state.—*State v. Sponaugle* (W. Va.) 283.

Money deposited with a person to be paid to a third held a legal demand, subject to the statute.—*Burbridge v. Sadler* (W. Va.) 1028.

§ 2. Computation of period of limitation.

Action by widow to recover for wrongful death of husband is not barred, if filed within two years from the death, though more than two years after the injury.—*Glover v. Savannah, F. & W. Ry. Co.* (Fla.) 876; *Savannah, F. & W. Ry. Co. v. Glover, Id.*

Where both partners died before dissolution, a suit on a demand by representative of one partner against representative of the other, as to firm business, was in time, if brought within four years after death of partner who died first.—*Harris v. Mathews* (Ga.) 906.

Limitation of action for injury caused by the diversion of a water course by digging a ditch held to begin to run from the date of the injury, and not from digging of the ditch.—*Hocutt v. Wilmington & W. R. Co.* (N. C.) 681.

Loss of ability of a creditor to sue a municipal corporation by reason of the repeal of its charter suspends the operation of the statute.—*Broadfoot v. City of Fayetteville* (N. C.) 804.

Claim of heir against attorney in fact appointed to collect and turn over his interest in the estate held barred by statute of limitations, as there was no trust.—*Hasher's Adm'r v. Hasher's Adm'r* (Va.) 41.

That attorney in fact collected part of principal's interest in an estate some time after he had collected main portion does not remove principal's claim against him from statute of limitations, as continuing trust.—*Hasher's Adm'r v. Hasher's Adm'r* (Va.) 41.

Code, § 2934, authorizing new action within one year from abatement of an action seasonably commenced, despite the bar of the statute in the meantime, does not apply to suit in equity.—*Dawes v. New York, F. & N. R. Co.* (Va.) 778.

1. Acknowledgment, new promise, and part payment.

Letter referring to an account barred by limitations will not, unless it contains a promise to or acknowledgment of liability, relieve the account from the bar of the statute.—Rudolph v. Ivers (Ga.) 599.

Claim on account *held* taken out of the statute agreement for adjustment.—Stancell v. Argwyn (N. C.) 378.

2. Pleading, evidence, and province of court and jury.

Creditor, though he may be injuriously affected by his debtor's failure to set up the statute, cannot set it up himself, or compel his debtor to do so.—Welton v. Boggs (W. Va.) 232.

plea of the statute is a personal defense, to be made by the party against whom demand is asserted.—Welton v. Boggs (W. Va.) 232.

LIQUOR SELLING.

"Intoxicating Liquors."

LIVE STOCK.

Liability of, see "Carriers," § 2.
Liabilities from operation of railroads, see "Railroads," §§ 6-12.

LOAN COMPANIES.

"Building and Loan Associations."

LOGS AND LOGGING.

An instrument *held* not to convey a perpetual right to use timber on described land as long as it might be growing thereon, but to limit the right of such use to period of 10 years.—Baxter v. Mattox (Ga.) 94; Mattox v. Baxter,

an owner of land grant trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure, forever, the grantee acquires an estate in fee in the trees, and an interest in the soil sufficient for their growth.—Baxter v. Mattox (Ga.) 94; Mattox v. Baxter, *Id.*

There is a right to use timber on separate tracts granted for 10 years from the time the statute should begin cutting, the period commenced to run as to all the tracts from the time logging was commenced on one of them.—Baxter v. Mattox (Ga.) 94; Mattox v. Baxter, *Id.*

LUNATICS.

"Insane Persons."

MANDAMUS.

Jurisdiction in mandamus proceedings, see "Courts," § 2.

Subjects and purposes of relief.
Mandamus to compel superintendents of election in a given county to consolidate the vote of the county must be directed to all the superintendents who participated in the election.—N. v. Tanner (Ga.) 368.

Under Const. art. 7, § 7, prohibiting levy of taxes by a county except for necessary expenses, application for mandamus to compel levy to a judgment must show the judgment was based on a necessary expense.—Bear v. Commissioners of Brunswick County (N. C.) 558.

The duty of a street-railway company to issue transfers to its passengers may be enforced by mandamus, the legal remedy being in-

adequate.—Richmond Railway & Electric Co. v. Brown (Va.) 775.

The duty of a street railway to issue transfers *held* an obligation enjoined by law, and not merely contractual, and hence enforceable by mandamus.—Richmond Railway & Electric Co. v. Brown (Va.) 775.

Mandamus lies to compel a board of canvassers to recount the ballots between competing candidates on the demand of either.—Hebb v. Cayton (W. Va.) 187.

The secretary of state will not be compelled by mandamus to issue charter to persons by the name of the "Baptist Missionary Society of West Virginia" for the purpose of promoting the Baptist religion.—Powell v. Dawson (W. Va.) 214.

Mandamus will not issue to compel election canvasser to certify result of recount of ballots by another canvasser, where they disagree as to the result.—Dent v. Board of Com'rs (W. Va.) 250.

A mere private contract will not be enforced by mandamus.—Miller v. State Board of Agriculture (W. Va.) 1007.

Mandamus will not lie against state officers or boards to compel them to execute an executory contract between an individual and the state.—Miller v. State Board of Agriculture (W. Va.) 1007.

§ 2. Jurisdiction, proceedings, and relief.

Plaintiff, in mandamus to compel payment of a judgment, *held* to waive his estoppel by going to the hearing on the merits of the claim on which the judgment was based.—Bear v. Commissioners of Brunswick County (N. C.) 558.

A party who is neither a citizen nor a taxpayer cannot prosecute an application for mandamus to compel the payment of taxes to a city.—Garrison v. City of Laurens (S. C.) 696.

Proceedings to compel a street railway to issue a transfer to a passenger may be brought in the name of such passenger.—Richmond Railway & Electric Co. v. Brown (Va.) 775.

A petition to compel a street railway to issue a transfer to a passenger *held* to sufficiently show petitioner's right to the relief.—Richmond Railway & Electric Co. v. Brown (Va.) 775.

Rule stated as to when there need be a mandamus nisi.—Hebb v. Cayton (W. Va.) 187.

Question of admissibility of a certificate filed as exhibit, with the return and answer to an alternative writ, raised on motion for a peremptory writ notwithstanding the answer.—Roe v. Town of Philippi (W. Va.) 224.

MANDATE.

To lower court of decision on appeal or writ of error, see "Appeal and Error," § 24.

MARINE INSURANCE.

See "Insurance," § 12.

MARRIAGE.

See "Divorce."

A register of deeds *held* not to have made reasonable inquiry to ascertain the age of a person for whose marriage he issued a license, under Code, § 1816.—Agent v. Willis (N. C.) 322.

MARRIAGE SETTLEMENTS.

See "Husband and Wife," § 2.

MASTER AND SERVANT.

See "Apprentices."

§ 1. Services and compensation.

An employé paid on the basis of profits is entitled to interest on compensation remaining in the master's hands after it is due.—*Goldsmith v. Latz* (Va.) 483.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

A conductor voluntarily coupling cars when not required by his employment *held* to assume the risk.—*Whitton v. South Carolina & G. R. Co.* (Ga.) 857.

An employé's contract, entered into by becoming a member of a relief department, agreeing that acceptance of benefits should release the master from liability, *held* not against public policy.—*Johnson v. Charleston & S. Ry. Co.* (S. C.) 2.

Const. 1895, art. 9, § 15, *held* not to inhibit an employé from making a contract exempting a railroad company from liability for its negligence.—*Johnson v. Charleston & S. Ry. Co.* (S. C.) 2.

Though an employé has entered into a contract exempting a railroad company from liability for negligence, which is contrary to public policy, he may, after being injured, for a valuable consideration, release his claim.—*Johnson v. Charleston & S. Ry. Co.* (S. C.) 2.

§ 3. — Tools, machinery, appliances, and places for work.

Failure of a railroad to use automatic couplers, in general use, on its freight cars, is negligence per se.—*Troxler v. Southern Ry. Co.* (N. C.) 560.

A railroad company is liable for injuries to a brakeman through defects of a car belonging to another company, which it was transporting over its road.—*Leak v. Carolina Cent. R. Co.* (N. C.) 884.

§ 4. — Rules.

Where the master contends that the servant violated a rule, the burden is on him to show the existence of the rule.—*Raleigh & G. R. Co. v. Allen* (Ga.) 622.

The court should not submit the reasonableness of a rule of the master to the jury, unless the evidence of it is clear.—*Raleigh & G. R. Co. v. Allen* (Ga.) 622.

Extension by congress of time for equipping freight cars with automatic couplers *held* not to affect a railroad's liability to its employes for negligence in failing to use such couplers.—*Troxler v. Southern Ry. Co.* (N. C.) 550.

§ 5. — Contributory negligence of servant.

Priv. Laws 1897, c. 56, making railroad companies liable for negligence of fellow servant, does not deprive a company of the defense of contributory negligence.—*Hancock v. Norfolk & W. Ry. Co.* (N. C.) 679.

A brakeman *held* not guilty of contributory negligence in stepping on a defective stirrup in mounting a car, without inspecting it.—*Leak v. Carolina Cent. R. Co.* (N. C.) 884.

§ 6. — Actions.

An instruction on defendant's theory that the injury was a mere accident *held* properly refused.—*Raleigh & G. R. Co. v. Allen* (Ga.) 622.

On trial by a brakeman to recover for an injury sustained while in defendant's service in another state, it was proper to charge the funda-

company to recover for personal injuries is tried in another state from that in which the contract was made and the injuries received, the rights of plaintiff are governed by the *lex loci*.—*South Carolina & G. R. Co. v. Thurman* (Ga.) 803.

An instruction on the relative care required of the master and of the servant *held* too general in an action for injuries through the master's negligence.—*Leak v. Carolina Cent. R. Co.* (N. C.) 884.

A complaint *held* to connect acts of negligence of defendant with the injury.—*Mew v. Charleston & S. Ry. Co.* (S. C.) 828.

The question whether a conductor assumed the risk of running a train without adequate help, and over a defective roadbed, of which he had knowledge, *held* for the jury.—*Mew v. Charleston & S. Ry. Co.* (S. C.) 828.

A charge *held* not one as to the facts.—*Mew v. Charleston & S. Ry. Co.* (S. C.) 828.

A complaint *held* not to state distinct acts of negligence, each capable of producing a result, but to show the acts to be co-operating causes.—*Mew v. Charleston & S. Ry. Co.* (S. C.) 828.

Under Code Civ. Proc. §§ 190, 192, 194, proof *held* to constitute a mere variance, within the court's power to obviate by amendment.—*Mew v. Charleston & S. Ry. Co.* (S. C.) 828.

MECHANICS' LIENS.

§ 1. Right to lien.

Where affidavit for foreclosure shows that parties asserting lien were not mechanics, but proprietors of a sawmill, a special demurrer to the affidavit was properly sustained.—*Evans v. Beddingfield* (Ga.) 604.

§ 2. Operation and effect.

Mechanic's lien of a builder who began work and furnished materials before the execution of a trust deed *held* entitled to priority.—*Cushwa v. Improvement, Loan & Building Ass'n* (W. Va.) 259.

§ 3. Waiver, discharge, release, and satisfaction.

A mechanic's lien *held* not waived by the lienor's accepting negotiable notes payable before the time limited for suit to enforce the lien.—*Cushwa v. Improvement, Loan & Building Ass'n* (W. Va.) 259.

Acceptance of notes payable after the time for the filing of a mechanic's lien had expired, but before the time limited for suit thereon, *held* no bar to a recovery on the lien, if the notes are surrendered at the trial.—*Cushwa v. Improvement, Loan & Building Ass'n* (W. Va.) 259.

MINES AND MINERALS.

§ 1. Title, conveyances, and contracts.

Where lessee of oil lease pays royalty, the oil remains the property of the lessor until brought to the surface.—*Carter v. Tyler County Court* (W. Va.) 216.

MISREPRESENTATION.

See "False Pretenses."

By insured, see "Insurance," § 9.

MODIFICATION.

Of judgment or order on appeal, see "Appeal and Error," § 24.

MORTGAGES.

Mortgages of particular species of property.
Personal property, see "Chattel Mortgages."

§ 1. Requisites and validity.

Evidence *held* to show that note and mortgage deed were a contract made in the state.—Taylor v. American Freehold Land-Mortgage Co. (Ga.) 153.

Evidence *held* insufficient to show that a deed absolute on its face was intended as a mortgage.—Shiver v. Arthur (S. C.) 310.

On the introduction of evidence tending to show that a deed absolute on its face was intended as a mortgage, the burden of proof is on the grantee to prove that it was an absolute conveyance.—Shiver v. Arthur (S. C.) 310.

Recital of a larger consideration in a deed than an indebtedness from the grantor to the grantee indicates that the deed was an absolute conveyance, and not a mortgage.—Shiver v. Arthur (S. C.) 310.

That a grantor did not surrender possession of a farm until two years after it was conveyed *held* not to show that the deed was intended as a mortgage.—Shiver v. Arthur (S. C.) 310.

Provision in a deed absolute from mortgagor to mortgagee that the mortgage should be left open, to protect the grantee against incumbrances and dower, *held* not to render the deed a mortgage.—Brown v. Bank of Sumter (S. C.) 816.

In an action to have a deed absolute declared a mortgage, *held*, that the pleadings formed an issue as to intent.—Brown v. Bank of Sumter (S. C.) 816.

A deed executed pursuant to a power of attorney given by a mortgagor *held* not a mortgage.—Brown v. Bank of Sumter (S. C.) 816.

A deed absolute *held* not a mortgage.—Brown v. Bank of Sumter (S. C.) 816.

§ 2. Recording and registration.

A duly-recorded mortgage, not showing when the deed matures, *held* notice to lessee from grantor of rights which the mortgagee has under the contract, performance of which is thereby secured.—Matlage v. Mulherin (Ga.) 940.

A second mortgage takes precedence over a prior unregistered mortgage, though the second mortgagee had actual notice of the first mortgage.—McAllister v. Purcell (N. C.) 715; Appeal of Worth, Id.

A mortgage admitted to record is prior to a second mortgage afterwards admitted, though the former be withheld by the clerk, and made to appear as having been admitted subsequent to the second deed.—Mercantile Co-operative Bank v. Brown (Va.) 64.

§ 3. Construction and operation.

Purchaser of a mortgage note *held* to have been put on inquiry as to whether the bank transferring the note to him had authority to do so.—Cussen v. Brandt (Va.) 791.

§ 4. Foreclosure by exercise of power of sale.

Where the mortgagee under a power conveyed in his own name, instead of the name of the mortgagor, *held*, that the grantee took an equitable title, which was a defense to an action by the mortgagor for injuries to the freehold.—Moseley v. Rambo (Ga.) 638.

Where usury was eliminated from a mortgage, and a new date fixed for payment, *held* that, on default in payment on that date, a power

of collecting the principal, with lawful interest.—Moseley v. Rambo (Ga.) 638.

§ 5. Foreclosure by action.

A judgment of foreclosure should state the specific sum adjudged to be due.—Gore v. Davis (N. C.) 554.

Foreclosure suit brought after default in payment of first interest installment *held* not premature where authorized by the mortgage.—Gore v. Davis (N. C.) 554.

A provision that suit must be brought by the trustee on written demand of a majority of the mortgagees does not make such demand a prerequisite to suit, it also providing that suit "may" be brought in case of default.—Barnwell v. Marion (S. C.) 313.

A requirement that a demand on the trustee by a majority of the mortgagees to bring suit shall be in writing is sufficiently complied with, where suit is brought in the name of all the mortgagees.—Barnwell v. Marion (S. C.) 313.

MOTIONS.

Continuance in civil actions, see "Continuance." New trial in civil actions, see "New Trial," § 2. — in criminal prosecutions, see "Criminal Law," § 12.

Opening or setting aside default judgment, see "Judgment," § 2.

Presentation of objections for review, see "Appeal and Error," §§ 3-6.

Quashing indictment or information, see "Indictment and Information," § 3.

Relating to pleadings, see "Pleading," § 7.

MUNICIPAL CORPORATIONS.

See "Counties."

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Regulation of railroads, see "Railroads," §§ 6-12. Water supply, see "Waters and Water Courses," § 4.

§ 1. Creation, alteration, existence, and dissolution.

Where a charter was repealed, and a new one granted, embracing the same territory, property, and corporators, *held*, that the new corporation was liable for the debts of the old.—Broadfoot v. City of Fayetteville (N. C.) 804.

§ 2. Proceedings of council or other governing body.

Ordinance of a town incorporated under Act Gen. Assem. Dec. 9, 1893, conferring on police court power to punish by imprisonment without opportunity to pay fine, is void.—Calhoun v. Little (Ga.) 86.

Where a city ordinance is pleaded merely for the purpose of showing defendant's negligence, the title, date, substance, and authority for passage and publication of such ordinance need not be alleged.—Nohrden v. Northeastern R. Co. (S. C.) 524.

An ordinance fully covering the subject-matter of a previous ordinance repeals it by implication.—Knight v. Town of West Union (W. Va.) 163.

§ 3. Officers, agents, and employes.

Notice of contest as to municipal office is not fatally defective in not showing that contestant had the requisite statutory qualifications.—Cushwa v. Lamar (W. Va.) 10.

§ 4. Contracts in general.

While a contract for water for a longer time than one year is illegal, yet where the parties erected a plant, and furnished the water, the

Where a contract with a city is void, complete performance will not estop the city from pleading the illegality of the contract.—City Council of Dawson v. Dawson Waterworks Co. (Ga.) 907.

§ 5. Torts.

Pol. Code, § 752, making officers of municipal corporations liable for official acts done maliciously or without authority, *held* not to apply to acts of member of council presiding in police court.—Calhoun v. Little (Ga.) 86.

When plaintiff's horse, which became frightened, and ran into an obstruction in defendant's street, was gentle, and the cause of its fright is unknown, plaintiff cannot be presumed to have been negligent.—Dillon v. City of Raleigh (N. C.) 548.

Obstruction in street with which runaway horse collided, and not the runaway, *held* to be the proximate cause of the resulting injury.—Dillon v. City of Raleigh (N. C.) 548.

Under Code, §§ 3802, 3803, city *held* liable for injuries caused by obstruction erected in street by railroad with city's permission.—Dillon v. City of Raleigh (N. C.) 548.

In an action to recover for injuries caused by an obstruction in a city street, evidence that such obstruction has been removed since the accident is inadmissible to prove the character of the obstruction.—Dillon v. City of Raleigh (N. C.) 548.

In an action to recover for injuries caused by an obstruction in a city street, evidence that such obstruction has been removed since the accident is admissible to show that such obstruction was unnecessary.—Dillon v. City of Raleigh (N. C.) 548.

Evidence *held* not to establish city's liability for injury to pedestrian, caused by limb falling from tree.—Jones v. City of Greensboro (N. C.) 675.

In an action to recover for injuries from a defect in a street, the refusal of an instruction to find for defendant, if it had no actual or implied notice of the defect, is error.—Jones v. City of Greensboro (N. C.) 675.

In an action for injuries from a defect in a street, the burden is on plaintiff to show that the city had actual or implied notice of the defect.—Jones v. City of Greensboro (N. C.) 675.

Where a party is injured by obstruction on a sidewalk, whether the town has been negligent in allowing it depends on the circumstances of the case.—Arthur v. City of Charleston (W. Va.) 1024.

Where a traveler trips over a rope stretched across a sidewalk, the question of negligence of the city is for the jury.—Arthur v. City of Charleston (W. Va.) 1024.

§ 6. Fiscal management, public debt, securities, and taxation.

The clerk of the city council of Brunswick *held* authorized to issue executions for municipal taxes on assessments regularly made for previous years.—Du Bignon v. City of Brunswick (Ga.) 102.

Evidence *held* not to show a contract between a city and a landowner exempting property from taxation.—Wells v. City of Savannah (Ga.) 689.

A city cannot contract for water on its credit for more than one year, and a contract to run for 20 years, each year's supply to be paid for semiannually, is operative from year to year, so long as neither party repudiates it.—City Council of Dawson v. Dawson Waterworks Co. (Ga.) 907.

incurring the debt.—City Council of Dawson v. Dawson Waterworks Co. (Ga.) 907.

The manner of holding city election, where the debt to be incurred is a bonded debt, is prescribed by Pol. Code, § 377 et seq.—City Council of Dawson v. Dawson Waterworks Co. (Ga.) 907.

There is no general law as to method of holding elections, where the debt to be incurred is not a bonded indebtedness, nor any local law authorizing the city council of Dawson to prescribe such method.—City Council of Dawson v. Dawson Waterworks Co. (Ga.) 907.

Const. 1895 does not give power to cities to exempt from taxation, except after approval by the voters.—Garrison v. City of Laurens (S. C.) 696.

Under Const. 1868, requiring all property to be assessed for taxation, a city cannot exempt factories from taxation.—Garrison v. City of Laurens (S. C.) 696.

Code, c. 47, § 31, authorizes towns and villages incorporated thereunder to levy taxes not exceeding one dollar on every one hundred dollars of property within the municipality.—Knight v. Town of West Union (W. Va.) 163.

Informality in holding election as to municipal bonds and declaring result will not vitiate an election otherwise impartial.—Knight v. Town of West Union (W. Va.) 163.

In municipality having less than 600 voters, an election on the issue of municipal bonds *held* not invalid because conducted in the manner described for elections for municipal officers in the absence of political nominations.—Knight v. Town of West Union (W. Va.) 163.

Ordinance authorizing bonds not to exceed \$6,000 *held* to fix the amount of the bonds at such sum.—Knight v. Town of West Union (W. Va.) 163.

In an action to compel payment for an improvement, a defense that, before the contract was made, the town had already reached its limit of indebtedness, *held* not sustained.—Roe v. Town of Philippi (W. Va.) 224.

MURDER.

See "Homicide," § 1.

MUTUAL BENEFIT SOCIETIES.

See "Beneficial Associations."

MUTUAL INSURANCE.

See "Insurance," § 16.

MUTUAL INSURANCE COMPANIES.

See "Insurance," § 2.

NATIONAL BANKS.

See "Banks and Banking," § 3.

NEGLIGENCE.

Causing death, see "Death," § 1.

By particular classes of parties.

See "Carriers," §§ 1, 3-9.

Employers, see "Master and Servant," §§ 2-6.

Railroad companies, see "Railroads," §§ 6-12.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Demised premises, see "Landlord and Tenant," § 3.

Production, supply, and use of gas, see "Gas."

Contributory negligence.

Of passenger, see "Carriers," §§ 3-9.

Of servant, see "Master and Servant," § 5.

§ 1. Contributory negligence.

One riding with a hired team and driver *held* not responsible for the latter's negligence, and hence not prevented from recovering for injury, where it concurs with defendant's negligence.—Crampton v. Irie (N. C.) 968.

§ 2. Actions.

It is error to charge that certain facts constitute negligence, where there are other relative facts in evidence.—Pickens v. South Carolina & G. R. Co. (S. C.) 567.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 3.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 12; "Homicide," § 9.

Necessity of motion for purpose of review, see "Appeal and Error," §§ 3-6.

Opening or vacating judgment, see "Judgment," § 5.

Remand by appellate court for new trial, see "Appeal and Error," § 24.

§ 1. Grounds.

Error in overruling a demurrer to an amendment to a petition cannot be reviewed on motion for new trial.—Holleman v. Bradley Fertilizer Co. (Ga.) 83.

Where testimony did not demand verdict for any amount against defendant, a motion for new trial by plaintiff, because of inadequacy of verdict, is properly refused.—Edgar v. Walker (Ga.) 582.

Exceptions to overruling of demurrer cannot be taken in motion for new trial.—Southern Ry. Co. v. Cook (Ga.) 585.

Though evidence be strong enough to withstand a motion for nonsuit, the court may grant a new trial, if dissatisfied with the verdict.—Morris v. Imperial Ins. Co. (Ga.) 595; Imperial Ins. Co. v. Morris, *Id.*

Where there is no decided evidence in favor of either side, a second new trial should not be granted to the same party, on the ground that the verdict was not authorized by the evidence.—Thornton v. Abbott (Ga.) 603.

For an attorney in a cause to give the jurors in the box a drink of water at their request is not cause for new trial.—Mitchell v. Corpening (N. C.) 798.

Under Const. art. 5, § 22, a party is not entitled to a new trial because one of the jurors was not registered as an elector, though the party did not know such fact.—Mew v. Charleston & S. Ry. Co. (S. C.) 828.

Jurors will not be heard to impeach their verdict.—Graham v. Citizens' Nat. Bank (W. Va.) 245.

§ 2. Proceedings to procure new trial.

Motion for new trial is properly dismissed where movant did not file brief of evidence in

brief of evidence, which had made a part of the record, a part thereof, without incorporating the old brief, *held* no ground for dismissing motion for new trial.—McCullough v. East Tennessee, V. & G. Ry. Co. (Ga.) 97.

Where brief of evidence was filed within time prescribed, and was to be approved at hearing of motion, an approval at such time was sufficient.—McCullough v. East Tennessee, V. & G. Ry. Co. (Ga.) 97.

Terms of order granting time to file in vacation a brief of evidence must be strictly complied with.—Eason v. City of Americus (Ga.) 106.

Failure to file brief of evidence because of negligence on part of stenographer in preparing report in time *held* not excused.—Eason v. City of Americus (Ga.) 106.

Judgment dismissing motion for new trial for want of approved brief of evidence *held* not erroneous, where brief was not presented for approval until hearing of a motion several months after trial, and where material evidence was omitted from the brief.—Lucas v. Cordele Guano Co. (Ga.) 120.

Dismissal of motion for new trial *held* proper on failure of movant to file brief of evidence within the time appointed by the order.—Berg v. New England Jewelry Co. (Ga.) 137.

It is too late, after motion for new trial has been determined on the merits, to raise question that proof of evidence was not duly filed.—Central of Georgia Ry. Co. v. Dorsey (Ga.) 873.

The statute requiring a motion for a new trial to be "made" within five days after judgment does not require it to be "heard" within that time.—Whetstone v. Livingston (S. C.) 561.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."
On trial, see "Trial," §§ 3-5.

NOTARIES.

Code, § 3308, providing that notaries' fees for each certificate and seal shall be 50 cents, does not apply to protests.—Price & Lucas Cider & Vinegar Co. v. Carroll (N. C.) 959.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

Action or process, see "Process," § 2.

To particular classes of parties.

See "Principal and Agent," § 3.

A charge *held* faulty which left the impression that mailing a notice was not sufficient service without proof of receipt by the addressee.—Bragaw v. Supreme Lodge Knights and Ladies of Honor (N. C.) 544.

NUISANCE.

§ 1. Private nuisances.

Where petition alleges nuisance erected by defendant, and evidence shows erection by predecessor in title of defendant, the latter is entitled to verdict.—Southern Ry. Co. v. Cook (Ga.) 585.

Where landowner is under ordinance required to repair any defects in sewer, he is liable

she can show injury resulting from sickness in her family as tending to show the unhealthy condition of the premises.—Cohen v. Bellenot (Va.) 455.

Where declaration alleges a continuous nuisance, plaintiff can recover for occasional nuisances, if caused in the manner alleged in the declaration.—Cohen v. Bellenot (Va.) 455.

Where plaintiff in action for damages sues as trustee, and not as occupant of the property, she cannot recover damages resulting to her as such occupant.—Cohen v. Bellenot (Va.) 455.

§ 2. Public nuisances.

Complaint against landowners for creating public nuisance by obstructing flow of surface water *held* not to allege damages peculiar to plaintiff.—Baltzeger v. Carolina Midland Ry. Co. (S. C.) 358.

Complaint against landowners for creating a nuisance by obstructing flow of surface water *held* not to show nuisance per se.—Baltzeger v. Carolina Midland Ry. Co. (S. C.) 358.

Complaint against landowners for creating nuisance by obstructing flow of surface water *held* to show that nuisance was a public one.—Baltzeger v. Carolina Midland Ry. Co. (S. C.) 358.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 2.

OBSTRUCTING JUSTICE.

Execution of lawful process by deputy sheriff who has failed to file oath of office is not illegal, and one willfully obstructing such deputy sheriff violates Pen. Code, § 306.—Stephens v. State (Ga.) 13.

OBSTRUCTIONS.

Of highways, see "Highways," § 3.

Of process, see "Obstructing Justice."

Of water course, see "Waters and Water Courses," § 1.

OFFICERS.

Mandamus, see "Mandamus," § 1.

Particular classes of officers.

See "Clerks of Courts"; "Judges"; "Notaries"; "Sheriffs and Constables."

Bank officers, see "Banks and Banking," § 2.

Corporate officers, see "Corporations," § 2.

County officers, see "Counties," §§ 1, 2.

Highway officers, see "Highways," § 2.

Municipal officers, see "Municipal Corporations," §§ 3, 5.

State officers, see "States," § 1.

§ 1. Appointment, qualification, and tenure.

Acts of de facto municipal officers within the scope of their authority and under color of law *held* valid.—Knight v. Town of West Union (W. Va.) 163.

§ 2. Liabilities on official bonds.

Sureties on official bond *held* liable for moneys in the hands of their principal at date of their bond, forming part of the fund which the bond secured, and coming to the hands of the principal during a prior term of office.—Town of Parsons v. Miller (W. Va.) 1017.

OPENING.

Judgment, see "Judgment," § 5.

OPINIONS.

Of courts, see "Courts," § 1.

OPTIONS.

To purchase or sell demised premises, see "Landlord and Tenant," § 2.

ORDER OF PROOF.

At trial, see "Trial," § 2.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," § 2.

PALACE CARS.

See "Carriers," §§ 3-9.

PARENT AND CHILD.

A parent *held* not entitled to his child's custody after contracting to give custody to another.—Anderson v. Young (S. C.) 448.

A parent's contract to put his child in the custody of another is not void, as against public policy, if not prejudicial to the child's welfare.—Anderson v. Young (S. C.) 448.

A father's right to the custody of his minor child may be subordinated to the best interests of the child.—Anderson v. Young (S. C.) 448.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 8.

PARTIES.

Admissions as evidence, see "Evidence," § 5.

Death ground for abatement, see "Abatement and Revival," § 1.

Persons concluded by judgment, see "Judgment," § 9.

To action for dissolution of insolvent corporation, see "Corporations," § 3.

In particular actions or proceedings.

On appeal or writ of error, see "Appeal and Error," §§ 2, 7.

To particular classes of conveyances, contracts, or transactions.

See "Contracts," § 2; "Fraudulent Conveyances," § 2.

§ 1. Defects, objections, and amendment.

Failure to demur *held* a waiver of an objection to a misjoinder of parties appearing on the face of the complaint.—Hocutt v. Wilmington & W. R. Co. (N. C.) 681.

Under Code, §§ 165, 169, defect of parties cannot be first urged on motion for nonsuit.—Shull v. Caughman (S. C.) 301.

A motion to dismiss will not lie for defect of parties.—Shull v. Caughman (S. C.) 301.

Defendants cannot take advantage of non-joinder after a plea to the merits.—McDonald v. Cole (W. Va.) 1033.

Nonjoinder of defendants must be pleaded in abatement filed at rules.—*McDonald v. Cole* (W. Va.) 1033.

PARTITION.

1. Actions for partition.

Owely may be enforced against land inherited by an infant, though, under Code, § 1900, it is not payable by an infant co-tenant until he reaches his majority.—*Powell v. Weathington* (N. C.) 380.

A suit in partition becomes an action of ejectment where the answer asserts sole ownership.—*Cox v. Beaufort County Lumber Co.* (N. C.) 381.

In partition and for an accounting, where the defense tendered merely the legal issue of the title, *held* proper to find that the land could not be equitably divided and to order a sale thereof.—*Hiers v. Risher* (S. C.) 509.

In an action for partition, the question of title should be submitted to the jury on the issues made by the pleadings.—*Sumner v. Harrison* (S. C.) 572.

PARTNERSHIP.

1. Mutual rights, duties, and liabilities of partners.

Limitations do not run against a claim by one partner against the other arising out of the firm business, until after dissolution.—*Harbison v. Mathews* (Ga.) 903.

2. Rights and liabilities as to third persons.

Action for slander does not lie against a partnership.—*Ozborn v. Woolworth* (Ga.) 581.

Where a verdict against a partnership having two members discharged one of them, it was proper to enter judgment against the other individually.—*Phillips v. Wait* (Ga.) 647.

3. Death of partner, and surviving partners.

Rights of surviving partners on foreclosure of mortgage held by the firm as a part of its assets, and not purchased by the surviving partners, determined.—*Mulherin v. Rice* (Ga.) 65.

PASSENGERS.

See "Carriers," §§ 3-9.

PAYMENT.

See "Compromise and Settlement."

By garnishee, see "Garnishment," § 4.

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

Of bill of exchange or promissory note, see "Bills and Notes," § 4.

1. Operation and effect.

A note will not be regarded as payment of a re-existing debt, in the absence of an express agreement to that effect.—*Cushwa v. Improvement, Loan & Building Ass'n* (W. Va.) 259.

2. Pleading, evidence, and province of court and jury.

Where defendant pleads payment, evidence that plaintiff ordered defendant's secretary to collect the debt, and apply it on an account due him from plaintiff, is admissible.—*Talbotton R. Co. v. Gibson* (Ga.) 151; *Gibson v. Talbotton R. Co., Id.*

Testimony of the maker of a note *held* not to now payment.—*Piedmont Bank of Morganton v. Wilson* (N. C.) 889.

In an action for goods sold and delivered, evidence of a usage as to the manner of keeping

books is admissible to show nonpayment.—*Harbison v. Hall* (N. C.) 964.

Lapse of 20 years *held* to afford presumption of payment of vendor's lien.—*Burbridge v. Sadler* (W. Va.) 1028.

§ 3. Recovery of payments.

Evidence *held* to show payment under a material mistake of fact authorizing a recovery of the money paid.—*City Nat. Bank v. Peed* (Va.) 34.

A right to recover back money paid by mistake *held* not barred by the fact that, by the exercise of greater diligence, the facts involved in the mistake might have been learned, where the ignorance was in good faith.—*City Nat. Bank v. Peed* (Va.) 34.

PEDDLERS.

See "Hawkers and Peddlers."

PENALTIES.

Violations of usury laws, see "Usury," § 2.

PERSONAL INJURIES.

See "Negligence."

To employé, see "Master and Servant," §§ 2-6.

To licensee, see "Railroads," §§ 6-12.

To passenger, see "Carriers," §§ 3-9.

To person on or near railroad tracks, see "Railroads," §§ 6-12.

To traveler on highway, see "Municipal Corporations," § 5.

— crossing railroad, see "Railroads," §§ 6-12.

To trespasser, see "Railroads," §§ 6-12.

PETITION.

In pleading, see "Pleading," § 1.

PLEA.

In civil actions, see "Equity," § 3; "Pleading," § 2.

PLEADING.

Applicability of instructions to pleadings, see "Trial," §§ 6-11.

Allegations as to particular facts, acts, or transactions.

See "Payment," § 2; "Statutes," § 4.

Statute of limitations, see "Limitation of Actions," § 4.

In particular actions or proceedings.

See "Equity," § 3; "Replevin," § 2.

Actions for causing death, see "Death," § 1. Indictment or criminal information or complaint, see "Indictment and Information."

§ 1. Declaration, complaint, petition, or statement.

A petition substantially complying with the law requiring the cause of action to be set forth in orderly paragraphs, consecutively numbered, is not subject to demurrer.—*Talbotton R. Co. v. Gibson* (Ga.) 151; *Gibson v. Talbotton R. Co., Id.*

Allegations in petition for injuries received through electric light wire *held* sufficiently specific to withstand demurrer.—*Brush Electric Light & Power Co. v. Simonsohn* (Ga.) 902.

A pleading otherwise good is not demurrable because it states evidentiary matters.—*Bolt v. Gray* (S. C.) 148.

the discretion of the court.—Gore v. Davis (N. C.) 554.

An answer *held* not to deny any of the allegations of the complaint.—Badham v. Brabham (S. C.) 444.

Code, § 171, subd. 2, *held* to permit a defendant to separately plead as many defenses as he may have, though inconsistent.—Millan v. Southern Ry. Co. (S. C.) 539.

Defendant's right under the Code to plead all defenses *held* to entitle him to plead separate inconsistent defenses, if each would defeat plaintiff's claim, wholly or partly.—Millan v. Southern Ry. Co. (S. C.) 539.

§ 3. Replication or reply and subsequent pleadings.

Plaintiff cannot reply where no counterclaim is set up.—Egan v. Bissell (S. C.) 1.

§ 4. Demurrer or exception.

Where plea of accord and satisfaction is specially demurred to, the demurrer is properly overruled, when not filed within the statutory time.—A. P. Brantley Co. v. Lee (Ga.) 101.

Where petition is good in substance, defects must be specifically pointed out by appropriate special demurrer.—Little Rock Cooperage Co. v. Hodge (Ga.) 603.

An answer is not demurrable because it alleges that an immaterial exhibit is attached, when in fact it is not so attached.—Walters v. Faves (Ga.) 609.

A demurrer attacking collectively two paragraphs of an answer, where one is good, is properly overruled.—Florence v. Pattillo (Ga.) 642.

A declaration containing good causes of action, which are defectively stated, is not demurrable.—Trump v. Tidewater Coal & Coke Co. (W. Va.) 1035.

§ 5. Amended and supplemental pleadings and replader.

Where original petition sets forth no cause of action, it cannot be amended.—Davis v. Muscogee Mfg. Co. (Ga.) 30.

Pending decision on demurrer, the judge is not bound to give plaintiff opportunity to amend petition.—Ripley v. Eady (Ga.) 343.

Defendant in a civil action brought before passage of Act Dec. 21, 1897, could set up any new defenses by way of amendment on making prescribed affidavit.—G. Ober & Sons Co. v. Drane (Ga.) 371.

Petition to foreclose a vendor's lien *held* properly amended.—Atlanta Land & Loan Co. v. Haile (Ga.) 606.

Amendments to petition *held* not to set up a new cause of action.—Glover v. Savannah, F. & W. Ry. Co. (Ga.) 876; Savannah, F. & W. Ry. Co. v. Glover, *Id.*

An affidavit is not a prerequisite to an amendment.—Jennings v. Parr (S. C.) 73.

Though demurrer is properly sustained for failure to state facts, plaintiff should be allowed to amend allegation showing that he intended to state the necessary facts.—Privett v. Wilmington, C. & C. R. Co. (S. C.) 75.

The requirement of an affidavit, on motion to amend the answer, that the proposed amendments are meritorious, or based on facts existing when it was prepared, or that failure to include them did not arise from negligence, *held* within the discretion of the court.—Millan v. Southern Ry. Co. (S. C.) 539.

swers on each other.—Egan v. Bissell (S. C.) 1.

§ 7. Motions.

A right to have an answer stricken as being frivolous *held* not waived by filing a demurrer.—Badham v. Brabham (S. C.) 444.

§ 8. Defects and objections, waiver, and aid by verdict or judgment.

Defects in the complaint *held* cured by judgment.—Sanders v. Houston Guano & Warehouse Co. (Ga.) 610.

Insufficiencies of a bill are cured by decrees entered by consent.—Scott v. Dameron's Adm'r (Va.) 415.

Technical defects in a declaration may be cured by the evidence.—Trump v. Tidewater Coal & Coke Co. (W. Va.) 1035.

PLEDGES.

Evidence *held* to show that the holder of collateral note had received from other sources a sufficient amount to discharge the same.—G. Ober & Sons Co. v. Drane (Ga.) 371.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," § 5.

POWERS.

Of attorney, see "Principal and Agent."

Of sale in mortgage, see "Mortgages," § 4.

PRACTICE.

In particular civil actions or proceedings.

See "Account, Action on"; "Contempt," § 2; "Ejectment"; "Prohibition"; "Replevin."

Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.

See "Abatement and Revival"; "Affidavits"; "Appearance"; "Continuance"; "Costs"; "Damages," § 1; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judicial Sales"; "Jury"; "Parties"; "Pleading"; "Process"; "Reference"; "Trial"; "Venue."

Particular remedies in or incident to actions.

See "Attachment"; "Discovery"; "Garnishment"; "Injunction."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

Bastardy proceedings, see "Bastards," § 1.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In insolvency, see "Insolvency."

In justices' courts, see "Justices of the Peace," § 2.

Procedure on review.

See "Appeal and Error"; "Certiorari," § 2; "Exceptions, Bill of"; "New Trial."

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," §§ 14-23.

PREMIUMS.

For insurance, see "Insurance," § 3.

PRESCRIPTION.

Establishment of highways, see "Highways," § 1.

PRESENTMENT.

Of bill or note, see "Bills and Notes," § 3.

PRESUMPTIONS.

On appeal or error, see "Appeal and Error," §§ 14-23.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers"; "Factors."

Corporate agents, see "Corporations," § 2.
Insurance agents, see "Insurance," § 3.

§ 1. The relation.

Declarations of agent, and acts, known to principal, may bind him, on the ground of acquiescence.—Hoge v. Turner (Va.) 291.

§ 2. Mutual rights, duties, and liabilities.

In an action by the principal against an agent for the sale of fertilizers for money collected, the agent cannot defend because the property had not been branded as required by law when it was sold.—Holleman v. Bradley Fertilizer Co. (Ga.) 83.

Power of attorney to prosecute a suit to set aside a fraudulent conveyance construed, and held not to authorize the agent to receive the purchase money from the fraudulent grantee or confirm the sale.—O'Connor v. O'Connor (W. Va.) 276.

§ 3. Rights and liabilities as to third persons.

Verdict for plaintiffs held unauthorized, there being evidence that defendant's agent contracted without authority.—Brandenstein v. Douglas (Ga.) 341.

Where principal retains possession of property after receiving it from his agent, he is not charged with ratification of unauthorized act of agent in obtaining the property, where principal, without such agreement, was entitled to the property.—Baldwin Fertilizer Co. v. Thompson (Ga.) 591.

One dealing with special agent is chargeable with notice of extent of his authority.—Baldwin Fertilizer Co. v. Thompson (Ga.) 591.

A settlement by a special agent, not within the scope of his agency, is not binding on principal.—Baldwin Fertilizer Co. v. Thompson (Ga.) 591.

A principal is not bound by unauthorized acts of special agent with limited powers, unless he ratifies them.—Phoenix Ins. Co. v. Gray (Ga.) 948.

The fact that proceeds of a note were applied to maker's debt to purchaser held not to charge

A power of attorney held not to authorize the attorney to sell or convey.—Hotchkiss v. Middlekauf (Va.) 36.

Under Code 1887, § 2877, all property acquired in a business is liable for debts of a trader conducting it as agent, where he fails, by a sign and by notice in newspaper, to disclose the name of his principal.—Hoge v. Turner (Va.) 291.

Any one conducting in person his business, under the name of "agent," held not within Code 1887, § 2877, requiring him to disclose his principal.—Hoge v. Turner (Va.) 291.

Where person transacts business as trader, with addition of word "agent," and fails to disclose the name of his principal, as required by Code, c. 100, § 13, all the property in the business is liable for his debts.—Morris v. Clifton Forge Grocery Co. (W. Va.) 997.

False statement of agent of corporation in buying timber that the company is a partnership held not to bind its members or the corporation to liability as such.—McDonald v. Cole (W. Va.) 1033.

PRINCIPAL AND SURETY.

See "Subrogation."

Liabilities on bonds for performance of duties of trust or office, see "Beneficial Associations": "Officers," § 2.

§ 1. Creation and existence of relation.

A bank discounting a note held not charged with notice of agreement between maker and sureties not to use note without signature of another surety.—Farmers' Bank of Roxboro v. Hunt (N. C.) 546.

§ 2. Nature and extent of liability of surety.

Sureties held liable on note, as against bona fide purchaser, notwithstanding violation of agreement of maker not to use note without procuring an additional surety.—Farmers' Bank of Roxboro v. Hunt (N. C.) 546.

§ 3. Discharge of surety.

If a creditor surrenders a lien on property of a principal, without consent of a surety, the surety is discharged according to the value of the property.—First Nat. Bank v. Parsons (W. Va.) 271.

A surety is not discharged by an act which does not affect his right or impair the remedy of the creditor.—First Nat. Bank v. Parsons (W. Va.) 271.

Where principal has no title to property given as security, the surety is not injured by surrender of the same by the creditor.—First Nat. Bank v. Parsons (W. Va.) 271.

Indulgence of principal debtor by creditor, without a binding contract, will not discharge surety.—First Nat. Bank v. Parsons (W. Va.) 271.

Continuance of a case against principal by consent of creditor held not to discharge surety.—First Nat. Bank v. Parsons (W. Va.) 271.

Unexecuted agreement to pay interest in advance held not a valid contract to extend payment so as to discharge surety.—Parsons v. Harrold (W. Va.) 1002.

To release surety by indulgence of principal, the creditor must know that the party is a surety.—Parsons v. Harrold (W. Va.) 1002.

Indulgence granted principal with consent of surety does not release the latter.—Parsons v. Harrold (W. Va.) 1002.

PRINTING.

Record on appeal or writ of error, see "Appeal and Error," § 9.

PRIORITIES.

Of mortgages, see "Mortgages," § 3.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 2.

PROBATE.

Of wills, see "Wills," § 4.

PROCESS.

Effect of appearance, see "Appearance."

Resistance or obstruction, see "Obstructing Justice."

Return of service on foreign corporation, see "Corporations," § 4.

Particular forms of writs or other process.

See "Injunction"; "Prohibition."

§ 1. Nature, issuance, requisites, and validity.

Process is issued by the clerk on order of plaintiff or his attorney, and not by order of the court.—Abney v. Ohio Lumber & Mining Co. (W. Va.) 256.

§ 2. Service.

Where entry of service of process is attacked, the officer must be made a party.—Southern Ry. Co. v. Cook (Ga.) 585.

Where plaintiff in action to set aside sale had testified that he had not been served, defendant, in rebuttal, could prove personal service by the officer.—Battle v. Braswell (Ga.) 838.

Defendant waives reading of summons by walking away from officer who shows it to him.—Williamson v. Cocke (N. C.) 963.

What constitutes proper service is a question for the court on the facts.—Williamson v. Cocke (N. C.) 963.

Order of publication *held* insufficient within the statute.—Styles v. Laurel Fork Oil & Coal Co. (W. Va.) 227.

§ 3. Defects, objections, and amendment.

Amendment of a return *held* properly allowed pending an action against the sheriff for false return.—Swain v. Burden (N. C.) 319.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

§ 1. Nature and grounds.

A writ will not issue to the circuit court controlling the exercise of its powers in issuing certificate of a corporation of a city or town, under Code, c. 47, § 9.—Bloxton v. McWhorter (W. Va.) 1004.

A writ will not lie to the action of a court in entering an order directing its clerk to issue

Where board of election canvassers erroneously assumed jurisdiction to canvass votes for relocation of county seat, prohibition will lie to restrain it.—Brown v. Board of Election Canvassers of Randolph County (W. Va.) 168.

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of loss insured against, see "Insurance," § 13. Taking additional proofs on appeal, see "Appeal and Error," §§ 14-23.

PROPERTY.

Adverse possession, see "Adverse Possession." Constitutional guaranties of rights of property, see "Constitutional Law," § 1.

Estates, see "Estates."

Licenses in respect to real property, see "Licenses," § 2.

Taking for public use, see "Eminent Domain."

Particular species of property.

See "Animals"; "Fixtures."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," §§ 6-11.

PUBLIC AID.

To railroads, see "Railroads," § 2.

PUBLICATION.

Service of process, see "Process," § 2.

PUBLIC DEBT.

See "Municipal Corporations," § 6.

PUBLIC LANDS.

§ 1. Disposal of lands of the states.

Where state claims no interest in lands covered by its grants, owner of one grant can sue to vacate conflicting grant.—Wyman v. Taylor (N. C.) 740.

Where grant is made of lands subject to certain reservations, and the reservations are located, the grant and the reservations are valid.—Wyman v. Taylor (N. C.) 740.

Rules for survey and registration of land, on division of county after entry of land and grant, determined.—Wyman v. Taylor (N. C.) 740.

Registration of junior grant in county set off from the county in which the lands were situated, and entry made before the registration of the senior grant, *held* not to render title under the junior grant superior.—Wyman v. Taylor (N. C.) 740.

A voidable grant *held* good, as against a subsequent grant, until declared void by a court having jurisdiction.—Wyman v. Taylor (N. C.) 740.

Irregularity in entry of land, and survey thereof, where the state took pay therefor and made the grant, *held* not to invalidate the grant.—Wyman v. Taylor (N. C.) 740.

Though amount of acres in grant by state are greater than the amount called for therein, the grant is not void.—Wyman v. Taylor (N. C.) 740.

One entering land under the law in force in 1852, failing to perfect his title within the time limited by law, held not to acquire even an equitable claim.—Wyman v. Taylor (N. C.) 740.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 2.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 4.

PUNISHMENT.

See "Criminal Law," § 18.

Fines, see "Fines."

QUASHING.

Attachment, see "Attachment," § 3.

Indictment or information, see "Indictment and Information," § 3.

QUESTIONS FOR JURY.

In civil actions, see "Trial," §§ 3-5.

QUIETING TITLE.

§ 1. Right of action and defenses.

A mere assertion of ownership held not such a cloud as can be removed in equity.—Waters v. Lewis (Ga.) 854.

RAILROADS.

See "Street Railroads."

Carriage of goods and passengers, see "Carriers."

§ 1. Railroad companies.

Suit against railroad company, in county of principal office, setting up cause of action in another county, dismissed where there was no allegation that corporation had agent in such other county.—Savannah, F. & W. Ry. Co. v. Tony (Ga.) 878.

§ 2. Public aid.

Const. 1895 held not to authorize the passage of 22 St. at Large, p. 316, validating a subscription to the capital stock of a railroad by the city of S.—Cudd v. Calvert (S. C.) 503.

§ 3. Right of way and other interests in land.

Under Acts 1894, p. 1002, § 14, authorizing a city to alter a street by condemnation, it cannot, without such proceeding, authorize laying of a railroad in a street, the abutters not consenting.—Wilkins v. Town Council of Gaffney City (S. C.) 299.

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an adjoining railroad may be recovered either as a single issue or by two separate issues.—Ridley v. Seaboard & R. R. Co. (N. C.) 825.

Damages to lands and past damages to crops growing thereon through the negligent construction of adjoining railroad embankment may be recovered in one action.—Ridley v. Seaboard & R. R. Co. (N. C.) 825.

In an action for past damages to crops by negligent construction of road, defendant may have permanent damages assessed, if demanded in the answer.—Ridley v. Seaboard & R. R. Co. (N. C.) 379.

Permanent damages for injury to land, and past damages for injury to crops thereon, may be recovered in the same action, where the past damages were not considered in ascertaining the amount of the permanent damages.—Ridley v. Seaboard & R. R. Co. (N. C.) 379.

Complaint in action against railroad company for flooding lands held insufficient because not alleging that defendant constructed the embankment obstructing the water flow, or had increased it since owning the land.—Privett v. Wilmington, C. & C. R. Co. (S. C.) 75.

§ 5. Sales, leases, traffic contracts, and consolidation.

A decree ordering a lessee to continue operation of the road may extend to a line owned by the lessee which connects the leased line with the lessee's main line.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

The lessee of a railroad may be enjoined from abandoning its operation, though the operation will be at a loss to lessee.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

A decree enjoining the lessee of a railroad from abandoning its operation is not objectionable because it requires the lessee to furnish the same train service that it previously had.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

A lease of a road held to impliedly provide that the lessee should continue the road in operation.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

Persons holding under the lessee of a road held bound by terms of the lease requiring the road to be kept in operation.—Southern Ry. Co. v. Franklin & P. R. Co. (Va.) 485.

§ 6. Operation—Statutory, municipal, and official regulations.

Ordinance imposing license tax on railroad companies held not limited to companies doing business exclusively within the city.—Florida Cent. & P. R. Co. v. City of Columbia (S. C.) 408.

A railroad company does business in a city, so as to be subject to a license tax under Act 1871, though it runs its trains over the tracks of another company.—Florida Cent. & P. R. Co. v. City of Columbia (S. C.) 408.

A railroad, though compelled by its charter as a carrier to do business in the city, may be required to take out a license for doing such business.—Florida Cent. & P. R. Co. v. City of Columbia (S. C.) 408.

Gen. St. § 1499 (1 Rev. St. § 1681), requires sufficient brakes to be attached to gondola and flat cars having eight wheels.—Mew v. Charleston & S. Ry. Co. (S. C.) 828.

§ 7. — Companies and persons liable for injuries.

A railroad company which has leased its road is liable for negligence of the lessee in operating it.—Pierce v. North Carolina R. Co. (N. C.) 399.

acts of an employé acting within the scope of his authority.—*Pierce v. North Carolina R. Co.* (N. C.) 390.

The proper issues in an action for death of a trespasser on a train by wrongful act, stated.—*Pierce v. North Carolina R. Co.* (N. C.) 399.

The question of a carrier's negligence in constructing a platform over water, and defectively covering it, whereby consignee's servant was injured, *held* for the jury.—*Cordell v. Wilmington & W. R. Co.* (N. C.) 706.

§ 9. — Accidents at crossings.

It is negligence for a railroad company, in digging a trench along its track near a crossing, to throw a pile of dirt into the highway so as to frighten horses.—*Parks v. Southern Ry. Co.* (N. C.) 387.

§ 10. — Injuries to persons on or near track.

Question *held* for the jury whether a railroad company was negligent, where horses were frightened by the escape of steam from an engine on a side track.—*Dunn v. Wilmington & W. R. Co.* (N. C.) 711.

Evidence *held* not to raise presumption that deceased did not stop and look before attempting to cross the track where he was killed.—*McVey v. Chesapeake & O. Ry. Co.* (W. Va.) 1012.

A company is not bound to use the same care in running trains over a right of way adjoining a street as if the track lay in the street itself.—*McVey v. Chesapeake & O. Ry. Co.* (W. Va.) 1012.

What constitutes ordinary care in running trains over a track used by foot travelers *held* to depend on circumstances.—*McVey v. Chesapeake & O. Ry. Co.* (W. Va.) 1012.

The fact that the right of way was used by foot travelers *held* to impose on the company the obligation to use greater care in running trains.—*McVey v. Chesapeake & O. Ry. Co.* (W. Va.) 1012.

§ 11. — Injuries to animals on or near tracks.

In action for killing stock on track, evidence that it was through no fault of plaintiff *held* admissible.—*Louisville & W. R. Co. v. Hall* (Ga.) 860.

In action for killing stock, evidence *held* to require an instruction that defendant would not be liable if at the time of the killing its agents exercised all ordinary care to prevent the same.—*Louisville & W. R. Co. v. Hall* (Ga.) 860.

In action for killing stock, *held* error to allow witness to testify that defendants killed a good many stock in that way.—*Central of Georgia Ry. Co. v. Ross* (Ga.) 904.

Where the liability of a railroad company depends on whether a mule was killed on the public crossing, and the evidence was conflicting, admission of improper evidence was ground for reversal.—*Central of Georgia Ry. Co. v. Ross* (Ga.) 904.

§ 12. — Fires.

An instruction placing burden of proof on plaintiff, in an action against a railroad company for damages for burning timber adjacent to its right of way, *held* proper.—*Moore v. Wilmington & W. R. Co.* (N. C.) 710.

RAPE.

§ 1. Prosecution and punishment.

It is error to refuse to allow accused on cross-examination to undertake to show by prosecu-

tor that he was not guilty.—*State v. Commonwealth* (Va.) 707.

Medical witness as an expert, after stating result of his examination, cannot express opinion that no one would have voluntarily submitted to the suffering necessary to bring about result.—*State v. Hull* (W. Va.) 240.

RATIFICATION.

Of act of agent, see "Principal and Agent," § 3.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1.

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Of corporations in general, see "Corporations," § 3.

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As evidence, see "Evidence," § 7.
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See "Deeds," § 2.

REDEMPTION.

From tax sales, see "Taxation," § 8.

REFERENCE.

§ 1. Referees and proceedings.

A referee appointed to take testimony cannot consider motion to dismiss.—*People's Loan & Exchange Bank v. Garlington* (S. C.) 513.

§ 2. Report and findings.

Under Code, § 423, *held*, that it was discretionary with the court whether or not to set aside a nonsuit consented to before a referee.—*Cummings v. Swenson* (N. C.) 966.

REFORMATION OF INSTRUMENTS.

§ 1. Right of action and defenses.

Reformation of a note refused, because the mistake was one of law.—*Morehead Banking Co. v. Morehead* (N. C.) 967.

REGISTRATION.

Of voters, see "Elections," § 1.

Of particular instruments or transactions.

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RELEASE.

See "Compromise and Settlement"; "Payment."

§ 1. Requisites and validity.

A finding that co-obligors were never liable on the obligation is not a "release" therefor discharging the other obligors.—*Sloan v. Pelzer* (S. C.) 481.

RELIGIOUS SOCIETIES.

In an action to subject property of a voluntary society to debts incurred by the trustees, the trustees *held* the only necessary parties defendant.—*Josey v. Union Loan & Trust Co. (Ga.)* 628.

Property of a voluntary religious society *held* subject to the debts incurred by the trustees.—*Josey v. Union Loan & Trust Co. (Ga.)* 628.

A certificate of incorporation, on the presentation of an agreement by certain persons to become a corporation by the name of the "Baptist Missionary Society of West Virginia," *held* in effect incorporating the church the parties represent contrary to the constitution and laws.—*Powell v. Dawson (W. Va.)* 214.

REMAINDERS.

See "Life Estates."

Where a testator bequeaths his estate to one during life, and then to the latter's children, the court has power, on application of the life tenant and all the living children, to order a sale.—*Ex parte Yancey (N. C.)* 491; *Appeal of Roushall, Id.*

A mortgage of a contingent remainder may be foreclosed on default without waiting until the happening of the condition on which the remainder would vest.—*People's Loan & Exchange Bank v. Garlington (S. C.)* 513.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 24.

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Of cause on appeal or writ of error, see "Appeal and Error," § 24.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 1.

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See "Landlord and Tenant," § 4.

REPEAL.

Of statute, see "Statutes," § 2.

REPLEADER.

See "Pleading," § 5.

REPLEVIN.

§ 1. **Right of action and defenses.**

Under Code, § 322, property held under execution against a third person is subject to replevin by persons other than the execution debtor.—*Mitchell v. Sims (N. C.)* 735.

§ 2. **Pleading and evidence.**

The declarations of the husband as to his wife's interest in the property *held* admissible in an action by the wife for recovery of the property from one claiming under execution against the husband.—*Mitchell v. Sims (N. C.)* 735.

REPLY.

See "Pleading," § 3.

REQUESTS.

For instructions in civil actions, see "Trial," §§ 6-11.

RESCISSION.

Of contract for sale of goods, see "Sales," § 3.
— for sale of land, see "Vendor and Purchaser," § 1.

Of insurance policy, see "Insurance," § 8.

RES GESTÆ.

In criminal prosecutions, see "Criminal Law," § 3.

RESIDENCE.

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RES JUDICATA.

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See "Trusts," § 1.

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Of election, see "Elections," § 2.

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REVIVAL.

Of action, see "Abatement and Revival," § 1.
Of judgment, see "Judgment," § 11.

RIGHT OF WAY.

Of railroads, see "Railroads," § 3.

ROADS.

See "Highways."

ROBBERY.

Suddenly snatching a purse, without using intimidation, and where there is no resistance, *held* not robbery.—*Spencer v. State (Ga.)* 849.

A felonious taking is established by showing that it was with the intent to deprive the owner of the use of the property and appropriate it to the taker.—*State v. Nicholson (N. C.)* 813.

Robbery near a highway is committed where the act is done within 50 or 75 yards of a county road in view thereof, though neither prosecutor nor accused knew of the road.—*State v. Nicholson (N. C.)* 813.

sufficient if it met the requirements of a contract of sale. —*State v. Nicholson* (N. C.) 813.

SALES.

See "Vendor and Purchaser."

Of intoxicating liquors, see "Intoxicating Liquors."

On foreclosure of mortgage, see "Mortgages," § 4.

Tax sales, see "Taxation," § 7.

§ 1. Requisites and validity of contract.

An agent, under 1 Rev. St. §§ 1859, 1860, cannot recover of his principal for loss sustained on a contract for future delivery of grain, unless he shows a bona fide intention of his principal to receive the grain at the maturity of the contract. —*Harvey v. Doty* (S. C.) 501.

§ 2. Construction of contract.

A contract *held* not to evidence a sale, but to create a del credere agency. —*Holleman v. Bradley Fertilizer Co.* (Ga.) 83.

§ 3. Modification or rescission of contract.

Where purchaser of personalty makes a material representation, which is false and on which the vendor acts, it is a fraud in law avoiding the sale. —*Newman v. H. B. Claffin Co.* (Ga.) 943.

§ 4. Performance of contract.

If the buyer continues to use property after discovery of breach of warranty, he is deemed to have accepted it. —*Huyett & Smith Mfg. Co. v. Gray* (N. C.) 718.

§ 5. Warranties.

Evidence in action on note *held* insufficient to show breach of warranty as a defense to the action on a note given for a sale of a newspaper. —*Florence v. Pattillo* (Ga.) 642.

Though a buyer accepts the property with knowledge that it is not as warranted, he is entitled to damages for the breach. —*Huyett & Smith Mfg. Co. v. Gray* (N. C.) 718.

Where buyer accepts property with knowledge of breach of warranty, the seller may recover price, less amount paid and damages. —*Huyett & Smith Mfg. Co. v. Gray* (N. C.) 718.

§ 6. Remedies of seller.

Where the buyer alleged that the goods were worthless, evidence of the value he placed on them when he applied for insurance thereon *held* admissible. —*Ryals v. Johnson County Sav. Bank* (Ga.) 645.

It was not admissible, however, to show that the insurance company would probably have paid him full value for the goods had he insured them at the invoice price. —*Ryals v. Johnson County Sav. Bank* (Ga.) 645.

Where the seller retains title to the property as security, he has a lien to secure the amount due, and, if not paid, is entitled to a foreclosure and sale. —*Huyett & Smith Mfg. Co. v. Gray* (N. C.) 718.

An agreement of a seller to extend the time of payment of the price *held* not a waiver of the right of possession of the chattels. —*Budham v. Brabham* (S. C.) 444.

§ 7. Remedies of buyer.

The measure of damages for breach of warranty of the soundness of an animal sold *held* the difference between its value sound and unsound. —*Hobbs v. Bland* (N. C.) 683.

A buyer may recoup damages for breach of warranty, in an action by the seller for the

price and the real value of the property received. —*Huyett & Smith Mfg. Co. v. Gray* (N. C.) 718.

SATISFACTION.

See "Accord and Satisfaction."

Of judgment, see "Judgment," § 12.

SCHOOLS AND SCHOOL DISTRICTS.

§ 1. Private schools and academies.

A provision that "no money would be returned" if a pupil was expelled, *held* not to prevent recovery of tuition due in advance at time of expulsion. —*Horner School v. Wescott* (N. C.) 885.

A catalogue and special contract construed, and *held*, that the school could recover tuition due on expulsion of pupil only. —*Horner School v. Wescott* (N. C.) 885.

§ 2. Public schools.

Under Const. art. 11, §§ 6, 12, and 22 St. at Large, p. 967, a county must show that liquor license funds were surplus after paying school-tax deficiencies, before it could compel the comptroller to apportion them among the counties. —*State v. Derham* (S. C.) 418.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

SENTENCE.

In criminal prosecutions, see "Criminal Law," § 13; "Larceny," § 2.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 3.

SEQUESTRATION.

A sequestration bond *held* to represent the property, and, accordingly, any party having an interest in the property might enforce it. —*H. B. Claffin Co. v. De Vaughn* (Ga.) 108.

SERVICE.

Of papers on appeal or writ of error, see "Appeal and Error," § 9.

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See "Work and Labor."

SET-OFF AND COUNTERCLAIM.

Right of stockholder of insolvent corporation to set-off against subscription, see "Corporations," § 3.

§ 1. Subject-matter.

A plea of set-off is not good unless it alleges facts showing demand against plaintiff due to defendant when the action was begun. —*Walters v. Eaves* (Ga.) 609.

One sued on a note by a bank cannot, after the bank is declared insolvent, maintain a counterclaim for a deposit made before the bank became insolvent, and after suit was commenced. —*Piedmont Bank of Morganton v. Wilson* (N. C.) 889.

A counterclaim cannot be filed in an action under Code to recover specific chattels, in the absence of exceptional circumstances entitling defendant to equitable relief.—*Badham v. Brabham* (S. C.) 444.

A deputy sheriff *held* entitled to set off his claim for services, in an action on his bond for failure to account for moneys received.—*Davis v. Baker* (W. Va.) 239.

SETTLEMENT.

See "Accord and Satisfaction"; "Compromise and Settlement."
Operation and effect of accounting, see "Account," § 1.

SHERIFFS AND CONSTABLES.

1. Appointment, qualification, and tenure.

That a deputy sheriff retained money collected for services to which he was entitled under his contract, when part of his duties had been taken from him without any change in the agreement or compensation, *held* no breach of his bond to account for said money.—*Davis v. Baker* (W. Va.) 239.

Reduction of a deputy sheriff's duties without any change in the original agreement for compensation does not necessarily reduce the compensation to which he is entitled.—*Davis v. Baker* (W. Va.) 239.

A bond of a deputy sheriff to the sheriff for the faithful performance of his duties *held* to be contract.—*Davis v. Baker* (W. Va.) 239.

2. Compensation.

Under Act March 2, 1897 (22 St. at Large, p. 4), constables of Bamberg county *held* not entitled to mileage for conveying prisoners from magistrate's court to the county jail.—*Highwer v. Bamberg County* (S. C.) 576.

3. Powers, duties, and liabilities.

Official acts of deputy sheriff *held* not invalid cause of his failure to take and file the oath of office.—*Stephens v. State* (Ga.) 13.

Bonds of deputy sheriff need not be approved, and therefore Pol. Code, § 252, and Pen. Code, § 2, are not applicable to deputies.—*Stephens v. State* (Ga.) 13.

Where, on certiorari to judgment of magistrate rendered on rule against constable, the judgment making rule absolute requires the constable to pay, out of a fund in his hands, to petitioner in the rule, more than the fund, the judgment is erroneous.—*Grimsley v. Alexander* (Ga.) 24.

In rule against sheriff for failure to sell, *held* error to make rule absolute for full amount of execution, where designated parts of property sold on belonged to persons other than defendant in execution, and were not subject thereto, and the balance of the property was of less value than the amount of the *fi. fa.*—*Wilkins v. American Freehold Land Mortgage Co. of London* (Ga.) 135.

SLANDER.

See "Libel and Slander."

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See "Statutes," § 1.

SPECIFIC PERFORMANCE.

§ 1. Contracts enforceable.

Parol contract giving owner right to redeem from tax sale will not be enforced, it not appearing there had been any part performance.—*Etheridge v. Woodard* (Ga.) 122.

Specific performance of contract to convey land on payment of price will not be decreed, where plaintiff entered into parol agreement with defendant to become answerable for debt of another and to pledge land as security, though agreement be not legally binding.—*Kirkland v. Downing* (Ga.) 632.

Oral rescission of contract does not bar specific performance without destruction of written contract, or, if oral, surrender of possession.—*Cunningham v. Cunningham* (W. Va.) 998.

Oral abandonment of oral contract for land will defeat specific performance by purchaser, if possession is surrendered to vendor.—*Cunningham v. Cunningham* (W. Va.) 998.

§ 2. Proceedings and relief.

Evidence in bill for specific performance of contract based on oral gift on a meritorious consideration and performance thereunder *held* to sustain judgment for plaintiff.—*Causey v. Causey* (Ga.) 138.

A bill *held* not to seek specific performance of a contract of a corporation to deliver bonds.—*Roanoke St. Ry. Co. v. Hicks* (Va.) 295.

Evidence must be clear to enable a court of equity to enforce oral contract for sale of land.—*Harris v. Elliott* (W. Va.) 176.

Where answer admits oral contract for sale of land as alleged, and the statute of frauds is not relied on, no proof of contract or delivery of possession and no writing is required.—*Cunningham v. Cunningham* (W. Va.) 998.

Oral waiver of contract, to defeat specific performance of purchaser, cannot be proven by casual conversations.—*Cunningham v. Cunningham* (W. Va.) 998.

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See "Intoxicating Liquors."

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§ 1. Government and officers.

Act 1899, purporting to abolish the office of prison superintendent, *held* not to abolish it, since it required performance of the same duties by others.—*State's Prison of North Carolina v. Day* (N. C.) 748.

An appointment by the governor of a state's prison superintendent to fill a vacancy caused by a resignation need not be confirmed by the senate.—*State's Prison of North Carolina v. Day* (N. C.) 748.

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§ 1. General and special or local laws.

Const. 1895, art. 3, § 34, subd. 11, prohibiting special laws where general laws are applicable, is not retroactive.—State v. Tucker (S. C.) 361.

§ 2. Repeal, suspension, expiration, and revival.

Gen. St. 1882, §§ 1178, 1179, 1181, requiring riparian owners to clean out running streams, is not repealed by Const. 1895, art. 17, § 11, subd. 8.—State v. Tucker (S. C.) 361.

Act 1871, § 8, empowering cities to impose license taxes, is not repealed by Act 1897, entitled "An act to render uniform taxation in towns and cities."—Florida Cent. & P. R. Co. v. City of Columbia (S. C.) 408.

1 Rev. St. c. 45, imposing conditions on foreign corporations, did not repeal the provisions of the Code subjecting property of foreign corporation to attachment.—Williamson v. Eastern Building & Loan Ass'n (S. C.) 766.

An amendment of a statute as to parties who may recover damages for causing a death does not apply to a cause of action arising before the amendment was adopted.—Nohrden v. Northeastern R. Co. (S. C.) 524.

No part of a statute can be rejected as unnecessary unless, on considering all the language, a rational effect cannot be given to it.—Postal Tel. Cable Co. v. Farmville & P. R. Co. (Va.) 468.

Where the meaning of a word in one instance is clear, it must be given same meaning elsewhere, unless different meaning was clearly intended.—Postal Tel. Cable Co. v. Farmville & P. R. Co. (Va.) 468.

Code, §§ 1287-1289, held in pari materia.—Postal Tel. Cable Co. v. Farmville & P. R. Co. (Va.) 468.

In construing a statute revising a former one, the meaning of which had been settled, change of phraseology will not be construed as a change of the law, unless the intent is clear.—Brown v. Randolph County Court (W. Va.) 165.

§ 4. Pleading and evidence.

Priv. Laws 1897, c. 56, is a public statute, and, though published among the private laws, need not be pleaded.—Hancock v. Norfolk & W. Ry. Co. (N. C.) 679.

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of banks, see "Banks and Banking," § 1.

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see "Railroads."

1. Regulation and operation.

A street-railway franchise held to entitle passengers on a country extension to a transfer to the city line, and thereafter to as many transfers as the city passengers were entitled to.—*Richmond Railway & Electric Co. v. Brown* (Va.) 775.

STREETS.

see "Highways"; "Municipal Corporations," § 5.

SUBROGATION.

Where a surety is compelled to pay a judgment against her principal, she is entitled to be subrogated to the judgment.—*Flood's Adm'r v. Mutter* (Va.) 64.

To warrant subrogation in one paying a debt surety or otherwise, the debt must have been lien on the land.—*Harris v. Elliott* (W. Va.) 6.

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See "Courts," § 3.

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See "Waters and Water Courses," § 2.

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SUSPENSION.

Of benefit insurance, see "Insurance," § 16.

Occupation or privilege taxes.

See "Licenses," § 1.

§ 1. Nature and extent of power in general.

Act imposing tax on president of every bank in the state *held* inoperative, when sought to be applied to proceeds of national banks.—*Linton v. Childs* (Ga.) 617.

Under Const. art. 10, § 1, requiring taxes to be equal and uniform, a county cannot tax a merchant's capital, the legislature having prescribed no method therefor.—*Board of Sup'rs of Montgomery County v. Tallant* (Va.) 479.

§ 2. Constitutional requirements and restrictions.

Const. art. 13, § 6, forfeiting loss for failure to enter for taxes, is not depriving person of property without due process of law.—*State v. Sponaugle* (W. Va.) 283.

§ 3. Liability of persons and property.

Under Acts 1889-90, p. 197, §§ 27, 28, providing for a license tax on merchants, their capital cannot be otherwise taxed.—*Board of Sup'rs of Montgomery County v. Tallant* (Va.) 479.

Prospective production of oil under oil lease cannot be properly charged on personal property books to the lessee as personalty.—*Carter v. Tyler County Court* (W. Va.) 216.

Under Code, c. 29, providing for assessment of taxes, the words "personal property" apply to all fixtures attached to land, if not included in the valuation in the land book.—*Carter v. Tyler County Court* (W. Va.) 216.

§ 4. Place of taxation.

Tugs and barges owned by a Virginia corporation enrolled in Philadelphia *held* taxable in Virginia.—*Norfolk & W. Ry. Co. v. Board of Public Works* (Va.) 779.

§ 5. Levy and assessment.

Ignorance of both the property owner and the taxing power as to a fact concerning the property assessed *held* not to entitle the property owner to relief.—*Du Bignon v. City of Brunswick* (Ga.) 102.

§ 6. Collection and enforcement against persons or personal property.

Act March 2, 1897, providing for recovery of past-due railroad taxes, cannot authorize assessment of suit taxes in the proceeding brought to recover them.—*State v. Cheraw & D. R. Co.* (S. C.) 691.

Allegation in a complaint against railroad company to recover past-due taxes *held* insufficient to show assessment of defendant's property.—*State v. Cheraw & D. R. Co.* (S. C.) 691.

Under Const. art. 1, § 6, and Id. art. 3, § 29, complaint against railroad company to recover past-due taxes under Act March 2, 1897, must allege that defendant's property was properly assessed.—*State v. Cheraw & D. R. Co.* (S. C.) 691.

§ 7. Sale of land for nonpayment of tax.

Property sold for taxes under fl. fa. of one in possession thereof who had returned it for taxes *held* not invalid because the property belonged to children of defendant in fl. fa.—*Dawson v. Dawson* (Ga.) 29.

Levy of tax execution for \$16.20 on half interest in 1,225 acres of land *held* so grossly excessive as to render sale thereunder void.—*Hobbs v. Hamlet* (Ga.) 351.

Effectual.—*Merrimon v. Lyman* (N. C.) 732.
Evidence that a tax collector received redemption money *held* sufficient to justify the submission of the question of his authority to the jury.—*Merrimon v. Lyman* (N. C.) 732.

Assignee of certificate issued to county suing to recover land allowed to proceed in same action to foreclose.—*Collins v. Bryan* (N. C.) 975.

Under Code, § 664, as amended by Acts Assem. 1897-98, pp. 513, 514, one in whose name land was returned delinquent, when sold to the state for taxes, may redeem, though it was sold a second time, after entry in the name of another.—*Dooley v. Christian* (Va.) 54.

A previous owner redeeming land that had been sold to the state a second time need not pay costs of the application of a stranger to purchase, where the land was not continued in the name of the previous owner, as required by Code, § 469.—*Dooley v. Christian* (Va.) 54.

§ 9. Tax titles.

Where property sold for taxes is not redeemed within 12 months, the purchaser gets good title, as against real owners, though it was sold for taxes against third person.—*Dawson v. Dawson* (Ga.) 29.

The assignee of a tax certificate issued to county commissioners can only acquire the title by foreclosure, as provided by Laws 1895, c. 119, § 90.—*Huss v. Craig* (N. C.) 974; *Whitman v. Dickey*, Id.

Assignee of a county purchasing land at a tax sale is not entitled to a deed therefor, but merely to a foreclosure of the certificate.—*Collins v. Bryan* (N. C.) 975.

Laches will not bar a landowner from assailing a tax title, where there is no possession under it.—*State v. Sponaugle* (W. Va.) 283.

Omission, in list of sales for taxes, to state the estate of the owner, will not annul the tax deed.—*State v. Sponaugle* (W. Va.) 283.

Irregularities in sheriff's deed *held* insufficient to render the same invalid.—*Nuzum v. McEl-downey* (W. Va.) 1024.

§ 10. Forfeitures and penalties.

A valid sale for taxes, passing title of owner, will prevent its forfeiture from failure to enter for taxes in the name of the former owner for years subsequent to sale.—*State v. Sponaugle* (W. Va.) 283.

The state is not prevented by a sale for taxes from setting up its right under forfeiture for omission to enter land for taxation either before or after tax sale.—*State v. Sponaugle* (W. Va.) 283.

Where land is sold for taxes, and the purchaser pays taxes thereon, it does not prevent, on theory of estoppel, the state from setting up against the tax purchaser a title to land by forfeiture for failure of the former owner to enter it for taxation.—*State v. Sponaugle* (W. Va.) 283.

TELEGRAPHS AND TELEPHONES.**§ 1. Regulation and operation.**

Where an agent sends a telegram in his own name, his failure to notify the company of the relation of the addressee and his principal, and that it is for the latter's benefit, *held* not to preclude the principal's recovery for a failure to deliver.—*Cashion v. Western Union Tel. Co.* (N. C.) 746.

A telegraph company authorizing railroad operators to receive messages in the night is liable for mental anguish caused by a failure to deliver.

for a message so received during the night.—*Lowdy v. Western Union Tel. Co. (N. C.) 802.*

A husband's failure to disclose that a telegram was for his wife's benefit held not to preclude her recovery for mental suffering caused by failure to deliver.—*Laudie v. Western Union Tel. Co. (N. C.) 886.*

Failure to promptly deliver a message held not the proximate cause of an injury.—*Davis v. Western Union Tel. Co. (W. Va.) 1026.*

A verdict for vindictive damages held not authorized.—*Davis v. Western Union Tel. Co. (W. Va.) 1026.*

A telegraph company may provide reasonable regulations as to the hours during which its offices shall be open for business.—*Davis v. Western Union Tel. Co. (W. Va.) 1026.*

Mental suffering, unaccompanied by any other injury, cannot found a recovery of damages.—*Davis v. Western Union Tel. Co. (W. Va.) 1026.*

TENANCY IN COMMON.

1. Mutual rights, duties, and liabilities of co-tenants.

Execution of a deed to common property by one of the co-tenants to a stranger held no ouster as to others, unless actual adverse possession taken.—*Parker v. Brast (W. Va.) 269.*

A tax title to common property indirectly acquired by one of the co-tenants held void.—*Parker v. Brast (W. Va.) 269.*

Lapse of time held no bar to a co-tenant's right to enter, until actually dispossessed by notorious act brought to his knowledge.—*Parker v. Brast (W. Va.) 269.*

Where joint tenant purchases adverse title, if it is co-tenant unreasonably delays to contribute the expense thereof until the condition of the property is changed he abandons all benefits arising from the purchase.—*Morris v. Roseberry (W. Va.) 1019.*

Where a tenant in common seeks to have a deed purchased by co-tenant set aside as a cloud on title, he must tender amount sufficient to reimburse his co-tenant, who obtained the deed.—*Morris v. Roseberry (W. Va.) 1019.*

2. Rights and liabilities of co-tenants as to third persons.

Where a tenant in common attempts to convey the entire estate, and the grantee enters, his possession is not presumed to be adverse.—*Oscoe v. John L. Roper Lumber Co. (N. C.) 89.*

TENDER.

To stop interest, tender must be of an exact amount, and must be kept ready at all times to be paid to the creditor on demand, which must be shown by the tenderer.—*Shank v. Groff (W. Va.) 248.*

Requisites of a tender, when the person to whom the money is offered refuses to accept it, stated.—*Shank v. Groff (W. Va.) 248.*

A bill to redeem a mortgage must allege a tender, if one is claimed, and the money must be paid into court.—*Shank v. Groff (W. Va.) 8.*

TERMS.

courts, see "Courts," § 1.

TESTAMENTARY CAPACITY.

see "Wills," §§ 1, 2.

THEFT.

see "Larceny."

TICKETS.

For carriage of passengers, see "Carriers," §§ 3-9.

TIMBER.

See "Logs and Logging."

TIME.

For holding court, see "Courts," § 1.

For taking appeal or suing out writ of error, see "Appeal and Error," § 8.

TITLE.

Covenants of title, see "Covenants," § 1.

Tax titles, see "Taxation," § 9.

Particular species of property or rights.

See "Mines and Minerals," § 1.

TORTS.

By particular classes of parties.

See "Counties," § 3; "Municipal Corporations," § 5.

Agents, see "Principal and Agent," § 3.

Particular torts.

See "Negligence"; "Nuisance"; "Waste."

Causing death, see "Death," § 1.

One who acquiesces in the erection of a building on his land, knowing that it had been removed from mortgaged premises, is liable to the mortgagee for its value.—*Stevens v. Smathers (N. C.) 969.*

TOWNS.

See "Counties"; "Municipal Corporations."

TRADE-MARKS AND TRADE-NAMES.

§ 1. Infringement and unfair competition.

Use of similar trade-mark, with intent to deceive and mislead the public, calculated to injure the business of the proper owner thereof, will be restrained by injunction.—*Whitley Grocery Co. v. McCaw Mfg. Co. (Ga.) 113.*

TRAFFIC ARRANGEMENTS.

Between railroads, see "Railroads," § 5.

TREES.

See "Logs and Logging."

TRESPASS.

Ejection of trespasser, see "Carriers," §§ 3-9.

Injuries to trespassers, see "Railroads," §§ 6-12.

TRIAL.

See "New Trial"; "Reference"; "Witnesses."

Sufficiency of verdict in action against a county, see "Counties," § 2.

Trial de novo on appeal, see "Appeal and Error," §§ 14-23.

Proceedings incident to trials.

See "Continuance."

Entry of judgment after trial of issues, see "Judgment," § 3.

Place of trial, see "Venue," § 1.

Right to trial by jury, see "Jury," § 1.

Trial of particular criminal proceedings.
Criminal prosecutions, see "Criminal Law," §§ 4-11; "Homicide," §§ 5-8.

§ 1. Course and conduct of trial in general.

Plaintiff's counsel having made no objection to defendant's assuming the burden, and claiming the right to the opening and closing argument, at the opening of the trial, cannot afterwards object thereto.—*Dwelle v. Blackwood* (Ga.) 593.

A reference, in overruling a demurrer framing issues for the jury, to one of the parties as "a nominal party merely," *held* not prejudicial.—*Egan v. Bissell* (S. C.) 1.

§ 2. Reception of evidence.

Where plaintiff had testified as to the manner in which he was injured, there was no abuse of discretion, after granting nonsuit, to refuse to allow plaintiff to be reintroduced to make clear his testimony.—*Freyermuth v. South-Bound R. Co.* (Ga.) 668.

§ 3. Taking case or question from jury—Questions of law or of fact in general.

A question of fact that is not admitted should be submitted to the jury, though there is uncontradicted testimony as to its existence.—*Mitchell v. Carolina Cent. R. Co.* (N. C.) 671.

A question of title to real estate must be determined by a jury.—*Egan v. Blasell* (S. C.) 1.

Where different inferences can be drawn from the same testimony, the inference to be drawn is for the jury.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

§ 4. — Dismissal or nonsuit.

It is too late for plaintiff to dismiss after knowledge by counsel that the jury have agreed on verdict for defendant, and are about to return to court.—*Brunswick Grocery Co. v. Brunswick & W. R. Co.* (Ga.) 92.

An order sustaining a motion to nonsuit a part of plaintiff's cause of action is erroneous.—*Talbotton R. Co. v. Gibson* (Ga.) 151; *Gibson v. Talbotton R. Co.*, *Id.*

Evidence in action by employé to recover for personal injuries *held* to authorize granting of nonsuit.—*Daniel v. Forsyth* (Ga.) 621.

Where, in action for malicious prosecution, there is no evidence connecting defendant with it, a nonsuit is properly ordered.—*Payne v. Atlanta Consol. St. Ry. Co.* (Ga.) 650.

Where, in action for personal injuries, the evidence shows they were occasioned by plaintiff's own negligence or by pure accident, a nonsuit was properly granted.—*Freyermuth v. South-Bound R. Co.* (Ga.) 668.

Where there is evidence tending to support plaintiff's contention, *held* error to grant nonsuit.—*Glover v. Savannah, F. & W. Ry. Co.* (Ga.) 876; *Savannah, F. & W. Ry. Co. v. Glover*, *Id.*

On motion for nonsuit, every proposition which there is evidence tending to establish must be taken as proved.—*Howell v. Norfolk & C. R. Co.* (N. C.) 317.

Affirmative defenses cannot be considered, on a motion for nonsuit, after plaintiff rests.—*Cogdell v. Wilmington & W. R. Co.* (N. C.) 706.

Failure, in conversion, to show malice, is not ground for nonsuit; the evidence justifying a recovery of actual damages.—*Rakestraw v. Floyd* (S. C.) 419.

a nonsuit.—*Rinake v. Victor Mfg. Co.* (S. C.) 983.

§ 5. — Direction of verdict.

Where plaintiff fails to make out a case, it is proper to direct verdict for defendant.—*Gress Lumber Co. v. New Ebenezer Ass'n* (Ga.) 90.

Where evidence does not demand verdict for defendant, *held* error to direct it.—*A. P. Brantley Co. v. Lee* (Ga.) 101.

Where, in trespass on realty, it appears that ancestor of plaintiff died testate, and that the land was devised, but it is not shown to whom, it is not error to direct verdict for defendant.—*Phillips v. Rents* (Ga.) 107.

It is error to direct verdict for full amount claimed when not sustained by evidence.—*Register v. Aultman & Taylor Co.* (Ga.) 116.

In action on note given for price of mule, which stipulated that seller did not warrant soundness of mule, it was proper to direct verdict for plaintiff, where the only defense was unsoundness of mule.—*McNeel v. Smith* (Ga.) 119.

Where both parties in ejectment claim under a common grantor, and plaintiffs have paramount title, it is proper to direct verdict for plaintiff.—*Brundage v. Bivens* (Ga.) 133.

Where, if a verdict had been rendered in favor of defendant, it would be absolutely without evidence to sustain it, it is not error to direct one for plaintiff.—*Taylor v. American Freehold Land-Mortgage Co.* (Ga.) 153.

It is error to direct a verdict on conflicting evidence.—*Murray v. Marshall* (Ga.) 634.

Where the evidence introduced is sufficient to show want of service, it is error to direct the jury to find against it, and in favor of the officer's return.—*Phillips v. Wait* (Ga.) 842.

Where the evidence is conflicting as to the matter in controversy, *held* error to direct verdict for plaintiff.—*City Council of Dawson v. Dawson Waterworks Co.* (Ga.) 907.

Where the main issue was fraud in procuring life insurance, and there was evidence warranting finding in defendant's favor, *held* error to direct verdict for plaintiff.—*Supreme Conclave Knights of Damon v. O'Connell* (Ga.) 946; *O'Connell v. Supreme Conclave Knights of Damon*, *Id.*

§ 6. Instructions to jury—Province of court and jury in general.

A charge *held* not faulty as assuming a state of facts to be not contradicted.—*Crampton v. Ivie* (N. C.) 968.

An instruction in action on fire policy *held* not defective as a charge in respect to matters of fact.—*Kingman v. Lancashire Ins. Co.* (S. C.) 762.

An instruction that, if defendant assaulted plaintiff willfully, vindictive damages were allowable, *held* not objectionable, as assuming that an assault was made.—*Bailey v. McCance* (Va.) 43.

§ 7. — Necessity and subject-matter.

Where evidence prejudicial to one party is properly admitted for one purpose only, the court should instruct the jury to consider it only for such purpose.—*Cohen v. Bellenot* (Va.) 455.

§ 8. — Form, requisites, and sufficiency.

An instruction that an admission constitutes a high degree of evidence *held* properly refused.—*Raleigh & G. R. Co. v. Allen* (Ga.) 622.

An instruction placing on a party the burden of establishing an admitted fact is erroneous.—*Phoenix Ins. Co. v. Gray* (Ga.) 948.

A party cannot complain of an omission from an instruction which is appropriately given in another charge.—*Crampton v. Ivie* (N. C.) 968.

9. — Applicability to pleading and evidence.

On trial for personal injuries, where defendant's attorney stated that he did not deny that plaintiff was injured, and where evidence so shows, it is not error to charge that the injury was admitted.—*Central of Georgia Ry. Co. v. Johnston* (Ga.) 78.

Failure to instruct on an issue not raised by the pleadings is not error.—*Sanders v. Southern Ry. Co.* (Ga.) 840.

An instruction on an issue as to whether defendant is entitled to recover on his counterclaims held erroneous.—*Lehman v. Tice* (N. C.) 330.

A charge not fitting the facts is properly refused.—*Crampton v. Ivie* (N. C.) 968.

An instruction without evidence to sustain held improper.—*Cohen v. Belenot* (Va.) 455.

It is not error to refuse correct abstract instructions if the evidence to support it is only plausible, and where verdict, according to instructions, would be set aside as without evidence.—*McDonald v. Cole* (W. Va.) 1033.

10. — Requests or prayers.

The refusal of an instruction is no ground of complaint where the court's charge is to the same effect.—*Pierce v. North Carolina R. Co.* (N. C.) 399.

The court having submitted an issue presenting every phase of a party's contention without prejudice, it need not submit other issues, though requested so to do.—*Kendrick v. Mutual Ben. Life Ins. Co.* (N. C.) 723.

Refusal of a request fully covered by charges given is not error.—*Slingluff v. Hall* (N. C.) 39.

An instruction covered by the main charge is properly refused.—*Mitchell v. Corpening* (N. C.) 38.

Unless all propositions of law in a request to charge are correct, it is properly refused.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

A request may be denied where it has been substantially covered in the charge already given.—*Kingman v. Lancashire Ins. Co.* (S. C.) 32.

A party cannot complain that a charge was not given as requested, when its substance was given in another place.—*Mew v. Charleston & S. Ry. Co.* (S. C.) 828.

If there is any evidence to prove facts on which a requested instruction is based, and it correctly states the law applicable to such facts, it should be given.—*Tyson v. Williamson* (Va.) 2.

Where instruction was calculated to mislead, and error to refuse, as too late, a modification requested during argument correctly propounded the law.—*Hoge v. Turner* (Va.) 291.

11. — Construction and operation.

Portions of a charge which, considered alone, are objectionable, are not erroneous if, when construed with the whole charge, the objections are not apparent.—*Pickens v. South Carolina & G. R. Co.* (S. C.) 567.

12. Verdict.

It is not error to refuse tendered issues, where those submitted with the charge cover all material points controverted.—*Hocutt v. Wilmington & W. R. Co.* (N. C.) 681.

An instruction that if the jury believe all the evidence on a certain issue, which was conflicting, they should answer a special interrogatory in the negative, held properly refused.—*Bank of Fayetteville v. Nimocks* (N. C.) 717.

§ 13. Waiver and correction of irregularities and errors.

A motion to dismiss an action at the close of plaintiff's case, under Acts 1897, c. 100, waives the competency of the evidence.—*Roscoe v. John L. Roper Lumber Co.* (N. C.) 380.

A motion to exclude plaintiff's evidence for insufficiency is waived if defendant thereafter introduces his own evidence.—*Trump v. Tidewater Coal & Coke Co.* (W. Va.) 1035.

TRUSTS.

(Charitable trusts, see "Charities.")

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Trust deeds, see "Chattel Mortgages."

§ 1. Creation, existence, and validity.

One to whom land was conveyed in consideration of his promise to pay the grantor's debts holds such property in trust for the payment of the debts.—*Moore v. Triplett* (Va.) 50.

Evidence held to establish a resulting trust.—*Jones v. Thorn* (W. Va.) 173.

In suit to charge lands in hands of fraudulent purchaser for purchase money, he yet holding the land, it must be subjected, and no personal decree can be rendered.—*Harris v. Elliott* (W. Va.) 176.

A resulting trust will not rise in favor of one paying for land conveyed to the other, if he stands unto such other in loco parentis.—*Harris v. Elliott* (W. Va.) 176.

Where, in paying for land conveyed to another, the party intended to make a gift, no resulting trust arises.—*Harris v. Elliott* (W. Va.) 176.

To create a resulting trust for one paying purchase money for land, where title is taken in another, the trust must arise when the title passes, and subsequent payment will not create it.—*Harris v. Elliott* (W. Va.) 176.

Resulting trust will not arise in one paying for land conveyed to another, where the payment is only a loan.—*Harris v. Elliott* (W. Va.) 176.

A co-tenant who permits common property to be sold for taxes, and indirectly secures the title himself, will be held a trustee for the others.—*Parker v. Brast* (W. Va.) 269.

§ 2. Construction and operation.

Where property was conveyed in trust for children, including those born thereafter, the trust remained executory so long as any child remained a minor, and there was possibility of further issue.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

Evidence of the impossibility of further issue at the time of trial, offered to show that a trust was executed, held inadmissible; the question being whether the trust was executed at the time the transaction in suit occurred.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

Where land is conveyed to a trustee for his wife and the issue of their marriage, held, that trust became executed when the youngest of the beneficiaries came of age.—*Hollis v. Lawton* (Ga.) 846; *Lawton v. Hollis*, Id.

Trust deed construed, and held only wife and children in being at the time of the execution of the deed were beneficiaries.—*Hollis v. Lawton* (Ga.) 846; *Lawton v. Hollis*, Id.

§ 3. Management and disposal of trust property.

A judgment against the trustee *held* to bind the beneficiaries.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

Obligation incurred by the trustee in managing the estate *held* chargeable against the property.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

A trustee *held* empowered to cultivate the land for the benefit of the beneficiaries.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

In a suit to charge property with a debt incurred by the trustee in managing same, *held*, that it was not necessary to allege that the income was insufficient to pay the debt.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

In a suit to charge the property with a debt incurred by the trustee in managing the same, *held*, that the beneficiaries were not necessary parties.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

Trust estate *held* chargeable with a debt incurred by the trustee in managing the same, though he had misappropriated the income.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

§ 4. Execution of trust by trustee or by court.

Where a trustee in good faith has discharged his trust, and sold property to a third person having no interest in the same at the time, he may thereafter acquire title from the purchaser.—*Board of Trustees v. Blair* (W. Va.) 203.

§ 5. Establishment and enforcement of trust.

Under Civ. Code, § 4961, *held* that, where no answer is filed, the petition may be taken as true.—*Sanders v. Houston Guano & Warehouse Co.* (Ga.) 610.

Where land is conveyed in trust for a wife and her then children, a suit, after the trust has been executed, cannot be maintained by the wife and all the children of her marriage to set aside a sale made by the trustee, and to re-establish the trust.—*Hollis v. Lawton* (Ga.) 846; *Lawton v. Hollis*, *Id.*

UNDISCLOSED AGENCY.

See "Principal and Agent," § 3.

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USURY.

§ 1. Usurious contracts and transactions.

Charter and by-laws of a building and loan association, and testimony of an officer, *held* admissible to show that the borrower's contract was not usurious.—*White v. Interstate Building & Loan Ass'n* (Ga.) 26.

Evidence *held* to show the note in controversy a contract not in violation of the usury laws.—*Taylor v. American Freehold Land-Mortgage Co.* (Ga.) 153.

That a borrower, in addition to the maximum rate of interest, pays attorneys of lender for examining titles to lands conveyed as security, *held* not to render transaction usurious.—*Gannon v. Scottish-American Mortg. Co.* (Ga.) 591.

Evidence *held* insufficient to establish defense of usury.—*Hicks v. Mather* (Ga.) 901.

§ 2. Penalties and forfeitures.

Where a resident of a foreign state resorts to the courts of this state to enforce a contract usurious in both this state and such foreign state, he is bound by the penalty fixed by the laws of this state.—*Meares v. Finlayson* (S. C.) 986.

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§ 1. Modification or rescission of contract.

Where, under a covenant for further assurances, the covenantor perfects the seisin before injury, by supplying missing link in his title, the grantee cannot rescind as for breach of covenant of seisin.—*Building, Light & Water Co. v. Fray* (Va.) 58.

§ 2. Performance of contract.

Where, in action for price, plea alleging defect in title does not allege that vendee is out of possession, presumption is that he is in possession under the contract.—*Mallard v. Allred* (Ga.) 588.

A purchaser in possession under bond for title cannot have relief in equity because of defect in title, unless he alleges some fact making it equitable for vendor to enforce payment of price.—*Mallard v. Allred* (Ga.) 588.

§ 3. Rights and liabilities of parties.

A grantee *held* to take with notice of a mortgagee's action to correct his mortgage.—*Wittkowsky v. Gidney* (N. C.) 731.

Unrecorded deed *held* good, against purchasers with notice, or who have not paid valuable consideration.—*Abney v. Ohio Lumber & Mining Co.* (W. Va.) 256.

A purchaser of common property from a co-tenant with notice acquires only the actual interest of his grantor.—*Parker v. Brast* (W. Va.) 269.

Burden of proof is on the grantee, claiming title to common property from one of the co-tenants, to show a notorious ouster or adverse possession with knowledge of disseised co-tenants.—*Parker v. Brast* (W. Va.) 269.

A purchaser of land from a fraudulent grantee after suit brought to annul the conveyance for fraud *held* not a bona fide purchaser, and bound to abide the result of the suit.—*O'Connor v. O'Connor* (W. Va.) 276.

Rights of parties determined on sale of land covered by vendor's lien, where purchaser conveys to his immediate vendor other land charged with a lien, to indemnify the first lien, where the second purchaser pays money to his immediate vendee to pay the lien, and he fails so to do.—*Burbridge v. Sadler* (W. Va.) 1028.

must distinctly aver incompetency.—Mallard v. Allred (Ga.) 588.

Grantee of vendee held chargeable with notice of vendor's lien.—Atlanta Land & Loan Co. v. Haile (Ga.) 606.

A transaction held to create a vendor's lien.—Atlanta Land & Loan Co. v. Haile (Ga.) 606.

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Claim for compensation for deficiency in land conveyed by deed held subject to the statute.—Burbridge v. Sadler (W. Va.) 1028.

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injunction.—Greathouse v. Greathouse (W. Va.) 994.

Bill to enjoin waste must state facts showing injury irremediable by ordinary legal procedure.—Greathouse v. Greathouse (W. Va.) 994.

WATERS AND WATER COURSES.

§ 1. Natural water courses.

Where a defendant dug a ditch through a natural watershed, he is liable for damages caused by water flowing through the ditch on the breaking of a dam, which would have otherwise flowed in another direction.—Hocutt v. Wilmington & W. R. Co. (N. C.) 681.

One diverting a water course by a ditch held liable for injuries caused by the waters in the ditch of another, which flowed into a former ditch.—Hocutt v. Wilmington & W. R. Co. (N. C.) 681.

One diverting a water course to the injury of another is liable therefor.—Hocutt v. Wilmington & W. R. Co. (N. C.) 681.

A private citizen may institute a prosecution for failure to clean a running stream, as required by Gen. St. 1882, §§ 1178-1180.—State v. Tucker (S. C.) 361.

§ 2. Surface waters.

In action for closing natural course of surface water, causing the flooding of plaintiff's land, if damage were caused by plaintiff's negligence, plaintiff cannot recover.—Edgar v. Walker (Ga.) 582.

A defendant sued for injuries to crops by diversion of a water course held to change the action to one for permanent damages to the land by asking for the assessment of permanent damages.—Hocutt v. Wilmington & W. R. Co. (N. C.) 681.

Landowners may obstruct flow of surface water without incurring liability to adjoining proprietors for damages, where no nuisance per se is created.—Baltzger v. Carolina Midland Ry. Co. (S. C.) 358.

§ 3. Conveyances and contracts.

A covenant to pay a certain sum annually for keeping up a dam held to run with the land.—Hurxthal's Ex'x v. Hurxthal's Heirs (W. Va.) 237.

§ 4. Public water supply.

Damages to property destroyed by fire from the failure of a water company to supply water under its contract with the city held the proximate cause of the breach.—Gorrell v. Greensboro Water-Supply Co. (N. C.) 720.

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On trial for carrying weapon, where there was positive proof that it was concealed at the time, evidence that defendant's habit was not to conceal it was inadmissible.—Oliver v. State (Ga.) 18; Id. 19.

Evidence held to sustain conviction for carrying weapons, under Pen. Code, § 341.—Willis v. State (Ga.) 155.

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§ 1, 2. Testamentary capacity.

Evidence that the husband of testatrix had previously devised the property devised by testatrix, and the devisees made conveyances under his will, *held* inadmissible to show want of testamentary capacity or undue influence.—*Whitelaw's Adm'r v. Whitelaw's Adm'r* (Va.) 458.

§ 3. Requisites and validity.

No technical words of conveyance are required in wills.—*Keith v. Scales* (N. C.) 809.

Indorsements on a certificate of insurance *held* testamentary dispositions of the proceeds, and hence void, because not executed as a will.—*Grand Fountain of United Order of True Reformers v. Wilson* (Va.) 48.

§ 4. Probate, establishment, and annulment.

It is proper to refuse an instruction on insanity in a will contest, where the evidence tends to prove imbecility.—*Mitchell v. Corpening* (N. C.) 798.

In proving imbecility of a testatrix, evidence of a gradual decline having been introduced, her mental incapacity a few days after execution of the will may be shown.—*Mitchell v. Corpening* (N. C.) 798.

On an issue of *devisavit vel non*, admissions of a legatee impeaching the will are inadmissible if other legatees are interested in maintaining it.—*Whitelaw's Adm'r v. Whitelaw's Adm'r* (Va.) 458.

§ 5. Construction.

Will construed, and *held*, that the daughters of testator took vested remainders in fee, subject to be divested by dying without issue.—*Chewning v. Shumate* (Ga.) 544.

Will construed, and *held* to give devisee a vested interest, subject to its being divested on his dying before termination of life estate.—*McDonald v. Taylor* (Ga.) 879.

A devise to testator's wife during her natural life or widowhood terminates on her remarriage.—*Beddard v. Harrington* (N. C.) 377.

A provision including a posthumous child in a devise to testator's two children then living *held* to include a prior devise to such children in remainder.—*Clark v. Benton* (N. C.) 553.

A devise to two daughters, remainder, if they died under age, to two other daughters, with provision for a posthumous child, *held* to include the posthumous child only if the first two daughters died under age.—*Clark v. Benton* (N. C.) 556.

A devise to two daughters, remainder to survivor if one died under age, to two others if both died under age, *held* to exclude second two daughters if one of first two died under age and her survivor attained majority.—*Clark v. Benton* (N. C.) 556.

A devise in trust *held* to show a latent ambiguity which was explainable by parol.—*Keith v. Scales* (N. C.) 809.

Under 12 St. at Large, p. 597, and Civ. St. p. 687, § 1993, a devisee takes, though the testator had conveyed to her the land devised, and then taken it back in exchange for other land.—*Gregg v. McMillan* (S. C.) 447.

Will construed, and devisee *held* entitled to a contingent remainder.—*People's Loan & Exchange Bank v. Garlington* (S. C.) 513.

Will construed, and *held* that, while duties imposed on the trustees under the will were unperformed, title did not vest in the beneficiary

testator's son, with remainder to his children, *held* not to vest in him under the statute of uses, where it would be impossible for trustees in such event to take charge of the property as provided by the will.—*People's Loan & Exchange Bank v. Garlington* (S. C.) 513.

Will construed, and *held*, that a vested interest of a devisee passed by the marriage settlement to his widow.—*Waring v. Waring* (Va.) 150.

Will construed, and *held*, that on the death of the children of a life tenant their interests were inherited by their father.—*Waring v. Waring* (Va.) 150.

A testator's intention, expressed in one clause of his will, to give the children of his son a vested remainder, *held* unchanged by a succeeding clause.—*Waring v. Waring* (Va.) 150.

Will construed, and *held*, that the grandchildren of testator took a vested interest in lands devised to their father for life.—*Waring v. Waring* (Va.) 150.

A will construed to vest, at the testator's death, a remainder in certain of his grandchildren.—*McComb v. McComb* (Va.) 453.

A will declaring that testator's undivided share in partnership land is realty thereby fixes the character of such property as against the beneficiaries.—*Todd v. McFall* (Va.) 472.

§ 6. Rights and liabilities of devisees and legatees.

Where lands were devised to testator's widow during life or widowhood, and on her death to another, and the widow remarried, they went to the heirs at law during the interim.—*Beddard v. Harrington* (N. C.) 377.

Will construed, and *held* not to show a charge on the land in favor of certain heirs.—*Perdue v. Perdue* (N. C.) 492.

Payment of a vendor's lien on land from a testator's personality *held* not to entitle a legatee to enforce payment from the land, where the remaining personality was insufficient to pay the legacy.—*Todd v. McFall* (Va.) 472.

A will *held* not to make testator's land chargeable with the payment of legacies.—*Todd v. McFall* (Va.) 472.

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Under Rev. St. 1893, §§ 677, 691, it is not required that certificates for witness fees be supported by affidavit of the person presenting them for payment.—*State v. Bullock* (S. C.) 424.

§ 2. Competency.

There was no error in excluding evidence of husband of defendant in criminal prosecution in her favor, they having elected to be jointly tried, and not having reserved right to testify for each other.—*Stephens v. State* (Ga.) 13.

On foreclosure by corporation, defendant *held* not competent to testify as to transactions with deceased agent of corporation.—*Register v. Aultman & Taylor Co.* (Ga.) 116.

In an action for board furnished decedent, *held*, that plaintiffs might testify that they operated a boarding house, it not being a transaction with deceased.—*Gomez v. Johnson* (Ga.) 600.

A devisee is competent to testify that he found the will and caused it to be probated, where the court records are burned.—*Cox v. Beaufort County Lumber Co.* (N. C.) 381.

A surviving partner *held* disqualified, under Code, § 590, to testify to personal transactions with a deceased partner, in an action against his estate on a partnership note.—*Charlotte Oil & Fertilizer Co. v. Rippey* (N. C.) 980.

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In action in behalf of wife, on indemnifying and given by judgment creditor of her husband a levy on execution on property which she claimed, *held*, the wife was incompetent as a witness, though her testimony was restricted to ones other than those of fraud.—*Hoge v. Turner* (Va.) 291.

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4. Credibility, impeachment, contradiction, and corroboration.

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